

AO 243 (Rev. 10/07)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District EASTERN OF MICHIGAN	
Name (under which you were convicted): KWAME M. KILPATRICK		Docket or Case No.:	
Place of Confinement: FCI EL RENO-		Prisoner No.: 44678-039	
UNITED STATES OF AMERICA Respondent,		Movant (include name under which convicted) V. KWAME M. KILPATRICK	

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging: UNITED STATES DISTRICT COURT-EASTERN DISTRICT MICHIGAN-SOUTHERN DIVISION-THEODORE LEVIN UNITED STATES COURTHOUSE -213 WEST LAFAYETTE BLVD.-DETROIT MICHIGAN-48226.
- (b) Criminal docket or case number (if you know): 2:10CR-20403-NGE-MKM-1
2. (a) Date of the judgment of conviction (if you know): March 11, 2013
- (b) Date of sentencing: OCTOBER 10, 2013
3. Length of sentence: 336 MONTHS-TWENTYEIGHT (28) YEARS
4. Nature of crime (all counts): RACKETEERING/CONSPIRACY/EXTORTION-BY-COLORADO OFFICIAL RIGHT MAIL FRAUD/WIRE FRAUD/FILING FALSE TAX RETURNS/BRIBERY
5. (a) What was your plea? (Check one)

(1) Not guilty ☒
(2) Guilty ☐
(3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to? N/A
6. If you went to trial, what kind of trial did you have? (Check one)

Jury ☒
Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐
9. If you did appeal, answer the following:
- (a) Name of court: UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
- (b) Docket or case number (if you know): 13-2500
- (c) Result: SENTENCE WAS AFFIRMED-RESTITUTION ORDER WAS VACATED
- (d) Date of result (if you know): AUGUST 14, 2015 REHEARING DENIED OCTOBER 21, 2015
- (e) Citation to the case (if you know): UNITED STATES v.. KWAME KILPATRICK
- (f) Grounds raised: Movant's claims were: denied his constitutional right to conflict free counsel; district court failed to thoroughly investigate and resolve conflicts after it was on notice of them because it "failed to take into account the nature of the conflict; challenge the lay-opinion testimony of two case agents regarding text messages; the district court erred by allowing witnesses to recount statements made to them by others for the purpose of establishing fear of the Defendants, Kilpatrick and Ferguson; incorrect calculation of Restitution; that the District Court erred in ordering him to pay \$195,403.61 as unpaid taxes;
- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☒ No ☐
- If "Yes," answer the following:
- (1) Docket or case number (if you know): No. 15-7790
- (2) Result: WRIT OF CERT WAS DENIED
- (3) Date of result (if you know): 06/27/2016
- (4) Citation to the case (if you know): Kwame M. Kilpatrick v. United States
- (5) Grounds raised: Whether this Court Should Grant Certiorari to Resolve a Significant Split among Circuits on an Important Issue Concerning the Foundation Requirement for Admission of Law Enforcement Officer Lay opinion Testimony Pursuant to FED R. EVID. 701?-II Whether Certiorari is Necessary to Clarify and resolve a Circuit Split Concerning the Appropriate Standard for Determining Whether a Non Constitutional Error in a Criminal Case is Harmless? -III Whether this Court Should Grant Certiorari to Decide if the Rule Announced by th Court in Holloway v. Arkansas, 435 U.S. 475 (1978), Applies When A Defendant Makes a Timely Objection Before Trial Before His Defense Attorney's Concurrent Conflict of Interest and requests New, Unconflicted, Counsel?
10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court? Yes ☒ No ☐
11. If your answer to Question 10 was "Yes," give the following information:
- (a) (1) Name of court: District Court
- (2) Docket or case number (if you know): _____
- (3) Date of filing (if you know): 11/21/16

(4) Nature of the proceeding: Motion for Extension of Time to File Response/Reply as to 582 Order Requiring Resp

(5) Grounds raised: Extension of time to Respond to Restitution Order

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐

No ☒

(7) Result: On 11/23/2016 Extension of Time Granted

(8) Date of result (if you know): 1/23/2016584 ORDER granting 583 Motion for Extension of Time until 12/19/16 to

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: District Court

(2) Docket of case number (if you know): 2:10-cr-20403-

(3) Date of filing (if you know):

(4) Nature of the proceeding: Restitution Issue pursuant to Mandate from Sixth Circuit Court of Appeals.

