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Filed	Document Description	Page	Docket Text
02/11/2011	20		Filed 10 copies Appendix vols. I & II by Appellant George H. Ryan, Sr. [20] [6286325] [10−3964] (RT)
	20 Volume I	2	
	20 Volume II	229	

No. 10-3964

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GEORGE H. RYAN SR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On appeal from the U.S. District Court for the
Northern District of Illinois, No. 10-cv-5512
Hon. Rebecca R. Pallmeyer, Judge, Presiding

SEPARATE APPENDIX OF PETITIONER-APPELLANT VOLUME 1

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SEPARATE APPENDIX

TABLE OF CONTENTS

Document	Page
Indictment (12/17/03)	A-000063
United States' Motion for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations (8/31/05)	A-000155
Ryan's Response to United States' Motion for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations (9/15/05)	A-000168
Judgment (9/6/06)	A-000186
Final decision from Seventh Circuit on initial appeal (11/2/07)	A-000203
Petition to Supreme Court for Certiorari	A-000285
Government Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (10/7/10)	A-000322
Excerpts from Transcript of Proceedings, pp. 2562	A-000366
Excerpts from Transcript of Proceedings, pp. 2844	A-000367
Excerpts from Transcript of Proceedings, pp. 3758-59	A-000368
Excerpts from Transcript of Proceedings, pp. 6922-24	A-000369
Excerpts from Transcript of Proceedings, pp. 7316-17	A-000371
Excerpts from Transcript of Proceedings, pp. 9421-31	A-000372
Excerpts from Transcript of Proceedings, pp. 9520-21	A-000375
Excerpts from Transcript of Proceedings, pp. 9552	A-000376
Excerpts from Transcript of Proceedings, pp. 10622-23	A-000377
Excerpts from Transcript of Proceedings, pp. 10728-29	A-000378
Excerpts from Transcript of Proceedings, pp. 11773-74	A-000379
Excerpts from Transcript of Proceedings, pp. 13499-502	A-000380

Excerpts from Transcript of Proceedings, pp. 13511-15	A-000382
Excerpts from Transcript of Proceedings, pp. 15517-19	A-000384
Excerpts from Transcript of Proceedings, pp. 15735-36	A-000386
Excerpts from Transcript of Proceedings, pp. 15744-45	A-000387
Excerpts from Transcript of Proceedings, pp. 15992	A-000389
Excerpts from Transcript of Proceedings, pp. 22462-3	A-000390
Excerpts from Transcript of Proceedings, pp. 22831	A-000391
Excerpts from Transcript of Proceedings, pp. 22836	A-000392
Excerpts from Transcript of Proceedings, pp. 22843-44	A-000393
Excerpts from Transcript of Proceedings, pp. 22850-52	A-000395
Excerpts from Transcript of Proceedings, pp. 22861-63	A-000397
Excerpts from Transcript of Proceedings, pp. 22865-91	A-000398
Excerpts from Transcript of Proceedings, pp. 22914	A-000405
Excerpts from Transcript of Proceedings, pp. 22941	A-000406
Excerpts from Transcript of Proceedings, pp. 22956-59	A-000407
Excerpts from Transcript of Proceedings, pp. 22962-63	A-000409
Excerpts from Transcript of Proceedings, pp. 22968-69	A-000411
Excerpts from Transcript of Proceedings, pp. 23097	A-000412
Excerpts from Transcript of Proceedings, pp. 23149	A-000413
Excerpts from Transcript of Proceedings, pp. 23697	A-000414
Excerpts from Transcript of Proceedings, pp. 23744	A-000415
Excerpts from Transcript of Proceedings, pp. 23764	A-000416
Excerpts from Transcript of Proceedings, pp. 23771	A-000417

Excerpts from Transcript of Proceedings, pp. 23773-74	A-000418
Excerpts from Transcript of Proceedings, pp. 23902-13	A-000419
Excerpts from Transcript of Proceedings, pp. 23982	A-000423
Excerpts from Transcript of Proceedings, pp. 24022	A-000424
Excerpts from Transcript of Proceedings, pp. 24074-6	A-000425
Excerpts from Transcript of Proceedings, pp. 25422-23	A-000427
Transcript of Proceedings, Sept. 6, 2006	A-000429
United States v. Warner, 2005 U.S. Dist. LEXIS 21367 (N.D. Ill. 9/23/05)	A-000430
United States v. Warner, 2006 U.S. Dist. LEXIS 64085 (N.D. Ill. 9/7/06)	A-000445

CERTIFICATE OF SERVICE

I, Matthew R. Carter, an attorney, hereby certify that I have this day caused ten copies of the Separate Appendix to be served on the Clerk of the Court. Additionally, I hereby certify that I have this day caused one copy of the Separate Appendix to be served on the following:

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Dated: February 11, 2011

Matthew R. Carter

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 02 CR 506
	)	
	)	Judge Rebecca Pallmeyer
	)	
v.	)	Violations: Title 18, United
	)	States Code, Sections 2, 1001
LAWRENCE E. WARNER and	)	1341, 1346, 1951, 1956 and 1962
GEORGE H. RYAN, SR.	)	Title 26, United States Code
	)	Sections 7206 and 7212; and
	)	Title 31, United States Code, Section 5324
	)	
	)	Second Superseding Indictment

JUDGE PALLMEYER

MAGISTRATE JUDGE BOBRICK

COUNT ONE

The SPECIAL APRIL 2002 GRAND JURY charges:

1. At times material to this indictment:

Office of the Secretary of State

A. The Office of the Secretary of State of the State of Illinois (hereinafter "SOS Office") was entrusted with comprehensive duties relating to motor vehicles, including licensing drivers, administering and enforcing driver safety, maintaining driving records, selling and distributing license plates and vehicle registration validation stickers and issuing and maintaining records of vehicle titles. In addition, the SOS Office, through its Inspector General Department (hereinafter "IG Department"), was charged with investigating alleged misconduct by SOS Office employees.

B. The Secretary of State, one of the elected statewide officers of the State of Illinois, was responsible for running the SOS Office, the second largest of Illinois' constitutionally-

110

mandated offices. From 1991 through early 1999, the SOS Office employed over 3,000 employees.

C. The SOS Office performed its functions through approximately twenty-one (21) departments, each of which was headed by a department director appointed by the Secretary of State. Department directors reported, in most instances, to the Chief of Staff.

Office of the Governor

D. The Office of the Governor of the State of Illinois (hereinafter "Governor's Office") was entrusted with comprehensive duties involving, among other things, appointing department directors and key administrators; issuing Executive Orders; annually proposing a budget and reporting on the fiscal condition of the state; supporting, approving and vetoing legislation; and otherwise setting priorities and direction for the State of Illinois.

E. The Governor's Office conducted its business through the staff of the Governor's Office and various departments which were managed by department directors, each of whom reported to the Governor's Office. In conjunction with the departments under its control, the Governor's Office comprised the largest of Illinois' constitutionally-mandated offices.

F. The Governor of the State of Illinois, who was the chief executive of the State of Illinois, was responsible for administration of all areas of the executive branch of state government not under the authority of the other constitutionally-elected officials.

Racketeering Defendants

G. Defendant GEORGE H. RYAN, SR., was elected by the voters of the State of Illinois to a four-year term as the Secretary of State in November 1990 and reelected to a second four-year term in November 1994. Accordingly, RYAN was the Secretary of State from January 1991 through early January 1999. In November 1998, RYAN was elected by the voters of the State

of Illinois to a four-year term as the Governor of the State of Illinois. RYAN was the Governor from January 1999 through early January 2003.

H. Defendant LAWRENCE E. WARNER owned and operated several businesses out of an office space at 3101 N. Western Avenue in Chicago, Illinois, including, among other businesses: a fire insurance adjustment business named Lash Warner & Associates; a construction maintenance and supervision business named Economy Building & Maintenance; and National Consulting Company and Omega Consulting Group Ltd., two entities which were solely-owned and operated by WARNER. In or about November 1990, defendant RYAN, then the Secretary of State, appointed defendant WARNER as a member of the SOS Office Transition Team, which is further described in paragraph 2(B) of Count Two below.

Other Individuals and Entities

I. **Donald Udstuen**: From the 1970s through approximately April 30, 2002, Donald Udstuen was affiliated in various capacities with the Illinois State Medical Society, an entity that, among other things, conducted lobbying activities for medical professionals in the State of Illinois. From 1991 to April 30, 2002, Udstuen was the Chief Operating Officer for the Illinois State Medical Insurance Exchange.

i. At times during defendant RYAN's career as a candidate and elected official, Udstuen served a number of roles to benefit RYAN, including serving as an advisor and fundraiser for RYAN's political campaigns.

ii. In or about January 1991, defendant RYAN, then the Secretary of State, appointed Udstuen to be the co-chairman of the SOS Office Transition Team.

J. **Associate 1**: Beginning in approximately 1973 and continuing through

approximately December of 2002, Associate 1 was a lobbyist and consultant representing individuals and entities before the Illinois legislature and Illinois' executive offices, including the SOS Office and the Governor's Office. As a lobbyist and on behalf of his clients, Associate 1 met with officials in the legislative and executive branches of Illinois government, including defendant RYAN, to promote and advance the positions of his clients.

K. **Scott Fawell:** In approximately February 1992, defendant RYAN, while serving as Secretary of State, appointed Scott Fawell to be his Chief of Staff. In this capacity and through in or about January 1999, Fawell, in conjunction with defendant RYAN, made personnel, policy, strategic and business decisions binding the SOS Office. In addition, beginning no later than February 1992 and continuing through early 1999, Fawell was a principal operating officer, adviser, and decision maker for Citizens For Ryan, an entity described in paragraph 1(L) below. In this capacity and through in or about January 1999, Fawell, in conjunction with defendant RYAN, made personnel, policy, strategic and business decisions binding Citizens For Ryan. In or about January 1999, RYAN appointed Fawell to be the Chief Executive Officer of the Metropolitan Pier & Exposition Authority, an agency that received a portion of its funding on an annual basis from the Illinois General Assembly.

L. **Citizens For Ryan:** Citizens For George Ryan, Sr. (hereinafter "Citizens For Ryan") was a private entity organized and existing under the laws of the State of Illinois as a state-wide political campaign committee established on behalf of defendant RYAN to support his campaign efforts. As a state political campaign committee, Citizens For Ryan was required to file income and expenditure reports accurately and truthfully disclosing income and expenditure activity, typically on a semi-annual basis, with the Illinois State Board of Elections, which reports were then

available to the public. Prior to each filing, the income and expenditure activity was reviewed by numerous Citizens For Ryan agents, including Fawell, and then verified for truth and completeness by the treasurer of Citizens For Ryan at the time of filing.

i. Citizens For Ryan maintained one or more bank accounts at various financial institutions in Illinois. Defendant RYAN, with the assistance of Fawell, possessed ultimate control and decision-making authority over Citizens For Ryan bank accounts. Citizens For Ryan also maintained one or more credit card accounts, and credit cards were issued to RYAN and Fawell, who utilized said credit cards, along with funds from the Citizens For Ryan bank accounts, to pay campaign and personal expenses of RYAN.

ii. From at least 1991 through 2002, defendant RYAN routinely used Citizens For Ryan funds and credit cards to benefit himself, family members and other third parties. Generally, Illinois law permitted the expenditure of campaign funds for personal purposes, provided that the personal expenditures were reported as such on the campaign finance disclosure reports. In addition, RYAN was required by law to accurately and fully report on his federal and state income tax returns all expenditures of Citizens For Ryan funds for personal purposes.

iii. During each of the 1994 and 1998 political campaigns involving defendant RYAN, RYAN caused substantial Citizens For Ryan funds to be set aside for personal use in the event that the respective campaigns were unsuccessful. Generally, Illinois law further permitted a former public official to use any outstanding balance in a campaign fund for personal use, provided again that the former public official accurately and fully reported on his federal and state income tax returns all such conversions of campaign funds.

iv. At all times between December 31, 1995 and May 2002, Citizens For

Ryan bank account balances remained in excess of $1 million.

M. **Alan A. Drazek**: Alan A. Drazek owned and operated a company called American Management Resources and was a personal associate of Donald Udstuen.

N. **Associate 2:** Through a real estate entity, Associate 2 owned a commercial building in South Holland, Illinois, which, in May 1997, was leased to the SOS Office. Through an entity called Seven Seas Villa, Associate 2 also co-owned a vacation home in Jamaica and personally owned a home in Palm Springs, California.

O. **Individual 1:** A suburban Chicago businessman, Individual 1 met defendant RYAN after RYAN became Secretary of State and had occasional contact with RYAN and members of RYAN's SOS Office staff.

Laws, Duties, Policies and Procedures Applicable to Defendant RYAN

2. Defendant RYAN, as an officer of the State of Illinois, was bound by the following laws, duties, policies and procedures:

A. As Secretary of State and as Governor, defendant RYAN was a constitutional officer and as such, at the outset of each term, was required to take an oath of office to support the Constitution of the United States and the Constitution of the State of Illinois, and to faithfully discharge the duties of the respective governmental office to the best of his abilities.

B. In his capacity as Secretary of State and Governor, defendant RYAN owed a duty of honest services to the people of the State of Illinois and to the State of Illinois in the performance of his public duties.

C. Pursuant to the criminal laws of the State of Illinois (720 ILCS 5/33-1(d)), as Secretary of State and Governor, defendant RYAN was prohibited from receiving, retaining, or

agreeing to accept any property or personal advantage which he was not authorized by law to accept, knowing that such property or personal advantage was promised or tendered with intent to cause him to influence the performance of any act related to the employment or function of his public office.

D. Pursuant to the criminal laws of the State of Illinois (720 ILCS 5/33-3(c) and (d)), as Secretary of State and Governor, defendant RYAN was prohibited from committing the following acts in his official capacity: (1) performing an act in excess of his lawful authority, with intent to obtain a personal advantage for himself or others; and (2) soliciting or knowingly accepting, for the performance of any act, a fee or reward which he knew was not authorized by law.

E. Pursuant to the criminal laws of the State of Illinois (50 ILCS 105/3), as Secretary of State and Governor, defendant RYAN was prohibited from being, in any manner, financially interested, either directly or indirectly, in any contract or the performance of any work in regard to which RYAN may have been called upon to act.

F. Pursuant to the criminal laws of the State of Illinois, including the Illinois Governmental Ethics Act (5 ILCS 420/4A-101), as Secretary of State and Governor, defendant RYAN was obligated to file annually a Statement of Economic Interest with the State of Illinois, wherein he was required to disclose, among other things: (1) the name of any entity doing business in the State of Illinois from which he derived income during the preceding calendar year in excess of $1,200 (that is, income other than for specified professional services); (2) the identity of any compensated lobbyist with whom he maintained a close economic association; and (3) the name of any entity from which a gift or gifts valued singly or in the aggregate in excess of $500 was received during the preceding calendar year. If defendant RYAN constructively controlled the interest described in (1) or (3) of a spouse or third party, he was obligated to disclose the interest as if it were

his own.

G. Pursuant to the criminal laws of the State of Illinois, including the Illinois Gift Ban Act (5 ILCS 425/10), as Governor, except as otherwise provided by the Gift Ban Act, defendant RYAN was prohibited from soliciting or accepting any gifts from any prohibited source or in violation of any federal or state statute, rule or regulation. Prohibited sources included, among others, anyone who was registered or required to be registered with the Secretary of State under the Lobbyist Registration Act, described below. Beginning no later than early 1999 and continuing through at least 2002, defendant RYAN, through certain personnel of the Governor's Office, maintained annual Gift Books, the purpose of which, among other things, was to log all gifts received by then Governor RYAN and to monitor RYAN's compliance with the Gift Ban Act.

H. Pursuant to Article VIII, Section 1(a) of the Constitution of the State of Illinois, as Secretary of State and Governor, defendant RYAN was permitted to use public funds, property and credit only for public purposes.

I. Political activity by state employees, including SOS Office employees, was limited in the following respects: (1) pursuant to the laws of the State of Illinois (5 ILCS § 320/4) no person was permitted to induce or persuade, or to attempt to induce or persuade, particular categories of state employees to violate the restrictions against performing political activity during regular working hours; (2) pursuant to laws of the State of Illinois (10 ILCS § 5/9-25.1), no public funds could be used to urge an elector to vote for or against any candidate or proposition, or be appropriated for political or campaign purposes to any candidate or political organization; and (3) pursuant to the written SOS Office policies and procedures (Article 5), SOS Office employees were prohibited from (i) using state working time for personal gain or for any reason other than

performing their governmental duties; and (ii) participating in any political campaigning or activity while on duty.

J. Beginning no later than August 26, 1997, pursuant to a written SOS Office policy memorandum issued immediately following Executive Order #2 declared by the then-Governor, all SOS Office employees, including RYAN, were prohibited from accepting any gifts, meals or entertainment with a value of $50 or more annually from any single prohibited source. A prohibited source was any person or entity who sought official action, did business or sought to do business with the SOS Office, conducted activities regulated by the SOS Office or had interests that could be substantially affected by the performance or non-performance of the employee's official duties. From at least August 1997 through 2002, defendant RYAN had a stated personal policy of not accepting personal gifts whose value was in excess of $50.

Laws and Duties Applicable To Defendant WARNER

3. In performing certain alleged functions as set forth below, defendant WARNER was bound by the following laws and duties:

A. Pursuant to the criminal laws of the State of Illinois (720 ILCS 5/33-1(c)), defendant WARNER was prohibited from promising or tendering to a public official, with intent to influence the performance of any official act, any property or personal advantage which the public officer would not be authorized by law to accept.

B. Pursuant to the Lobbyist Registration Act (25 ILCS 170/1-170/12), which became effective in or about January 1994, defendant WARNER was required to register with the SOS Office as a lobbyist if he qualified under either of the following definitions: "(1) Any person who, for compensation or otherwise, either individually or as an employee or contractual employee

of another person, undertakes to influence executive, legislative or administrative action"; or "(2) Any person who employs another person for the purposes of influencing executive, legislative or administrative action."

C. Pursuant to the Lobbyist Registration Act, defendant WARNER had an obligation to disclose in annual statements filed with the SOS Office all expenditures related to lobbying, and to itemize any expenditures over $100 made on behalf of, or benefits given to, any legislative or executive branch official, including gifts and travel and entertainment expenses.

Federal Grand Jury Investigation

4. In or about the Spring of 1998, the SPECIAL JUNE 1997-2 Grand Jury sitting in Chicago, Illinois, commenced grand jury investigation 98 GJ 596. Successive federal grand juries, including the SPECIAL APRIL 2002 Grand Jury, continued the investigation into, among other things, allegations of official misconduct, corruption and fraudulent conduct relating to the SOS Office, the Governor's Office and related entities and individuals (the "Grand Jury Investigation").

A. On or about September 3, 1998, in furtherance of the Grand Jury Investigation, federal law enforcement officers executed arrest warrants and search warrants, interviewed numerous individuals and served grand jury subpoenas on SOS Office employees. As a result of the arrests and related official proceedings that day, the existence of the Grand Jury Investigation became known to the public, including defendant RYAN, no later than this date.

B. At various times between September 1998 and December 2003, the following matters, among others, were material to the Grand Jury Investigation:

Award of Contracts, Leases and Other Official Acts

i. Whether defendant RYAN awarded and authorized contracts, leases and low-digit license plates and performed other official acts for the benefit of WARNER, Udstuen, Associate 1, Associate 2, as well as others with personal relationships with RYAN (hereinafter, collectively the "Associates");

ii. Whether certain of the Associates provided any personal or financial benefits or other things of value to defendant RYAN, RYAN's family members or Citizens For Ryan, for the purpose of influencing or rewarding RYAN in the course of performing or authorizing any official act.

iii. Whether the offering or receipt of said things of value were concealed through the actions of defendant RYAN and certain of the Associates.

Termination of IG Investigators and Reorganization of IG Department

iv. Whether the decision by RYAN and Fawell to terminate IG investigators and reorganize the IG Department in June 1995 was made, at least in part, in order to conceal and otherwise protect certain SOS Office employees' political fundraising and other campaign activity performed on behalf of Citizens For Ryan;

Diversion of SOS Office Resources To Benefit Political Efforts

v. Whether SOS Office employees, including defendant RYAN and Fawell, authorized the diversion of SOS Office labor and resources in support of campaign activities sponsored or promoted by RYAN, Fawell and Citizens For Ryan.

vi. Whether SOS Office officials took action to conceal the diversions of SOS Office labor and resources, including taking actions after gaining knowledge of the existence

of the Grand Jury Investigation.

C. As part of, and in conjunction with, the Grand Jury Investigation, defendant RYAN was interviewed by federal law enforcement on matters material to the Grand Jury Investigation on the following dates: January 5, 2000; July 6, 2000; October 16, 2000; and February 5, 2001.

The Enterprise

5. At all times material to this indictment, the State of Illinois constituted an "Enterprise" as that term is defined in Title 18, United States Code, Section 1961(4), which was engaged in, and the activities of which affected, interstate commerce.

6. Defendant RYAN was employed by and associated with the Enterprise, and defendant WARNER was associated with the Enterprise.

Purposes of the Defendants

7. The purposes of the defendants included the following:

A. Performing official government acts; awarding government contracts and leases and low-digit license plates; receiving payments relating to government contracts, and otherwise utilizing the resources of the State of Illinois for the personal and financial benefit of RYAN, RYAN's family members, Citizens For Ryan, and certain of the Associates, including defendant WARNER; and

B. Promoting, concealing and otherwise protecting purpose (A) of the defendants from public exposure and possible criminal prosecution.

The Racketeering Conspiracy

8. Beginning in approximately November 1990 and continuing to at least 2002, in Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere:

GEORGE H. RYAN, SR. and
LAWRENCE WARNER,

defendants herein, and others known and unknown to the Grand Jury, being persons employed by and associated with an enterprise engaged in, and the activities of which affected, interstate commerce, namely, the Enterprise, did conspire with each other and others known and unknown to the Grand Jury to violate Title 18, United States Code, Section 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the Enterprise through a pattern of racketeering activity involving multiple acts indictable under the following provisions of federal law:

A. 18 U.S.C. § 1341 and 1346 (mail fraud);

B. 18 U.S.C. § 1956(a)(1)(A)(i), (a)(1)(B)(i) and (a)(1)(B)(ii) (money laundering);

C. 18 U.S.C. § 1951 (extortion);

D. 18 U.S.C. § 1503 and 1512 (obstruction of justice);

and multiple acts involving bribery chargeable under the following provisions of state law:

720 ILCS 5/33-1(c) and (d); and 5/33-3(d).

It was part of the conspiracy that the defendants agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise.

Means and Method of the Conspiracy

9. It was part of the conspiracy that defendants RYAN and WARNER, as well as other co-conspirators, engaged in a scheme to defraud the people of the State of Illinois and the State of Illinois of money, property and the intangible right to the honest services of defendant RYAN, in his capacity as a state official, and of other state officials, by means of materially false and fraudulent pretenses, representations, promises and material omissions, as more fully described in Count Two, paragraphs 2-148 of this indictment. Defendants RYAN, WARNER and certain other Associates used and caused to be used the United States mails and other interstate carriers in furtherance of the scheme.

10. It was further part of the conspiracy that defendant WARNER and other Associates provided personal and financial benefits to, and for the benefit of, defendant RYAN, RYAN family members, third parties affiliated with RYAN, and Citizens For Ryan, due to RYAN's official position, and for the purpose of influencing and rewarding RYAN in the exercise of RYAN's official authority.

11. It was further part of the conspiracy that defendant RYAN knowingly took actions in his official capacity to benefit the personal and financial interests of defendant WARNER and certain Associates while concealing, in violation of the law, RYAN's financial relationship with WARNER and certain Associates.