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐

No ☒

(7) Result: Pending Response from Defendant/Movant Kilpatrick

(8) Date of result (if you know): None presently.

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☒

(2) Second petition: Yes ☐ No ☒

Pending/NA

- (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): NOT UNLAWFUL.
See attachment "A"..

- Name and location of the court where the motion or petition was filed: N/A

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Docket or case number (if you know): N/ADate of the court's decision: N/AResult (attach a copy of the court's opinion or order, if available): N/AN/AN/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐ N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐ N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐ N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

N/ADocket or case number (if you know): N/ADate of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Venue called for post conviction proceeding as the proper avenue.**GROUND TWO:** The court erred when it denied Movant'S requests and motion for new trial counsel, because "it was a tactic to delay the trial and untimely."

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See attachment "B".

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(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐No ☒(2) If you did not raise this issue in your direct appeal, explain why: Same as before Venue.**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): N/ADate of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐No ☐N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐No ☐N/A None filed previously. Movant proceeds herein pro se.

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐No ☐N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/ADocket or case number (if you know): N/ADate of the court's decision: N/AResult (attach a copy of the court's opinion or order, if available): N/A

[illegible]

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND FOUR: The court erred when it did not properly determine the amount of Loss/Harm, a key component of selecting the appropriate sentencing guideline range

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Attachment D.

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

NOT COGNIZABLE IN THE APPELLATE VENUE.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/AName and location of the court where the motion or petition was filed: N/ADocket or case number (if you know): N/ADate of the court's decision: N/AResult (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐No ☐

N/A

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐No ☐

N/A

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐No ☐

N/A

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/ADocket or case number (if you know): N/ADate of the court's decision: Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: NOT COGNIZABLE IN THE APPELLATE VENUE.

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

NONE OF THE GROUNDS PRESENTED HERE HAVE BEEN PRESENTED IN ANY FEDERAL COURT.

ISSUES PRESENTED HERE ARE DONE SO BECAUSE THEY ARE MORE COGNIZABLE IN A MOTION UNDER
28 USC SECTION 2255 WHICH ALLOWS FOR EXPANSION OF THE RECORD.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing: James C. Thomas-12900 Hall Road, Suite 350-Sterling Heights, MI 48313

Secondary Counsel-Joseph A. Niskar -23023 Orchard Lake Rd. Suite A-1-Farmington, MI 48336

(b) At the arraignment and plea:

(c) At the trial:

(d) At sentencing:

(e) On appeal: HAROLD GUREWITZ

333 W. FORT STREET, SUITE 1400-DETROIT, MI 48226

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

N/A

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐ N/A

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 20 lines visible. The paper appears to be a standard notebook page.

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: VACATE THE VERDICT/SENTENCE SET ASIDE/
REMANDED BACK TO DISTRICT COURT BASED ON GROUNDS AND SUPPORTING ARGUMENTS PLACE THE COURT, OR IN
GRANT MOTION FOR EVIDENTIARY HEARING AT THE EARLIEST POSSIBLE DATE.
or any other relief to which movant may be entitled.

N/A
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on JUNE 23, 2017
(month, date, year)

Executed (signed) on JUNE 23, 2017 (date).