12. It was further part of the conspiracy that defendant RYAN knowingly permitted defendant WARNER and certain Associates to participate in the governmental decision making process, and provided WARNER and certain Associates with access to material, non-public information relating to governmental decisions. With RYAN's authority and concurrence,

WARNER and certain Associates converted the participatory status and information provided by RYAN into financial benefits for themselves, defendant RYAN and third parties.

13. It was further part of the conspiracy that defendants RYAN and WARNER, as well as certain other conspirators, engaged in financial transactions designed, in whole or in part, to conceal and disguise the nature, source, ownership, and control of the proceeds of the scheme, including the structuring of cash withdrawals from bank accounts to avoid the filing of currency transaction reports, the payment of funds to third parties who acted as conduits and nominees, and the payment of cash and the writing of checks to cash.

14. It was further part of the conspiracy that defendant WARNER and others committed and attempted to commit extortion, which extortion obstructed, delayed and affected commerce, by knowingly obtaining and attempting to obtain property in the form of payments from vendors and prospective vendors of the SOS Office induced by a) the wrongful use of actual and threatened fear of economic harm, and b) under color of official right.

15. It was further part of the conspiracy that defendant RYAN, Fawell and other agents of Citizens For Ryan diverted, and caused the diversion of, SOS Office labor and resources for the personal and political benefit of defendant RYAN, Fawell and Citizens For Ryan.

16. It was further part of the conspiracy that defendant RYAN and Fawell acted to terminate IG Department investigators and to reorganize the IG Department to, among other things, discourage the legitimate investigation of improper political fundraising activities and related official misconduct of SOS Office employees, and thus benefit RYAN personally and Citizens For Ryan.

17. It was further part of the conspiracy that defendant RYAN and Fawell obstructed and attempted to obstruct the Grand Jury Investigation and otherwise misrepresented, concealed and hid,

and caused to be misrepresented, concealed and hidden, the purposes of and acts done in furtherance of the conspiracy.

All in violation of Title 18, United States Code, Section 1962(d).

COUNT TWO

The SPECIAL APRIL 2002 GRAND JURY charges:

1. The allegations in paragraphs 1–4 of Count One of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. At all times material to this count of the indictment:

A. The SOS Office had, among others, the following departments:

i. Vehicle Services Department: The Vehicle Services Department was responsible for, among other things, the registration, licensure, and titling of vehicles. The Vehicle Services Department also processed vehicle titles, registered vehicles, and issued license plates and vehicle registration validation stickers.

ii. Driver Services Department: The Driver Services Department was responsible for, among other things, testing applicants and issuing automobile and truck drivers' licenses through over 130 driver's license facilities located throughout the State of Illinois. The Property Management Division of the Driver Services Department was responsible for negotiating and managing leases entered into with third parties relating to over 130 driver's license facilities.

iii. Information Systems Services Department: The Information Systems Services Department was responsible for, among other things, providing computer and office automation services to all Departments in the SOS Office.

iv. Physical Services Department: The Physical Services Department was responsible for, among other things, the maintenance and upkeep of certain buildings, including among others, certain buildings leased by the SOS Office from outside individuals and entities, and all the buildings comprising the State Capitol Complex in Springfield, Illinois.

v. Index Department: The Index Department was responsible for, among other things, administering and maintaining public records related to the registration, activities and expenditures of lobbyists in the State of Illinois.

The SOS Office Transition Team

B. Beginning in or about late 1990, defendant RYAN, as the Secretary of State-elect, chose a number of individuals, including defendant WARNER and Udstuen, to assist in the planning of the RYAN SOS Office Administration (hereinafter the "SOS Office Transition Team"). In particular, the SOS Transition Team was created to review the practices, procedures, administration and duties of the SOS Office and to make recommendations to the newly-elected Secretary of State for changes and improvements to the SOS Office. As part of that function, the SOS Office Transition Team was provided access to SOS Office officials and employees, as well as internal SOS Office documents and information not generally available to the public. Among other things, the SOS Office Transition Team reviewed and made recommendations regarding issues related to the SOS Office mainframe computer system, the installation of a new heating and cooling system within the State Capitol Complex buildings, and the status and options relating to one or more SOS Office real property leases. The SOS Office Transition Team issued a report in or about March 1991.

C. In addition to serving as a member of the SOS Office Transition Team and after the work of the Transition Team was completed in or about March 1991, WARNER, with the knowledge and authorization of RYAN, attended internal SOS Office meetings, including policy meetings and one or more staff retreats; occasionally performed private work inside the governmental offices of RYAN; directed and advised SOS Office personnel, including one or more

department directors, regarding matters related to the award of SOS Office contracts to vendors and the award of SOS Office real property leases; and assisted in determining the content of official SOS Office documents and communications, including specifications related to one or more SOS Office contracts with vendors.

The Scheme To Defraud

3. Beginning in approximately November 1990 and continuing to at least 2002, in the Northern District of Illinois, Eastern Division, and elsewhere:

GEORGE H. RYAN, SR. and
LAWRENCE WARNER,

defendants herein, as well as Associate 1, Donald Udstuen, Scott Fawell, Citizens For Ryan and others known and unknown to the Grand Jury, devised and intended to devise, and participated in, a scheme and artifice to defraud the people of the State of Illinois, and the State of Illinois, of money, property and the intangible right to the honest services of defendant RYAN and other officials and employees of the State of Illinois, by means of materially false and fraudulent pretenses, representations, promises and material omissions, and in furtherance thereof used the United States mails and other interstate carriers, which scheme is further described in the following paragraphs:

Overview of Scheme

4. It was part of the scheme that defendant RYAN performed and authorized official actions to benefit the financial interests of RYAN, defendant WARNER, Associate 1, Associate 2 and certain Associates and designated third parties, including RYAN family members and Citizens For Ryan. The official actions RYAN performed and authorized included:

A. Awarding, and authorizing the award of, contracts and leases, and intervening in governmental processes related thereto and causing

contractual payments to be made to benefit the financial interests of defendant WARNER, as described below;

B. Providing defendant WARNER and Associate 1 with participatory status in, and material non-public information relating to, governmental decisions, which WARNER and Associate 1 then converted into financial benefits for themselves, defendant RYAN and third parties, as described below.

C. Awarding a real property lease and causing contractual payments to be made to benefit Associate 2, as described below;

D. Awarding, and authorizing the award of, contracts and intervening in governmental processes related thereto in order to benefit the financial interests of Associate 1, as described below; and

E. Awarding, and authorizing the award of, low-digit license plates to WARNER, Individual 1, and others, as described below.

5. It was further part of the scheme that defendant RYAN and certain third parties affiliated with RYAN received personal and financial benefits from defendant WARNER, Associate 1 and certain Associates, while defendant RYAN knew that such benefits were provided with intent to influence and reward RYAN in the performance of official acts. Such benefits included, but were not limited to, the following:

A. Monetary payments and gifts on multiple occasions to defendant RYAN which payments and gifts exceeded the $50 threshold;

B. Vacation benefits to defendant RYAN;

C. Personal service benefits to defendant RYAN;

D. Monetary payments, loans, gifts and personal service benefits to RYAN's family members;

E. As directed and approved by defendant RYAN, the allocation and distribution to designated Associates of proceeds obtained from vendors doing business with the State of Illinois;

F. Financial support, in the form of loans to benefit Comguard, a private company which had financial troubles throughout the 1990s and which defendant RYAN supported in its efforts to obtain State of Illinois contracts for electronic monitoring of prisoners. Comguard was owned, in part, by a RYAN family member;

G. Forebearance on loans to a RYAN family member and to Comguard; and

H. Financial benefits to Citizens For Ryan, some of which benefits were converted to RYAN's personal use.

6. It was further part of the scheme that, from the early 1990s to at least 2002, defendants RYAN, WARNER and certain Associates concealed their financial relationships with each other by, among other things:

A. RYAN knowingly failing to disclose gifts, financial benefits and things of value he received from WARNER and the other Associates as required by law and policy;

B. RYAN making false statements to federal investigators regarding his financial relationship with WARNER, Associate 2 and Individual 1;

C. WARNER and certain Associates knowingly i) filing, and causing the filing of, materially false lobbyist registration statements and related disclosure documents, and ii) failing to file lobbyist registration statements and related disclosure documents; and

D. WARNER and certain Associates structuring withdrawals, paying funds to third parties who served as conduits and nominees, making payments in cash, writing checks to cash and otherwise concealing financial transactions.

Authorizing Official Actions Related To WARNER and Udstuen

7. It was part of the scheme that, in or about early 1991, defendant WARNER and Udstuen discussed a plan to make money from one or more vendors doing business with the SOS Office and prospective vendors desiring to do business with the SOS Office.

8. It was further part of the scheme that, beginning in or about 1991 and continuing thereafter, defendant WARNER advised Udstuen that, with defendant RYAN's knowledge and

approval, WARNER would provide Udstuen with one-third of the proceeds that WARNER obtained from certain vendors doing business with the SOS Office, as a reward for Udstuen's past service to defendant RYAN. Thereafter, defendant WARNER did provide Udstuen with one-third of the proceeds that WARNER obtained from American Decal Manufacturing (hereinafter "ADM") and International Business Machines (hereinafter "IBM"), as described below, even though Udstuen performed minimal or no services to earn said proceeds.

9. It was further part of the scheme that, in or about 1991, defendant WARNER and Udstuen agreed that in order to conceal the flow of proceeds from WARNER to Udstuen related to the SOS Office vendors, defendant WARNER would use Alan Drazek's company, American Management Resources, as a conduit for the purpose of passing payments from WARNER to Udstuen relating to ADM and IBM, as described below. WARNER agreed to issue checks to Drazek, who in turn would provide a substantial portion of the proceeds relating to ADM and IBM back to Udstuen in cash.

10. It was further part of the scheme that, in or about early 1991, defendant WARNER told Udstuen that WARNER would be "taking care" of defendant RYAN with WARNER's two-thirds share of the proceeds that he obtained from the vendors doing business with the SOS Office.

11. It was further part of the scheme that, beginning in the early 1990s and continuing thereafter through at least early 1999, WARNER provided personal and financial benefits to and for the benefit of defendant RYAN, including, but not limited to the following:

A. Monetary payments and gifts on multiple occasions to defendant RYAN which payments and gifts exceeded the $50 threshold;

B. Personal and professional service benefits to defendant RYAN;

C. Over $300,000 in payments to Udstuen relating to ADM and IBM's contractual dealings with the SOS Office, as directed and approved by defendant RYAN based on Udstuen's past service to RYAN;

D. Two loans totalling $145,000 related to Comguard, and forebearance on one of the loans;

E. A $5,000 no-interest loan for the benefit of a RYAN family member and forebearance on that loan;

F. Significant financial expenditures (in excess of $3,000) relating to the 1997 wedding of a RYAN family member;

G. Over $6,000 in financial investments in a RYAN family member's business;

H. Over $7,000 in non-compensated professional services to a RYAN family member;

I. Financial benefits to Citizens For Ryan.

12. It was further part of the scheme that defendant RYAN concealed the personal and financial benefits he received from defendant WARNER in violation of the law and his stated policy.

13. It was further part of the scheme that defendant WARNER financially benefitted from the following contracts and leases for which defendant RYAN took and authorized official action:

The Awarding Of The Validation Stickers Contracts To ADM

14. At times material to this indictment:

A. The SOS Office Contract Award Process: In the performance of its lawful functions, the SOS Office awarded contracts for goods and services to outside entities and individuals (hereinafter collectively "vendors"). As to certain contracts, the particular SOS Office Department seeking to obtain the goods and services was generally responsible for drafting contract "specifications" which described, among other things, the technical requirements a bidding company

had to meet in order to win the contract. To initiate the process, contract specifications were forwarded from the SOS Office to the Illinois Department of Central Management Services (hereinafter "Central Management Services"), a state agency independent from the SOS Office that handled certain aspects of the purchasing and procurement process for other state agencies, including the SOS Office. After receiving contract specifications from the SOS Office, Central Management Services generally solicited bids from vendors based upon the requirements set forth in the SOS Office specifications. The vendors wishing to bid on a contract had to submit those bids directly to Central Management Services, which in turn would share the bid information with the SOS Office.