Swane N. Kipetich
Signature of Movant

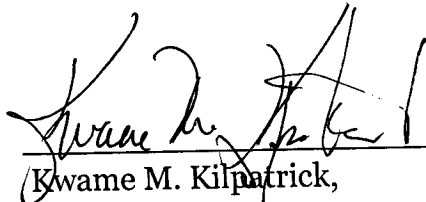
If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

VERIFICATION

Pursuant to 28 U.S.C. §§ 1746 and Federal Rules Governing Title 18 U.S.C.

Section 2255, Kwame M. Kilpatrick, declares, under penalty of perjury,
that:

1. I have read the foregoing Motion to Vacate, Set Aside or Correct ,
Sentence, in which I am the Movant.
2. I know that the factual allegations contained in the motion are true.
3. with respect to facts alleged in the motion upon information and belief, I
believe these factual allegations to be true.
4. I declare under penalty of perjury that this verification is correct.


Kwame M. Kilpatrick,

Pro se

Fed. Reg. No: 44678-039

Dated this 21 day of APRIL 2017.

At: FCI El Reno

P.O. Box 1500

El Reno, OK. 73036

VERIFICATION

**MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE
BY A PERSON IN FEDERAL CUSTODY (CONT'D.)**

ATTACHMENT A

GROUND ONE

The court instructions provided no assurance that the jury could find where Movant agreed to commit an "Official Act", as clearly defined. *(COUNTS ONE, COUNTS TWO-FIVE, & 17)*

The testimony at-trial described how Movant set-up meetings, contacted other officials, hosted events, and even discussed contracts. The jury convicted Movant without finding that he committed or agreed to commit an "Official Act" related to any "question, matter, cause, suit, proceeding or controversy" within the trial.

The court did not instruct the jury that it must identify a "question, matter, cause, suit, proceeding or controversy" involving the formal exercise of governmental power. The government consistently used broad ideas and concepts, like "Pay to Play", or "Kilpatrick Enterprise", or assertions like "The Mayor controls everything in the city." But there were no specific and focused matters, causes, issues, where Movant agreed to exercise his governmental authority to do, change, implement, or take official action.

At trial, several of Movant's subordinates testified that he may have asked them to attend a meeting, or make a phone call. Not a single one of Movant's subordinates gave testimony that he expected them to do anything other than that. There was no "pay to play", nor any evidence to suggest it. The theater surrounding the trial, and the misinformation and wrong instructions given to the jury, created an environment of unfairness and injustice. Movant did not receive a fair trial, and was convicted of activities that were not unlawful.

ATTACHMENT B

GROUND TWO

THE COURT ERRED WHEN IT DENIED MOVANT'S REQUESTS AND MOTION FOR NEW TRIAL COUNSEL, BECAUSE "IT WAS A TACTIC TO DELAY THE TRIAL & UNTIMELY."

Movant did everything in his power to alert the court that he was receiving inadequate assistance of counsel because of trial attorney's conflicts of interest. The court never conducted any meaningful review of trial counsel's conflict relationships, nor the depth and breadth of how they affected his representation, and all the witnesses, issues, and claims they connected too within the trial.

The record reflects serious breakdowns in communication and trust between Movant and trial counsel. Trial counsel lied about his ongoing representation of a government witness, and even accompanied and consulted with that same witness at the grand jury that indicted Movant. Trial counsel failed to notify the court or Movant about this conflict of interest. And even after the court was alerted by Movant about this conflict, trial counsel failed to notify the court or Movant about another egregious simultaneous conflict of interest. The court wrongly minimized and disregarded the seriousness of the nature of trial counsel's deformed representation, and caused great harm to Movant's ability to receive a Fair Trial.

The court forced Movant to have No Representation, whatsoever, during substantial and important parts of the trial. Key witness testimony was not cross-examined at all, and Movant was without his Right of Confrontation during the trial, because trial counsel was prohibited from engaging them, refused to engage them, or refused to ask any questions to the witness about areas where the conflict was at issue. At least four of these witnesses represented the most serious conviction counts in this trial.

Even if Movant requests for new counsel would be considered untimely, the court's failure to conduct an adequate and meaningful inquiry into the extent of the conflict outweigh any issues of timing.