B. The Validation Stickers Contract: The SOS Office periodically awarded a contract to manufacture and print vehicle registration validation stickers, which were the stickers required to be affixed to all Illinois license plates to show current vehicle registration (hereinafter the "validation stickers contract"). The Vehicle Services Department was generally responsible for preparing specifications and, along with Central Management Services, overseeing the competitive bidding process for the validation stickers contract. Up to and including 1991, the validation stickers contract, which cost the State of Illinois approximately $800,000 to $1,200,000 annually, was held by ADM.

C. At no point prior to 1991 had ADM made payments to any third parties to receive or keep the validation stickers contract. As of 1991, the existing SOS validation stickers contract with ADM included the requirement of a feature known as the "metallic security mark," which feature was a product created and manufactured by ADM and this requirement had the effect of substantially guaranteeing the award of the validation stickers contract to ADM.

15. It was further part of the scheme that, beginning in about July 1991 and continuing

thereafter, defendant WARNER made unsolicited contacts with officials of ADM and indicated to them that, in exchange for monthly payments, WARNER would ensure that the "metallic security mark" requirement would remain in the specifications for the SOS Office validation stickers contract.

16. It was further part of the scheme that defendant WARNER threatened one or more officials of ADM, stating if ADM did not pay WARNER the monthly payment amount, WARNER would cause the specifications to change such that ADM would lose the validation stickers contract. As a result of WARNER's statements and out of fear that ADM might otherwise lose the validation stickers contract, officials of ADM authorized monthly payments to WARNER in amounts dictated by WARNER.

17. It was further part of the scheme that, beginning in or about July 1991 and continuing thereafter, defendant WARNER directed a high-ranking official of the Vehicle Services Department (hereinafter "SOS Official A") to take certain actions to financially benefit WARNER. Understanding that WARNER was acting with the authority of RYAN, SOS Official A followed WARNER's directions.

18. It was further part of the scheme that, in or about April 1992, defendant RYAN told SOS Official A that he did not want SOS officials getting too close to a Minnesota-based company, 3M, which was a potential competitor to ADM in the validation sticker contracts.

19. It was further part of the scheme that, in or about late 1992, after SOS Official A failed to respond promptly to defendant WARNER's contacts on official SOS Office matters, defendant RYAN contacted SOS Official A and inquired as to why SOS Official A was not returning WARNER's calls. When SOS Official A informed RYAN that he was uncomfortable with Warner

because Warner was frequently intervening in his SOS Office job and manipulating SOS contracts, RYAN told SOS Official A, among other things, that WARNER was Official A's "friend" and directed Official A to return defendant WARNER's calls.

20. In or about 1993, the Vehicle Services Department conducted research and analysis regarding the security features of the validation stickers contract, and a committee consisting of approximately seven Vehicle Services Department employees unanimously recommended to SOS Official A that the "metallic security mark" requirement be removed from the specifications for the validation stickers contract. Shortly thereafter, SOS Official A, acting on the committee's recommendation, caused the "metallic security mark" requirement to be removed from the specifications and the modified specifications to be forwarded to Central Management Services for initiation of the competitive bidding process.

21. It was further part of the scheme that, in or about 1993, after SOS Official A had caused the "metallic security mark" requirement to be removed from the specifications following the committee's recommendation in order to enhance the SOS Office's options in selecting a cost-effective qualified vendor, defendant WARNER directed SOS Official A to put back into the specifications the requirement for the "metallic security mark."

22. It was further part of the scheme that, in or about April 1993, defendant RYAN intervened to assist defendant WARNER in his efforts on behalf of ADM by, among other things, directing SOS Official A to change the specifications back to include the "metallic security mark" to benefit ADM. RYAN further directed SOS Official A to retrieve the specifications back from CMS quietly, and SOS Official A did so, such that ADM was advantaged. Thereafter, and as a result of RYAN's conduct, SOS Official A made no effort to revise the specifications, and the

validation stickers contract thereafter continued to be awarded to ADM.

23. It was further part of the scheme that, with defendant RYAN's assistance, from about 1991 through approximately 2000, the SOS Office continued to make payments to ADM under the validation stickers contracts authorized by defendant RYAN's SOS Office. During this period, defendant WARNER received approximately $332,000 in payments from ADM related to the validation stickers contracts. After receiving the payments, WARNER, with RYAN's approval, provided Udstuen one-third of the proceeds through payments made through American Management Resources, as described above.

The Awarding Of The Title Laminates Contract To ADM

24. At times material to this indictment:

The SOS Office periodically awarded a contract to manufacture and print laminated strips to be affixed to vehicle titles for security purposes (hereinafter the "title laminates contract"). The Vehicle Services Department was generally responsible for preparing the specifications and, along with Central Management Services, overseeing the competitive bidding process for the title laminates contract. Up to and including 1991, the title laminates contract was held by 3M.

25. It was further part of the scheme that, in about August 1991, defendant WARNER told an official of ADM that in exchange for $67,000, WARNER would cause the SOS Office title laminates contract, then held by 3M, to be awarded to ADM. Based upon WARNER's statements, ADM authorized total payments of $67,000 to WARNER.

26. It was further part of the scheme that, in about August 1991, at the direction of defendant WARNER, and understanding that defendant WARNER was acting with the authority of defendant RYAN, SOS Official A took official actions to materially benefit ADM and to the

competitive disadvantage of 3M.

27. It was further part of the scheme that, as a result of defendant WARNER's actions, the SOS Office awarded the title laminates contract to ADM, which thereafter received the title laminates contracts through approximately September 1998.

The Awarding Of Computer-Related Contracts To IBM

The Mainframe Computer Upgrade Contract

28. At times material to this indictment:

A. The SOS Office awarded contracts to provide computer and information technology services related to SOS Office functions, including among other contracts, contracts related to installing and maintaining a mainframe computer system used throughout the SOS Office (hereinafter, the "mainframe computer upgrade contract"). The Information Systems Services Department was generally responsible for preparing the specifications and overseeing the competitive bidding process for the mainframe computer upgrade contract and other computer-related SOS Office contracts.

B. As of early 1991, Honeywell/Bull (hereinafter "Honeywell) held the existing mainframe computer system contract with the SOS Office and was attempting to ensure that it would win future computer-related contracts with the SOS Office, including the prospective mainframe computer upgrade contract. As of no later than 1992, International Business Machines (hereinafter "IBM") desired to win future computer-related contracts with the SOS Office, including the prospective mainframe computer upgrade contract.

29. It was further part of the scheme that, beginning in or about early 1991, due to defendant RYAN providing defendant WARNER and Udstuen with participatory status in, and

material non-public information relating to, governmental decisions, WARNER and Udstuen learned information pertaining to the SOS Office's intentions regarding the mainframe computer upgrade contract.

30. It was further part of the scheme that, in or about the summer of 1991, defendant WARNER and Udstuen, and later Associate 1, met with representatives of Honeywell. During the meetings, WARNER and Udstuen, and later Associate 1, indicated that in exchange for total payments of up to $1,000,000 from Honeywell, Honeywell would be awarded one or more computer-related contracts with the SOS Office, including the prospective mainframe computer upgrade contract.

31. On or about September 24, 1991, after Honeywell declined to pay defendant WARNER, Udstuen or Associate 1 to ensure the award of SOS Office contracts, Honeywell's representative reported WARNER, Udstuen and Associate 1's solicitation activities personally to defendant RYAN.

32. It was further part of the scheme that, at the September 24, 1991 meeting with Honeywell's representative, defendant RYAN acknowledged, among other things, that Udstuen and WARNER were among his advisors, that RYAN had too much to lose to allow something like the alleged conduct involving Udstuen and WARNER go on in his Administration and that RYAN would "get to the bottom of it."

33. It was further part of the scheme that, after defendant RYAN had been informed of WARNER and Udstuen's solicitations relating to Honeywell, defendant RYAN authorized WARNER and Udstuen to assist in the process of hiring a Director of the Information Systems Services Department whose responsibilities included, among other things, assisting in the selection

and implementation of the mainframe computer upgrade contract.

34. It was further part of the scheme that, when Udstuen was approached for a lobbyist referral for IBM relating to potential business with the SOS Office, Udstuen referred IBM to defendant WARNER, knowing that Udstuen would profit with WARNER on any business that IBM performed with RYAN's SOS Office.

35. It was further part of the scheme that, in or about February 1992, defendant WARNER and Udstuen interviewed a candidate for the Director position (hereinafter "SOS Official B"), and, during the interview process, SOS Official B disclosed that Official B would be supportive of selecting IBM for the mainframe computer upgrade contract. Shortly thereafter, WARNER and Udstuen recommended to RYAN that the SOS Office hire SOS Official B as the Director of the Information Services Department, and RYAN then hired SOS Official B for the position as Director of Information Services.

36. It was further part of the scheme that, in approximately March 1993, defendant WARNER entered a written contract with IBM, retroactive for services beginning July 1, 1992, and under which IBM agreed to pay WARNER a percentage of all revenues, up to $1,000,000, that were received by IBM in connection with SOS Office contracts.

37. It was further part of the scheme that, on one or more occasions, at the direction of defendant WARNER, and understanding that defendant WARNER was acting with the authority of defendant RYAN, SOS Official B took official actions to benefit WARNER financially relating to IBM.

38. It was further part of the scheme that, based, at least in part, on the actions taken by defendant WARNER, defendant RYAN awarded the mainframe computer upgrade contract to IBM,

which contract payments made during RYAN's SOS Office Administration exceeded $25,000,000.

The Kiosk Project Contract

39. At times material to this indictment:

A. Commencing in or about 1995, the SOS Office began to consider a pilot project using computerized kiosks within certain SOS license facilities to allow citizens to renew vehicle registration, obtain validation stickers and perform other vehicle titling and related registration.

B. On or about April 24, 1995, a high-ranking SOS Office official who supported the use of kiosks (hereinafter "SOS Official C"), notified defendant RYAN and Fawell in writing that there was an opportunity for the SOS Office to view kiosk demonstrations by several vendors at an upcoming event in Columbus, Ohio.

40. It was further part of the scheme that defendant RYAN, defendant WARNER and Fawell travelled to Columbus, Ohio, to attend the kiosk demonstrations, including demonstrations made by IBM and a competing vendor. SOS Official B, SOS Official C, and a representative of the competing vendor also attended the kiosk demonstrations.

41. After returning from the April 25, 1995 trip, SOS Official C recommended to other officials of the SOS Office that the kiosk project contract should be awarded to the competing vendor and not IBM.

42. It was further part of the scheme that, after SOS Official C made the recommendation opposing IBM's selection, Udstuen, at defendant WARNER's request, directed SOS Official C to drop Official C's opposition to IBM's selection. Understanding that WARNER and Udstuen acted with the authority of defendant RYAN, SOS Official C did as Udstuen advised.

43. It was further part of the scheme that, due at least in part to defendant WARNER and Udstuen's actions, in or about January 1996, defendant RYAN selected IBM for the kiosk project contract.

44. It was further part of the scheme that, from in or about 1993 through early 1999, defendant WARNER received approximately $1,000,000 in payments under his contract with IBM, principally related to the mainframe computer upgrade contract. WARNER, in turn, directed one-third of the proceeds to Udstuen, through American Management Resources.

45. It was further part of the scheme that, in or about 2000, after defendant WARNER and Udstuen learned that federal investigators were inquiring into matters relating to WARNER, WARNER and Udstuen discussed how they could further conceal the flow of proceeds that Udstuen received from WARNER.

46. It was further part of the scheme that defendant WARNER filed false and misleading lobbyist registration statements relating to IBM and failed to disclose all his RYAN-related expenditures.

Awarding of Digital Licensing Contract To Viisage Technologies

47. At times material to this indictment:

A. In approximately 1996, the SOS Office began an initiative to switch to a digital licensing system through which all State of Illinois automobile and truck drivers' licenses would be created and maintained through digital technology. The Drivers Services Department was generally responsible for preparing the specifications and overseeing the competitive bidding process related to awarding a contract for digital licensing services.

B. In approximately June 1997, the SOS Office awarded the contract to provide

digital licensing and related services for the State of Illinois through approximately 2004 (hereinafter the "digital licensing contract") to Viisage Technologies, a Massachusetts-based company (hereinafter "Viisage").

48. It was further part of the scheme that, in about August 1996, due to defendant RYAN providing defendant WARNER with participatory status in, and material non-public information relating to, governmental decisions, WARNER learned that the SOS Office was evaluating the merits of switching to a digital licensing system and that a high-ranking SOS Office official who would have a role in the implementation of the system (hereinafter "SOS Official D") preferred Viisage.

49. It was further part of the scheme that, in or about October 1996, defendant WARNER, working with another individual, agreed with Viisage to enter into a lobbying contract to assist Viisage in its efforts to obtain the digital licensing contract with the SOS Office, in return for a percentage of all gross revenues received should Viisage receive the digital licensing contract (the "lobbying contract").

50. It was further part of the scheme that, in order to conceal defendant WARNER's involvement with Viisage in the lobbying contract for the digital licensing contract, WARNER caused his name to be excluded from the initial lobbying contract, even though WARNER was to be the principal lobbyist for Viisage.

51. It was further part of the scheme that, in or about December 1996, before the SOS Office commenced the bidding process on the digital licensing contract, defendant WARNER guaranteed Associate 1 payments totalling $36,000 in 1997 relating to Viisage if Associate 1 agreed to assist WARNER on behalf of Viisage. WARNER further indicated that the "cash flow" on the

yet-to-be-awarded contract might not commence until mid-1997.

52. It was further part of the scheme that, due to defendant RYAN providing defendant WARNER with participatory status in, and material non-public information relating to the award of the digital licensing contract, prior to the award of the digital licensing contract to Viisage, defendant WARNER purchased Viisage stock and advised another SOS Office employee to purchase Viisage stock in order to profit from the SOS Office's subsequent decision to award the digital licensing contract to Viisage.

53. It was further part of the scheme that, on or about June 2, 1997, after bids were received from two entities, defendant RYAN awarded the digital licensing contract to Viisage.

54. It was further part of the scheme that, shortly after defendant RYAN awarded the digital licensing contract to Viisage, defendant WARNER caused the financial interest in the lobbying contract with Viisage to be assigned explicitly to WARNER's business. Thereafter, between approximately 1999 and November 2002, defendant WARNER received approximately $800,000 in revenues related to the lobbying contract, via the United States mails.

55. It was further part of the scheme that, beginning in approximately 1999, defendant WARNER paid Associate 1 $36,000 from WARNER's Viisage proceeds, even though Associate 1 performed no services on behalf of Viisage.

56. It was further part of the scheme, and in order to conceal the scheme, that defendant WARNER and Associate 1 knowingly failed to register as lobbyists for Viisage.

The Awarding Of The Automated System Consulting Contract To ATC

57. At times material to this indictment:

In approximately 1991, the SOS Office began an initiative to install an automated

heating and cooling system for certain State Capitol Complex buildings in Springfield, Illinois. The Physical Services Department was generally responsible for preparing the specifications and overseeing the competitive bidding process related to the automated heating and cooling system. To facilitate that process, beginning in about early 1992 and continuing through about October 1994, the SOS Office sought to award a series of engineering consulting contracts for assistance with preparing the specifications and consultations with regard to the contractual process related to the automated heating and cooling system (hereinafter collectively the "automated system consulting contract").

58. It was further part of the scheme that, in or about 1991, due to defendant RYAN providing defendant WARNER with participatory status in, and material non-public information relating to, governmental decisions, WARNER learned that the SOS Office was seeking to award the automated system consulting contract to an outside consultant.

59. It was further part of the scheme that, in or about December 1991, defendant WARNER solicited a Northbrook-based company, Affordable Temperature Control ("ATC") to provide consulting services under the SOS Office's automated system consulting contract. ATC agreed to provide the services.

60. It was further part of the scheme that defendant WARNER contacted a high-ranking official in the Physical Services Department (hereinafter "SOS Official E") and told SOS Official E that WARNER had identified a contractor to receive the automated system consulting contract. Understanding that defendant WARNER was acting with the authority of defendant RYAN, SOS Official E followed WARNER's direction and caused ATC to be awarded the automated system consulting contract.

61. It was further part of the scheme that, from about January 1992 through October 1994, ATC received payments from the SOS Office for services related to the automated system consulting contract.

62. It was further part of the scheme that, after ATC had been awarded and begun work under the automated system consulting contract, defendant WARNER contacted ATC and indicated he wanted 8% of ATC's revenues under the automated system consulting contract.

63. It was further part of the scheme that between about June 1992 and October 1994, defendant WARNER received approximately $8,240 in payments from ATC related to the automated system consulting contract.

64. It was further part of the scheme that Fawell caused to be maintained and updated a confidential "master list" which was used to track and monitor official acts that the SOS Office had performed on behalf of, or relating to, a particular "sponsors," such as defendant WARNER. On the master list, Fawell caused WARNER to be listed as the "sponsor" for ATC's selection for the automated system consulting contract.

Soliciting Modern Business Systems Relating to SOS Office Photocopier Leases

65. At times material to the indictment:

The SOS Office entered into leases with one or more vendors for the use and the service of photocopier machines at SOS Offices (hereinafter "the photocopier leases"). Each SOS Office Department seeking to use a photocopier within that Department was generally responsible for negotiating the terms and conditions of the photocopier leases. Up to and including 1991, Modern Business Systems, Inc. held several of the photocopier leases with the SOS Office.

66. It was further part of the scheme that, in or about mid-1991, due to defendant RYAN

providing defendant WARNER with participatory status in, and material non-public information relating to, governmental decisions, WARNER learned that Modern Business Systems, Inc., which then held certain of the SOS Office photocopier leases, was attempting to win future additional leases with the SOS Office.

67. It was further part of the scheme that, on about July 16, 1991, defendant WARNER, representing he was an agent of the SOS Office, solicited Modern Business Systems, Inc. to make $2,000 per month payments to WARNER personally, in return for WARNER guaranteeing that Modern Business Systems, Inc. would be awarded additional business with the SOS Office. An official with Modern Business Systems, Inc. declined.

Awarding Real Property Leases To Warner-Controlled Entities

68. At times material to the indictment:

A. The SOS Office awarded leases of real property, including certain buildings owned by outside individuals and entities. The Physical Services Department was responsible for negotiating particular SOS Office real property leases and overseeing the maintenance and upkeep related to said leases.

B. The Property Management Division of the Drivers Services Department was responsible for negotiating leases at drivers license facilities and overseeing the maintenance and upkeep related to said leases.

17 N. State Lease

69. It was further part of the scheme that, in approximately early 1991, due to defendant RYAN providing defendant WARNER with participatory status in, and material non-public information relating to, governmental decisions, WARNER learned that the SOS Office was seeking

to relocate certain of its administrative office facilities then located at 188 W. Randolph Street in Chicago.

70. It was further part of the scheme that, in approximately April 1991, defendant WARNER spoke with an individual associated with a building at 17 N. State Street in Chicago, Illinois (hereinafter "Property Manager 1").

71. It was further part of the scheme that, in or about April 1991, defendant WARNER caused a contract to be entered into with Property Manager 1, giving WARNER a 6% commission interest in any SOS Office lease relating to the 17 N. State Street building (hereinafter the "commission contract").

72. It was further part of the scheme that defendant WARNER concealed his financial interest in the commission contract with Property Manager 1 by omitting his name from the commission contract and causing the commission contract to be executed by a third party, who had no involvement in facilitating a lease of the 17 N. State property.

73. It was further part of the scheme that, in or about mid-1991, defendant WARNER contacted an SOS Office employee responsible for identifying relocation sites for the operations then located at 188 W. Randolph (hereinafter "SOS Official F"), and directed SOS Official F to contact Property Manager 1. Understanding that WARNER was acting with defendant RYAN's authority and unaware of WARNER's interest in the commission contract, SOS Official F did as WARNER directed.

74. It was further part of the scheme that, on or about October 22, 1991, defendants RYAN and WARNER caused the SOS Office to enter a six-year lease for use and occupancy of the building at 17 N. State Street in Chicago (hereinafter "the 17 N. State Lease"). Thereafter, in or

about early 1998, RYAN's SOS Office agreed to renew the 17 N. State Lease for an additional six-year term, with WARNER receiving an additional 6% commission from Property Manager 1.

75. It was further part of the scheme that Fawell caused the "master list" to identify defendant WARNER as the "sponsor" for the 17 N. State Lease.

76. It was further part of the scheme that, between approximately October 1991 and at least October 2001, defendant WARNER received approximately $383,276 in commission payments related to the 17 N. State Lease and its renewal.

The Bellwood Lease

77. It was further part of the scheme that, in approximately 1992, due to defendant RYAN providing defendant WARNER with participatory status in, and material non-public information relating to, governmental decisions, WARNER learned that the SOS Office was seeking office space for certain operations of the SOS Office's Department of Police.

78. It was further part of the scheme that, in or about early 1992, defendant WARNER contacted SOS Official E and advised SOS Official E that the SOS Office had identified a building at 405 N. Mannheim Road in Bellwood, Illinois, for potential use by the SOS Office's Department of Police. WARNER further indicated that defendant RYAN would be contacting SOS Official E with the information.

79. It was further part of the scheme that, shortly thereafter, a secretary to defendant RYAN contacted SOS Official E and directed SOS Official E to consider the 405 N. Mannheim Road location for use by the SOS Office's Department of Police.

80. It was further part of the scheme that, on or about October 15, 1992, for the purpose of leasing the property to the SOS Office and profiting therefrom, defendant WARNER obtained an

ownership interest in the building at 405 N. Mannheim Road in Bellwood, Illinois, while concealing this interest through the use of a third party nominee.

81. It was further part of the scheme that defendant RYAN authorized the SOS Office to enter, on or about December 15, 1992, a five-year lease for use and occupancy of the building at 405 N. Mannheim Road in Bellwood (hereinafter "the Bellwood Lease"). In or about March 1998, RYAN authorized the renewal of the Bellwood Lease for another five-year term.

82. It was further part of the scheme that, between approximately December 1992 and March 2003, defendant WARNER received approximately $171,000 in proceeds related to the Bellwood Lease, a portion of which he applied toward a $95,000 loan related to Comguard.

The Joliet Lease

83. It was further part of the scheme that, in approximately early 1994, due to defendant RYAN providing defendant WARNER with participatory status in, and material non-public information relating to, governmental decisions, WARNER learned that the SOS Office was seeking office space in the Joliet area.

84. It was further part of the scheme that, in approximately early 1994, defendant RYAN instructed a high-ranking SOS Office official (hereinafter referred to "SOS Official G") to contact defendant WARNER to help locate a building for the purpose of a new SOS Office lease.

85. It was further part of the scheme that SOS Official G did as defendant RYAN directed, and defendant WARNER arranged for and caused SOS Official G to inspect a building at 605 Maple Road in Joliet, Illinois.

86. It was further part of the scheme that, on or about October 31, 1994, for the purpose of leasing the property to the SOS Office and profiting therefrom, defendant WARNER obtained a

substantial ownership interest in the building at 605 Maple Road in Joliet, Illinois, while concealing his ownership interest in the building through the use of a third party nominee.

87. It was further part of the scheme that defendant RYAN authorized the SOS Office to enter, on or about January 1, 1995, a four-year lease for use and occupancy of the building at 605 Maple Road in Joliet (hereinafter "the Joliet Lease").