1 ATTACHMENT C

2 GROUND THREE

3 IMPERMISSABLE HEARSAY NO CONFRONTATION

4 Kim Harris was an employee in the City of Detroit's Human Rights department. Mr.
5 Harris testified about a hearsay statement from Gerard Grant Phillips, the former Director of the
6 Human Rights department, who was deceased. There was no way for Movant to confront Mr.
7 Phillips on these statements. Additionally, Movant was denied the opportunity to confront Mr.
8 Harris in front of the jury about the inconsistencies of Mr. Harris' testimony in light of the
9 documentation showing that the decertification of a company, was completely proper and
10 consistent with the rules and regulation of the City of Detroit.

11 The admission of hearsay statements through Mr. Harris is symptomatic of a larger
12 problem that arose in this case. The government was able to admit broad swaths of hearsay
13 concerning the state of mind of victims and the defendants. Hearsay statements, speculations
14 and prognostications introduced at trial were done so under either a theory of RICO or perceived
15 "climate of fear."

16 Although Kim Harris never met with Movant, never had a conversation with Movant, and
17 also performed the correct action in his own department, Movant was still left with no way to
18 defend himself, no way to confront a deceased man, nor confront Mr. Harris, who the court
19 allowed to hide behind Impermissible Hearsay.
20
21
22
23
24

ATTACHMENT D

GROUND FOUR

THE COURT ERRED WHEN IT DID NOT PROPERLY DETERMINE THE AMOUNT OF LOSS/HARM, A KEY COMPONENT OF SELECTING THE APPROPRIATE SENTENCING GUIDELINES RANGE. THERE WAS NO ECONOMIC LOSS TO THE CITY OF DETROIT, NOR ANY ENTITY, OR PERSON(S), RELATED TO THIS CASE.

THE COURT ERRED WHEN IT SUBSTITUTED "PROFITS" (GAIN) FOR THE PURPOSES OF DETERMINING THE GUIDELINE RANGE FOR SENTENCING. THERE IS NO EVIDENCE THAT MOVANT SHOULD HAVE BEEN GIVEN A MORE THAN 20-LEVEL ENHANCEMENT, AND SENTENCED FOR \$9,654,553 OF VALUE BENEFIT RECEIVED FROM "ESTIMATED PROFITS" FROM HIS CO-DEFENDANT'S COMPANIES. THE COURT FAILED, AFTER OBJECTION, TO APPLY THE PROPER GUIDELINES TO MOVANT'S SENTENCE.

The calculation of LOSS/HARM to victim(s) is a critical determinant of a Defendant's sentence. USSG Sec. 2B1.1 relies on this concept. And very often, it's the single most important factor in application of the Sentencing Guidelines.

Gain is not an acceptable measure of harm, and has been rejected by the Court of Appeals in this case.

Movant contends that his sentence is unreasonable because there is No Economic Loss in this case to the City of Detroit, nor any entity or person within the case. Also because GAIN or "profits" cannot be substituted for LOSS.

Movant's Base Offense Level was increased more than 20-levels, without any preponderance of proof as to any LOSS/HARM caused by Movant's criminal conduct. This increase of 20-levels, from the Base Offense Level, represents half of the total guideline point calculation (Level 43). It is not only a misapplication of the sentencing guidelines, its also intentional sentence manipulation by the trial court. The offense level increase of more than 20-levels in not supported by any evidence of harm caused by Movant's charged or convicted criminal conduct. Nor were there any discussions, writings, records, or any communications whatsoever, before, during, or after trial, that reflects any LOSS/HARM to victims that would legally justify this enhancement.

Movant contends there is NO LOSS to the any victims in this case, and that the government failed to meet the preponderance of proof as to a loss caused by Movant's criminal conduct, and therefore, the 20-level enhancement to Movant's sentence should be excluded from the guideline calculation.