88. It was further part of the scheme that, beginning in approximately January 1995 and continuing to March 1999, defendant WARNER received approximately $387,500 in proceeds related to the Joliet Lease.

Awarding An SOS Office Lease to Associate 2

89. It was further part of the scheme that, beginning in or about 1993 and continuing to at least 2002, Associate 2 provided personal and financial benefits to defendant RYAN, including annual vacation-related benefits. In particular, RYAN received free lodging each year at the Jamaican vacation home of Associate 2 and, on at least two occasions, received free lodging at Associate 2's Palm Springs, California, home. Annually, Associate 2 provided RYAN between $1,000-2,000 in lodging benefits.

90. It was further part of the scheme that, beginning in or about 1994 and continuing to in or about 1998, Fawell also received free lodging at the Jamaican vacation home of Associate 2, and on at least two occasions, received free lodging at Associate 2's Palm Springs, California home. For each year from 1994-1998, Fawell received between $1,000-2,000 in lodging benefits from Associate 2.

91. It was further part of the scheme that, in or about early 1997, defendant RYAN, with Fawell's assistance, took official action to benefit Associate 2. In particular, RYAN initiated

contact with Associate 2 and proposed that the SOS Office lease a commercial building located in South Holland, Illinois, then principally vacant, which was owned by an entity controlled by Associate 2.

92. It was further part of the scheme that defendant RYAN instructed SOS Official D to contact Associate 2 and arrange an SOS Office lease of Associate 2's South Holland building (the "South Holland Lease"). In negotiating the South Holland Lease with Associate 2, SOS Official D reported directly to defendant RYAN and obtained direction from RYAN.

93. It was further part of the scheme that defendant RYAN and Fawell, working through SOS Official D and other SOS Office officials, approved the South Holland Lease. Defendant RYAN signed the lease documents, including approving terms and conditions that were not part of the standard SOS Office lease and which terms benefitted Associate 2.

94. It was further part of the scheme that, between approximately May 1997 and June 2002, pursuant to the lease defendant RYAN approved and signed, Associate 2 received approximately $600,000 in lease payments from the SOS Office, via the United States mails.

95. It was further part of the scheme to defraud that, from in or about 1993 to at least January 2002, in order to conceal the free lodging benefits defendant RYAN was receiving from Associate 2 and at RYAN's urging, RYAN and Associate 2 repeatedly engaged in sham transactions, in which RYAN tendered a check to Associate 2 in the amount of the lodging benefit and Associate 2 provided back to RYAN amounts of cash equal to the amounts indicated on the checks tendered by and through RYAN.

96. It was further part of the scheme that, after August 26, 1997, and continuing through approximately January 2002, defendant RYAN and Fawell continued to receive lodging benefits

from Associate 2 in violation of RYAN's stated gift policy and in violation of the SOS Office policy directive described above in paragraph 2(J) of Count One.

97. It was further part of the scheme that defendant RYAN concealed the vacation benefits he had received from Associate 2 by, among other things, a) knowingly failing to disclose gifts and financial benefits he had received from Associate 2 as required by law and b) making false and misleading statements of material fact when interviewed in January 2000 about financial arrangements involving his vacations with Associate 2 by federal investigators conducting the Grand Jury Investigation.

Authorizing Official Acts Relating To Associate 1

98. It was further part of the scheme that, beginning no later than the mid-1990s and continuing to at least 2002, Associate 1 provided personal and financial benefits to and for the benefit of defendant RYAN. Such benefits included, without limitation, the following:

A. Monetary payments and gifts on multiple occasions to defendant RYAN which payments and gifts exceeded the $50 threshold;

B. Vacation benefits to defendant RYAN, including benefits associated with a 1995 trip to Cancun, Mexico; and

C. Gifts and personal service benefits to RYAN's family members, including a $2,200 vacation benefit to a RYAN daughter's family in 1999.

99. It was further part of the scheme that defendant RYAN concealed the personal and financial benefits he received from Associate 1, and Associate 1 concealed the personal and financial benefits he provided to RYAN.

100. It was further part of the scheme that defendant RYAN took official action to benefit Associate 1 relating to the following contracts and business opportunities:

Awarding SOS Office Leases To Clients Of Associate 1

101. It was further part of the scheme that, in 1995 and again in 1997, defendant RYAN authorized the SOS Office to enter into leases of Springfield, Illinois property, and Associate 1 received commissions for assisting in placing these leases with the SOS Office. Said commission payments to Associate 1 totalled over $38,000.

Awarding Grayville Prison To Associate 1 Client

102. At times material to this indictment:

A. In or about late 2000, the Governor's Office, in conjunction with the Illinois Department of Corrections (hereinafter "IDOC"), commenced a site selection process for the purpose of identifying a specific geographic location for the construction of a maximum security prison to house prisoners in the custody of the IDOC.

B. In or about January 2001, the IDOC, with the knowledge and concurrence of the Governor's Office, publicly announced three particular locations that had been selected as finalists for the site of the maximum security prison.

C. On or about February 23, 2001, at an internal meeting of high ranking officials of the Governor's Office and the IDOC, defendant RYAN chose the town of Grayville, located in southeastern Illinois, to be the site for the maximum security prison from among the three finalists. Defendant RYAN's February 23, 2001 internal decision was not then made public.

D. Prior to February 23, 2001, one or more high-ranking officials in the Governor's Office had complained to defendant RYAN's gubernatorial chief of staff that it was improper for Associate 1 to routinely participate and be present for the conducting of official government business in and around defendant RYAN's governmental office.

103. It was further part of the scheme that, on or about February 23, 2001, due to defendant RYAN providing Associate 1 with participatory status in, and material non-public information relating to, governmental decisions, RYAN informed Associate 1 that RYAN had selected Grayville to be the recipient of the maximum security prison site. At the time RYAN provided Associate 1 the information regarding Grayville, an aide to RYAN reminded Associate 1 that Grayville's selection was not public information.

104. It was further part of the scheme that, shortly after defendant RYAN informed Associate 1 of the Grayville selection, Associate 1 met with a representative of a business group affiliated with Grayville (hereinafter the "Grayville Representative") and entered into an agreement to lobby for the selection of Grayville as the site for the proposed maximum security prison, in return for $50,000 in upfront lobbying fees.

105. It was further part of the scheme that, on or about March 12, 2001, Associate 1 received a $50,000 cashier's check from the Grayville Representative as his lobbying fee. Associate 1 then deposited this check into a checking account that he controlled. During the two-month period thereafter, Associate 1 structured cash withdrawals from his bank account totaling approximately $35,000, such that no single withdrawal exceeded $10,000, the threshold level which would have triggered the financial institution's obligation to notify the Internal Revenue Service of the withdrawals.

106. It was further part of the scheme that, after entering into the agreement, Associate 1 falsely told one or more individuals affiliated with the Grayville Representative that he was actively lobbying for Grayville's selection pursuant to their agreement and did not disclose that defendant RYAN had already made known to Associate 1 that the prison selection had been made.

107. It was further part of the scheme that, on or about April 12, 2001, defendant RYAN announced his selection of Grayville as the chosen prison site in a public ceremony in Grayville, at which announcement RYAN publicly acknowledged, at Associate 1's recommendation, the efforts of the Grayville Representative in promoting Grayville's selection.

Referring Wisconsin Energy To Associate 1

108. At times material to the indictment:

In or about mid-1999, Wisconsin Energy was seeking to hire a lobbyist in the State of Illinois to handle various regulatory and governmental issues in connection with a proposed project Wisconsin Energy was undertaking in Illinois. Udstuen was contacted by an intermediary, acting on behalf of Wisconsin Energy, to solicit Udstuen's recommendation for an Illinois lobbyist.

109. It was further part of the scheme that Udstuen thereafter conferred with defendant RYAN, and RYAN and Udstuen agreed that Udstuen should recommend Associate 1 as the lobbyist for Wisconsin Energy.

110. It was further part of the scheme that, in or about late 1999, Udstuen told Associate 1 that Associate 1 was being recommended as a lobbyist for Wisconsin Energy and that his recommendation was being made with the concurrence of defendant RYAN.

111. It was further part of the scheme that, after Wisconsin Energy hired Associate 1 as its lobbyist, Associate 1 gave Udstuen a $4,000 cash payment in the men's bathroom of a Chicago restaurant for making the referral of Associate 1.

112. It was further part of the scheme that, after providing Udstuen with $4,000, Associate 1 told Udstuen that he was also "taking care" of defendant RYAN relating to the referral of Wisconsin Energy.

Hiring Associate 1 As A Lobbyist For MPEA

113. At times material to the indictment:

A. The Metropolitan Pier and Exposition Authority ("MPEA") was an entity which received annual public funding and which made other requests through Illinois' General Assembly. Officers and directors of the MPEA were jointly appointed by the Governor and the Mayor of the City of Chicago.

B. During and throughout the 1990's, MPEA had engaged a law firm (hereinafter, "Firm A") as its principal outside lobbyist to represent its interests before Illinois' General Assembly.

114. It was further part of the scheme that, in 1999, defendant RYAN directed that Associate 1 be hired as an additional lobbyist for MPEA, even though neither MPEA nor Firm A was seeking any additional lobbying assistance at that time. Beginning on or about January 1, 2000, at the direction of Fawell and defendant RYAN, Firm A hired Associate 1 as a "sub-lobbyist" with an annual retainer of $60,000 per year. This retainer was paid by MPEA to Firm A for disbursal to Associate 1 and continued for three years through December 31, 2002.

115. It was further part of the scheme that, in calendar year 2000, the initial year of the lobbying relationship, Firm A had little or no work to give to Associate 1, and thus Associate 1's firm provided little or no lobbying services to MPEA. Thereafter, understanding that Associate 1's firm would remain as a sub-lobbyist, Firm A provided Associate 1's firm some basic assignments, which assignments previously had been performed by Firm A.

Authorizing the Award of Low Digit Plates To Those Providing Benefits To RYAN

116. At times material to this indictment:

The SOS Office was responsible for issuing license plates to qualifying individuals. In addition to the general distribution of plates, the SOS Office issued low-digit or specialty license plates, which were not generally available to any member of the public (collectively, the "low-digit plates"). During the period from January 1991 to January 1999, defendant RYAN personally approved the award of the most coveted low-digit plates.

Awarding Low Digit Plates To Those Providing Campaign And Personal Benefits

117. In or about October 1990, shortly before defendant RYAN's November 1990 election as Secretary of State, defendant RYAN solicited, on behalf of Citizens For Ryan, a $75,000 loan from an individual known to RYAN (hereinafter "Individual 3"). Individual 3 then arranged for a $75,000 loan to Citizens For Ryan through a friend of Individual 3. Within two weeks of receipt of the loan, Citizens For Ryan repaid the loan in full, and no interest was charged for the loan. In or about November 1990, in a handwritten note, defendant RYAN personally acknowledged Individual 3's efforts.

118. It was further part of the scheme that, in or about early 1991, shortly after defendant RYAN took office, RYAN initiated contact with Individual 3 and Individual 3's friend and awarded each with low-digit plates as rewards for their arranging the $75,000 loan to Citizens For Ryan.

119. It was further part of the scheme that, thereafter, defendant RYAN awarded coveted low-digit plates to individuals as a reward for financial support provided to defendant RYAN and Citizens For Ryan.

Low Digit Plates Provided To Individual 1

120. By no later than 1995, defendant RYAN met Individual 1, who desired to obtain low digit plates for himself and family members. Individual 1 had acquired a number of low-digit plates from prior SOS Office administrations.

121. It was further part of the scheme that, beginning in March 1996 and continuing through December 1998, defendant RYAN awarded Individual 1 a number of low-digit plates while receiving, annually, at least $500 or more in personal checks from Individual 1.

122. It was further part of the scheme that, on or about September 5, 1997, defendant RYAN and Individual 1 had an in-person conversation in Chicago at a social event. In the conversation, Individual 1 expressed an interest in contributing to RYAN's gubernatorial campaign in the amount of $2,000. Individual 1 further indicated that he did not wish his contribution to be disclosed on campaign disclosure reports. In order to conceal the contribution to RYAN, RYAN directed that Individual 1 make out four $500 checks to RYAN and specified RYAN family members, which Individual 1 then did.

123. It was further part of the scheme that defendant RYAN accepted gifts from Individual 1 in December 1997 and December 1998 in violation of RYAN's stated gift policy and in violation of the SOS Office policy directive described above in paragraph 2(J) of Count One.

124. It was further part of the scheme and to conceal the scheme that defendant RYAN failed to disclose the financial benefits he received from Individual 1 in 1997 and 1998 until after federal investigators participating in the Grand Jury Investigation first questioned RYAN on October 16, 2000 about his relationship with Individual 1.

Warner Low Digit Plates

125. It was further part of the scheme that, in or about early 1991, defendant WARNER advised defendant RYAN that RYAN needed to keep close track of how low digit plates were issued and that RYAN should use the plates as a "plum."

126. It was further part of the scheme that, beginning in the early 1990s and continuing through late 1998, defendant RYAN approved low-digit plate requests made by defendant WARNER. WARNER made the requests for, among others, a) numerous business associates and clients of his private insurance business and b) employees of his private business, both of which inured to his personal and financial benefit.

127. It was further part of the scheme that, in order to raise campaign funds to benefit Citizens For Ryan, defendant WARNER solicited, among others, some of the individuals who had received low-digit plates approved by defendant RYAN at the request of WARNER.

128. It was further part of the scheme that, to facilitate defendant WARNER's request for low-digit plates, one of defendant RYAN's government secretaries maintained a cash "kitty," consisting of cash that WARNER had given to her and which the secretary used to pay fees associated with many of WARNER's numerous low-digit plate requests. WARNER, who was the only individual for whom such arrangement was made, replenished the cash kitty periodically.

129. It was further part of the scheme that defendant RYAN otherwise gave defendant WARNER preferential treatment in the low-digit license plate award process and awarded over 90 low-digit license plates to WARNER and third parties acting through WARNER.

Terminating IG Investigators and the Reorganizing-IG Department

130. At times material to the indictment:

A. Beginning no later than 1991 and continuing through at least 1998, Citizens For Ryan, working principally through SOS Office departmental contacts, sponsored annual political fundraising events that relied upon SOS Office personnel selling political fundraising tickets. On an annual basis, the two principal employee-based fundraising events raised approximately $500,000 per year for Citizens For Ryan.

B. On behalf of Citizens For Ryan and related to the annual employee-based fundraisers, SOS Office chief of staff Scott Fawell mandated political fundraising "goals" for SOS Office departments. Cognizant of Fawell's directives regarding fundraising activities, certain SOS Office employees, including supervisory employees in the Driver Services Department and Vehicle Services Department, individually sold thousands of dollars in fundraising tickets on behalf of Citizens For Ryan through various means.

C. On approximately an annual basis until the late 1990s, in conjunction with the employee fundraising events, defendant RYAN participated in ceremonies with SOS Office employees to acknowledge individual SOS Office employees, who had sold substantial numbers of political fundraising tickets. Such participation included RYAN taking photographs with some of the top fundraising ticket sellers from the SOS Office.

D. By December 1994, shortly after the 1994 reelection campaign, Fawell and defendant RYAN were aware that agents of the IG Department had been or were investigating alleged official misconduct by employees of the Drivers Services Department and the Vehicle Services Department motivated by, or involving, the sale and distribution of Citizens For Ryan

fundraising tickets, including the following:

i. In March 1993, the IG Department had investigated alleged official misconduct by SOS Office employees of the Libertyville driver's license facility. During the course of the investigation, IG Investigators obtained evidence that the alleged official misconduct may have been linked to sales of Citizens For Ryan fundraiser tickets by one or more SOS Office employees. During the investigation, IG Investigators seized a briefcase containing cash and fundraising tickets from the governmental office of an SOS Office employee who was a suspect in the criminal investigation. On or about March 9, 1993, the Inspector General, who reported to defendant RYAN, told RYAN that IG Investigators had located fundraising-related evidence in the SOS Office employee's governmental office.

ii. In late March1994, the IG Department had investigated allegations, aired on local television, that an SOS Office employee had solicited an auto parts dealer, regulated by the SOS Office, for fundraising tickets during state working hours. The fundraising-related allegations, which were aired on local television, were communicated to defendant RYAN.

iii. In April 1994, the IG Department had investigated official misconduct by an employee of the SOS Office's Naperville licensing facility. During the course of the investigation, IG Investigators believed that the alleged official misconduct may have been motivated by sales of Citizens For Ryan fundraising tickets by an SOS Office employee. On or about April 26, 1994, at the direction of the Inspector General, an IG Investigator called defendant RYAN and communicated the alleged fundraising-related motive directly to defendant RYAN.

iv. In November 1994, IG Investigators learned that a driver involved in a widely-publicized fatal traffic incident may have obtained his commercial driver's license illegally

at the McCook driver's license facility. After the allegations were learned of by an IG Investigator and a preliminary inquiry was made, the allegations were reported to the Inspector General who, in turn, notified other high-ranking SOS Office officials of the allegations.

131. It was further part of the scheme that, in December 1994, in an internal memorandum not intended for public disclosure, Fawell recommended to defendant RYAN that certain IG Investigators be terminated and reassigned, in order to discourage investigations into improper political fundraising activities and related official misconduct benefitting defendant RYAN and Citizens For Ryan.

132. It was further part of the scheme that, in one or more face-to-face meetings between Fawell and defendant RYAN following the distribution of the December 1994 memo, defendant RYAN agreed to Fawell's recommendation in the December 1994 memo as to the IG Department and thereafter authorized the termination or reassignment of the majority of IG Investigators.

133. It was further part of the scheme that, in or about January 1995, Fawell directed a memorandum to defendant RYAN summarizing the results of their meetings, including the decision to reassign IG Investigators who were "trouble."

134. It was further part of the scheme that Fawell drafted and distributed written memoranda falsely justifying the decision to terminate IG Investigators and reorganize the IG Department as being based on budgetary cutbacks at the SOS Office.

135. It was further part of the scheme that, from February 1995 through June 1995, most of the IG Investigators, including those who had made inquiries into allegations of official misconduct linked to fundraising ticket sales, were terminated or reassigned. As a direct consequence of these actions, defendant RYAN and Fawell disabled the IG Department and

substantially hindered it from fulfilling its duties to, among other things, investigate all allegations of SOS Office misconduct, including allegations linked to fundraising efforts of Citizens For Ryan.

Diverting and Authorizing The Diverting Of State Resources To Benefit RYAN

136. It was further part of the scheme that, at times between 1992 and 1998, defendant RYAN, Fawell and others authorized the diversion of SOS Office resources to benefit RYAN personally and Citizens For Ryan, including in connection with certain political campaigns defendant RYAN supported.

137. It was further part of the scheme that, with respect to a 1995-96 primary campaign of then Texas Senator Phil Gramm, who was a candidate for president of the United States (the "Gramm campaign"), defendant RYAN met with Fawell and Richard Juliano, another high-ranking SOS Office official, to plan their participation in the Gramm campaign effort.

138. It was further part of the scheme that, in planning a primary campaign budget for the Gramm campaign in Illinois, defendant RYAN proposed that certain individuals be given "consulting" payments related to Gramm campaign.

139. It was further part of the scheme that defendant RYAN, with the assistance of Fawell, determined that RYAN, through certain of his family members, Fawell and Juliano would split the "consulting" payments from the Gramm campaign.

140. It was further part of the scheme that defendant RYAN, with the assistance of Fawell and Udstuen, recruited Alan Drazek to participate in the Gramm campaign through his company, American Management Resources ("AMR"). In order to conceal the financial benefits that defendant RYAN and Fawell were to receive, RYAN, Fawell and Juliano used AMR as a conduit to funnel the "consulting" payments they were receiving. As further part of the effort to conceal, at

no time did RYAN, Fawell or Juliano disclose to the Gramm campaign that Fawell or RYAN would be financial beneficiaries of the AMR payments.

141. It was further part of the scheme that, during the Gramm campaign, Fawell, Juliano and other SOS Office employees working at their direction, and with the authorization and knowledge of defendant RYAN, performed campaign work on state time and utilized state resources to benefit the Gramm campaign. In particular, Fawell, Juliano and other SOS Office employees personally participated in campaign activities, including campaign meetings, phone conferences, political fundraisers, organizational meetings, strategy sessions, as well as public appearances with Gramm. Many of the campaign activities occurred during the business day and utilized SOS Office resources.

142. It was further part of the scheme that, from in or about September 1995 to in or about March 1996, defendant RYAN, Fawell and Juliano caused over $32,000 in payments to be made from the Gramm campaign through AMR to individuals and entities RYAN, Fawell and Juliano designated. RYAN directed his share of the "consulting" payments to certain family members, who did not perform bona fide services for the Gramm campaign.

143. It was further part of the scheme that defendant RYAN concealed the benefits he received from the Gramm campaign by a) omitting the income on his 1995 and 1996 Statement of Economic Interest forms; and b) omitting the Gramm campaign related income from his original and amended 1995 and 1996 federal and state tax returns prior to the public disclosure of his payments during the course of the Grand Jury Investigation.

144. It was further part of the effort to conceal the nature of defendant RYAN's participation in the scheme that, in 2002, in amending, for the second time, his 1995 and 1996

federal and state tax returns to disclose the Gramm payments, RYAN made false and misleading statements by indicating that it was the Gramm campaign's idea for RYAN to receive funds related to the Gramm campaign.

Concealing Misconduct And Obstructing the Grand Jury Investigation

Shredding Incident

145. It was further part of the scheme that, in or about September 1998, after learning of the existence of the Grand Jury Investigation (as set forth in paragraph 4 above), Scott Fawell, in the presence of defendant RYAN and in anticipation of law enforcement action, directed SOS Office employees, including William Mack, to "clean up" Citizens For Ryan related documents on SOS Office premises.

146. It was further part of the scheme that, after Fawell gave Mack the directive in the presence of defendant RYAN, Mack gathered together a number of SOS Office employees and directed them to shred voluminous amounts of material present in the SOS executive offices. Such shredding occurred late into the evening and filled numerous garbage bags, which bags were transported out of the executive office area that evening. Such shredded and destroyed documents were relevant and material to the Grand Jury Investigation and included campaign-related financial reports, low-digit license plate requests, candidate schedules, campaign press releases, computer files, volunteer information and other campaign related information that had been created and maintained by SOS Office employees on SOS Office premises.

147. It was further part of the scheme that, shortly after the shredding was complete, Mack personally contacted defendant RYAN and Fawell to inform each that the SOS Office had been "cleaned up."

Interviews of RYAN In Relation To Grand Jury Investigation

148. It was further part of the scheme that defendant RYAN made material false statements in three interviews with law enforcement agents who were conducting the Grand Jury Investigation, including the following:

A. In the January 5, 2000, interview, defendant RYAN made false material statements by stating, in substance, that:

i. On each occasion when RYAN was a guest of Associate 2 in Jamaica, RYAN paid his own way and also paid all his own expenses, including lodging. Regarding lodging in Jamaica, RYAN said that the cost was $1,000 per week, which RYAN believed was the going rate for lodging at the property. RYAN further stated he paid the lodging fee out of his own pocket. In addition, and related to the Jamaica inquiries by federal investigators, RYAN caused checks purporting to be his payments for lodging to be provided to federal investigators.

ii. RYAN was totally unaware of the pricing and contents of the South Holland Lease and did not personally take part in the negotiation of the lease;

iii. RYAN had no recollection or knowledge of the original negotiations of the Joliet lease;

iv. Regarding RYAN's appointment of WARNER to the McPier board, RYAN stated it was a resigning board member's recommendation that RYAN appoint WARNER and RYAN merely went along with the recommendation.

v. Inspector General Dean Bauer never informed him of the finding of the briefcase and the campaign fundraising tickets at the Libertyville raid; and no one at the SOS Office, including Dean Bauer, ever linked ticket sales to improper licensing.