1 A Presentence Investigation Report (PSR) was prepared, dated 7/15/13. It recommended
2 a Total Offense Level of 43 (PSR 132), Criminal History Category 4 (Id, 135). Offense Level
3 43, Criminal History Category 4 provide for a life term in the guideline sentence table.

4 Movant was sentenced using 3 separate groups, that correlated to the counts of
5 conviction. The Adjusted Offense Level, in Group 1, recommended an increase of 20 based
6 upon "the profit in this case of \$16,802,773.98." According to the PSR, the Base Offense Level
7 was increased 20 levels, or from Level 24 to Level 44, based upon a so-called "profit" of over
8 \$16 million. Paragraph 191 of the PSR asserts that it would use "the most conservative approach
9 and use a 26% figure for each contract representing profit". This so-called "profit" was an
10 estimated amount of gain from Movant's Co-Defendant's Companies.

11 objected to the "profits generated" approach used by the PSR. Objections submitted to
12 the Probation Department included the use of the "profit" figure of 26%, or any percentage,
13 because it was unreliable, and could not be assigned to Movant at all.

14 A revised PSR was issued dated 9/30/13. It used an arbitrary figure for computation of a
15 "profit" of 10% instead of 26% (Revised PSR, 191). It then reached a total amount of
16 \$9,654,553 as a profit amount for guideline purposes instead of the amount in the original PSR
17 of \$16,802,773.98.

18 Movant submitted a memorandum to the Court concerning those objections to the
19 guideline scoring in the PSR. He also objected to the enhancement to guideline scoring for
20 Group 1 of 20 offense levels because it was "not supported by the evidence or applicable legal
21 principles." (Id, Pg ID 15928 & 15920) Movant also objected to the number because the court
22 was analyzing it as though it was a loss in this case. The court substituted "gain" for "loss" The
23 "overarching objection" (Id, Pg ID 16158) was based on the insufficient reliable evidence in the
24 record to make the assessment against Movant. Also, that the jury made no determination of
25 those amounts. The calculation relied on matters that were not in evidence (Id, Pg ID 16159).

The court agreed "completely that the \$9.6 million is a defensible number, foreseeable to
Movant based upon the 10% 'profit' figure." The court erroneously sentenced Movant, by using
a method that was absent of any legal principle, arbitrary, capricious, and without any evidence
from the record to support it. The court erroneously substituted "gain" for "loss". There was no
loss in this case.

ATTACHMENT E

GROUND FIVE

*THE COURT ERRED WHEN IT DID NOT GIVE AN "ALLEN CHARGE" TO THE JURY.
THE JURY FAILED TO COME TO A UNANIMOUS VERDICT.*

On March 11, 2013 the jury rendered a verdict. However, the date that the jury actually formed its verdict is unclear. It appears as if the verdict was incomplete. It was a partial verdict. In fact, the jury had not rendered a verdict on several counts. Instead of notifying all parties that the jury had come to a partial verdict, counsel heard nothing until the following Monday when they were advised that the jury had rendered a verdict.

Neither the Government nor counsels for the defendants were notified of the fact that the jury had not come to a decision on some of the counts. They were not given an opportunity to ask the jury to go back and continue deliberating.

The court's failure to notify the parties of the incomplete verdict precluded them from seeking strategies to prevent an impasse.

A decision either to convict or acquit is not a verdict until the jury announces its verdict and then polled to confirm it. This allows for the possibility that a jury that has agreed to render a verdict on many counts may enter into further discussions and thereafter change that agreement. The purpose of an Allen charge is to encourage a jury to come to a unanimous verdict.

Movant asserts that he has a Due Process Right to a complete deliberation, uninterrupted, on all of the counts until he has received what has been commonly accepted as a complete verdict. There was not a complete verdict in this case. The defendants were not advised of the fact that there were unresolved counts nor were they allowed to be given the opportunity to weigh-in on whether the Court should have given the jury an Allen charge which would have allowed for further deliberation, or compromise on counts that had been preliminarily agreed to..

ATTACHMENT F

GROUND SIX

THE COURT ERRED IN PROVIDING THE JURY WITH AN INCORRECT INSTRUCTIONS ON THE DEFINITION OF "OFFICIAL ACT". THE JURY CONVICTED MOVANT FOR A RICO CONSPIRACY COUNT WITHOUT FINDING THAT HE COMMITTED OR AGREED TO COMMIT AN "OFFICIAL ACT" RELATED TO ANY "QUESTION, MATTER, CAUSE, SUIT, PROCEEDING, OR CONTROVERSY" AS CLEARLY DEFINED.

The court instructions provided no assurance the jury could find where Movant agreed to commit an "Official Act", as clearly defined. This made it impossible for the jury to find guilt on Count 1; RICO Conspiracy.

There were more than 300 Detroit Water and Sewage Department (DWSD) contracts that were being performed, supervised, and directed by that department between 2002-2008. There were more than 2000 contracts being performed, supervised, and directed by the other 39 City of Detroit Departments, during the same period of time.

The criminal trial asserted that there was a two person RICO Conspiracy surrounding only eight (8) of these more than 2300 contracts. Each one of these (8) contracts was done on-time, on-budget, and are serving the city of Detroit very well today.

The jury in the criminal trial gave no direction, inclination, information, records, writings, or any formal decision whatsoever (nor were they directed to do so by the court), regarding any or which specific acts, claims, or contracts they used for their determination of guilt, for the RICO Conspiracy count.

There were only two different contractual processes in the city of Detroit, and also discussed at-trial; 1) the "usual process" through the Detroit City Council, and 2) The Special Administrator process, through the United States District Court (through Judge John Feikens, who is deceased and was so at-trial), because of a Federal Consent Decree in the DWSD.

The "usual process" (2002-2008) had no involvement from Movant, nor anyone in the Mayor's office at all. DWSD assess their own needs, produces specifications for those needs, then they work with the City of Detroit's Law and Purchasing Departments to formalize a contract, and a bid-process. After taking bids, DWSD employees tabulate the bids, in accordance with Federal, State, and Local Laws and Ordinances. After this process, a winner is chosen and notified. The winning bid is then presented to the Detroit City Council for a vote.

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1
2 After council votes in the affirmative, the winning bidders sit down with the
3 DWSD employees to begin negotiations on terms and particulars; scheduling, budget,
4 performance measures, etc.

5 The only difference between this process and the Special Administrator process is
6 that after the bids are tabulated by DWSD employees, (in accordance with Federal, State, and
7 Local Laws and Ordinances) and the winner is notified, instead of going to City Council,
8 immediately begins negotiations on terms and particulars with DWSD employees. Then, the
9 DWSD communicates with the Judge Feikens, United States District Court, and he prepares a
10 Federal Order for Movant's signature.

11 Also, because of the Federal Consent Decree, and the jurisdiction being within the
12 Federal Court, any contract that was procured through the Special Administrator process, had no
13 obligation to go through any part of the "usual process" at all.

14 Even though the Special Administrator could have legally, and well within the
15 mandates of the Special Administrative Order, picked a contractor without any involvement from
16 anyone else, every contract in this case used a very responsible process.

17 The jury clearly understood that Movant had no role, no involvement, or any part
18 in the "usual process". The jury also understood that Movant could not produce a Federal Court
19 Order, nor force a federal judge to do so. The jury did not find that there were any specific
20 matters where Movant exercised is governmental authority to do, change, implement, or take
21 official action.

22 The court erred by giving the jury an incorrect definition of "Official Act", and
23 therefore, incorrect instructions, as well as, improper guidance as to the legal foundation of what
24 must be determined by the jury to find a guilty verdict for the RICO Conspiracy count, Movant
25 was convicted for activity that was not unlawful.