B. In the October 16, 2000, interview, defendant RYAN made false material statements by stating, in substance, the following:

i. RYAN never had any discussions with defendant WARNER regarding WARNER's interest in the Joliet lease or any SOS Office lease, and, further, RYAN had no personal knowledge of WARNER profiting in any way regarding the Joliet lease;

ii. RYAN had no idea how WARNER could have had advance knowledge of the SOS Office looking into a lease in the Joliet area and RYAN provided no advance information to WARNER regarding future leases with the SOS Office; and.

iii. RYAN had no personal financial relationship with WARNER.

C. In the February 5, 2001, interview, defendant RYAN made false material statements by stating, in substance, the following:

With respect to a conversation on a boat trip with Individual 1 that resulted in RYAN receiving four $500 checks from Individual 1, RYAN stated that he did not give Individual 1 the name of his son, nor did he write down the names or addresses of his son or his son's wife and provide them to Individual 1.

149. On or about August 3, 2000, at Chicago, in the Northern District of Illinois, Eastern Division, and Springfield, Illinois,

GEORGE H. RYAN, SR. and
LAWRENCE E. WARNER,

defendants herein, for the purpose of executing the aforesaid scheme, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon an envelope containing a $43,760.89 check from the State of Illinois relating to the Validation Stickers contract, and addressed to:

American Decal & Mfg. Co.
4100 West Fullerton
Chicago, IL 60639

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT THREE

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 2-148 of Count Two of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about January 11, 1999, at Chicago, in the Northern District of Illinois, Eastern Division, and Springfield, Illinois,

GEORGE H. RYAN, SR. and
LAWRENCE E. WARNER,

defendants herein, for the purpose of executing the aforesaid scheme, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon an envelope containing a State of Illinois check in the amount of $18,561.69 relating to the Joliet Lease, and addressed to:

Joliet Maple Limited Liability
Park Place Investment
800 N. Clark Street Suite 219
Chicago, IL 60610

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT FOUR

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 2-148 of Count Two of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about December 28, 1998, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

GEORGE H. RYAN, SR. and
LAWRENCE E. WARNER,

defendants herein, for the purpose of executing the aforesaid scheme, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon an envelope containing a check from IBM in the amount of $21,295.18 relating to the computer system contract and other SOS Office computer-related contracts, and addressed to:

Omega Consulting
3101 N. Western Avenue
Chicago, IL 60618

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT FIVE

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 2-148 of Count Two of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about January 12, 1999, at Chicago, in the Northern District of Illinois, Eastern Division, and Springfield, Illinois,

GEORGE H. RYAN, SR. and
LAWRENCE E. WARNER,

defendants herein, for the purpose of executing the aforesaid scheme, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon an envelope containing a check in the amount of $7,098.65 from Omega Consulting Group and relating to IBM, and addressed to:

American Management Resources
7831 Churchill
Morton Grove, IL 60053

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT SIX

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 2-148 of Count Two of this indictment are hereby realleged and incorporated as if fully set forth herein.

2. On or about January 22, 1999, in the Northern District of Illinois, Eastern Division, and Springfield, Illinois,

GEORGE H. RYAN, SR.,

defendant herein, for the purpose of executing the aforesaid scheme to defraud, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon an envelope containing a State of Illinois check in the amount of $10,000 relating to the South Holland Lease addressed to:

16475 Van Dam Road Building Partnership
16835 South Halsted
Harvey, Illinois 60426-6113

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT SEVEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 2-148 of Count Two of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about November 15, 2002, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

GEORGE H. RYAN, SR. and
LAWRENCE E. WARNER,

defendants herein, for the purpose of executing the aforesaid scheme, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon an envelope containing a check from Viisage in the amount of $18,902.79 relating to the digital licensing contract, and addressed to:

National Consulting Company
3101 North Western Avenue
Chicago, IL 60618

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT EIGHT

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 2-148 of Count Two of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about January 19, 1999, at Chicago, in the Northern District of Illinois, Eastern Division, and Springfield, Illinois,

GEORGE H. RYAN, SR., and
LAWRENCE E. WARNER,

defendants herein, for the purpose of executing the aforesaid scheme, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon an envelope containing a State of Illinois check in the amount of $10,005 relating to the Bellwood Lease, and addressed to:

Wells Mannheim Partnership
1839 North Lincoln
Chicago, IL 60614

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT NINE

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 2-148 of Count Two of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about April 14, 1999, at Chicago, in the Northern District of Illinois, Eastern Division,

GEORGE H. RYAN, SR. and
LAWRENCE E. WARNER,

defendants herein, for the purpose of executing the aforesaid scheme, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon an envelope containing a check in the amount of $18,590.82 relating to the 17 N. State Lease, and addressed to:

National Consulting
3101 N. Western Avenue
Chicago, IL 60618

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT TEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 2-148 of Count Two of this indictment are hereby realleged and incorporated as if fully set forth herein.

2. On or about March 12, 2001, in the Northern District of Illinois, Eastern Division, and elsewhere,

GEORGE H. RYAN, SR.

defendant herein, and Associate 1, for the purpose of executing the aforesaid scheme to defraud, and attempting to do so, knowingly did cause to be deposited with a private and commercial interstate carrier for delivery according to the directions thereon, an envelope containing a cashier's check in the amount of $50,000, which represented a lobbyist fee relating to the Grayville representative; addressed to Associate 1 in Springfield, Illinois.

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT ELEVEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about January 5, 2000, in Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

GEORGE H. RYAN, SR.,

defendant herein, did knowingly and willfully make materially false, fictitious and fraudulent statements and representations in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency within the executive branch of the Government of the United States, when he stated the following:

i. On each occasion when RYAN was a guest of Associate 2 in Jamaica, RYAN paid his own way and also paid all his own expenses, including lodging. Regarding lodging in Jamaica, RYAN said that the cost was $1,000 per week, which RYAN believed was the going rate for lodging at the property. RYAN further stated he paid the lodging fee out of his own pocket.

ii. RYAN was totally unaware of the pricing and contents of the South Holland Lease and did not personally take part in the negotiation of the lease;

iii. RYAN had no recollection or knowledge of the original negotiations of the Joliet lease;

iv. Regarding RYAN's appointment of WARNER to the McPier board, RYAN stated it was a resigning board member's recommendation that RYAN appoint

WARNER and RYAN merely went along with the recommendation.

v. Inspector General Dean Bauer never informed him of the finding of the briefcase and the campaign fundraising tickets at the Libertyville raid; and no one at the SOS Office, including Dean Bauer, ever linked ticket sales to improper licensing.

All in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT TWELVE

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about October 16, 2000, in Chicago, in the Northern District of Illinois, Eastern Division,

GEORGE H. RYAN, SR.,

defendant herein, did knowingly and willfully make materially false, fictitious and fraudulent statements and representations in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency within the executive branch of the Government of the United States, when he stated the following:

i. RYAN never had any discussions with defendant WARNER regarding WARNER's interest in the Joliet lease or any SOS Office lease, and, further, RYAN had no personal knowledge of WARNER profiting in any way regarding the Joliet lease;

ii. RYAN had no idea how WARNER could have had advance knowledge of the SOS Office looking into a lease in the Joliet area and RYAN provided no advance information to WARNER regarding future leases with the SOS Office; and

iii. RYAN had no personal financial relationship with WARNER.

All in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT THIRTEEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about February 5, 2001, in Chicago, in the Northern District of Illinois, Eastern Division,

GEORGE H. RYAN, SR.,

defendant herein, did knowingly and willfully make materially false, fictitious and fraudulent statements and representations in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency within the executive branch of the Government of the United States, when he stated the following:

With respect to a conversation on a boat trip with Individual 1 that resulted in RYAN receiving four $500 checks from Individual 1, RYAN stated that he did not give Individual 1 the name of his son, nor did he write down the names or addresses of his son or his son's wife and provide them to Individual 1.

All in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT FOURTEEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One of this indictment are hereby realleged and incorporated as if fully set forth herein.

2. In about September 1998, in Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

LAWRENCE E. WARNER,

defendant herein, attempted to commit extortion, which extortion obstructed, delayed and affected commerce, by knowingly attempting to obtain property in the form of payments from American Decal Manufacturing under the color of official right and induced by the wrongful use of actual and threatened fear of economic harm,

In violation of Title 18, United States Code, Sections 1951 and 2.

COUNT FIFTEEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One of this indictment are hereby realleged and incorporated as if fully set forth herein.

2. On or about May 18, 1998, in Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

LAWRENCE E. WARNER,

defendant herein, knowingly conducted and attempted to conduct a financial transaction affecting interstate commerce, when defendant caused a National Consulting Company check to be issued, made payable to American Management Resources, on North Community Bank account number 1403880, in the amount of $1,666.67, which financial transaction involved the proceeds of specified unlawful activity, namely, acts and activities constituting mail fraud, in violation of Title 18, United States Code, Sections 1341 and 1346, and extortion, in violation of Title 18, United States Code, Section 1951, related to the SOS Office validation stickers contract, as further described in Count Two of this indictment, knowing that the transaction was designed in whole and in part to conceal the nature, source, and ownership of the proceeds of said specified unlawful activity, and while conducting and attempting to conduct said financial transaction, knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity,

In violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

COUNT SIXTEEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about July 31, 1997, in the Northern District of Illinois, Eastern Division, and elsewhere,

LAWRENCE E. WARNER,

defendant herein, knowingly conducted and attempted to conduct a financial transaction affecting interstate commerce, when defendant caused an Omega Consulting Group Ltd. check to be issued, made payable to American Management Resources, on North Community Bank account number 1701044, in the amount of $43,453, which financial transaction involved the proceeds of specified unlawful activity, namely, acts and activities constituting mail fraud, in violation of Title 18, United States Code, Sections 1341 and 1346, and extortion, in violation of Title 18, United States Code, Section 1951, related to the computer system contract and other SOS Office computer-related contracts, knowing that the transaction was designed in whole and in part to conceal the nature, source, and ownership of the proceeds of said specified unlawful activity, and while conducting and attempting to conduct said financial transaction, knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity,

In violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

COUNT SEVENTEEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One of this indictment are hereby realleged and incorporated as if fully set forth herein.

2. Beginning on or about July 31, 1997 and continuing through at least August 5, 1997, in Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

LAWRENCE E. WARNER,

defendant herein, for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a) and regulations prescribed thereunder, structured and assisted in structuring and attempted to structure and assist in structuring, a transaction with the North Community Bank, a domestic financial institution, namely, the withdrawal of $14,000 in United States currency from his Omega Consulting Group Ltd. checking account into two separate transactions at different branches of the North Community Bank and involving the cashing of two checks, each in an amount under $10,000, as described below:

Check No.	Date of Check	Amount	Date Check Cashed
1071	July 31, 1997	$9,000	August 4, 1997
1072	July 31, 1997	$5,000	August 5, 1997

3. Defendant WARNER committed this offense while violating other laws of the United States, as set forth in Count One of this indictment, and as part of a pattern of illegal activity involving more than $100,000 in a 12 month period commencing on May 5, 1997;

In violation of Title 31, United States Code, Section 5324(a)(3) and (d)(2).

COUNT EIGHTEEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1–4 of Count One of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. At times material to this indictment:

A. RYAN Relative One was the husband of a RYAN Daughter.

B. Individual 2 was a caretaker for defendant RYAN's mother-in-law.

Income and Expenditure Reports (D-2s)

C. CFR was required under Illinois law to file income and expenditure reports (D-2s), typically on a semi-annual basis, with the Illinois State Board of Elections. The D-2s reported the amount and purpose of each expenditure of $150 or more incurred by CFR. At the time of filing, each D-2 was verified for truth and completeness by the treasurer of CFR.

D. Campaign Reporting Services ("CRS") was a Springfield-based firm that was hired by CFR to prepare its D-2 campaign disclosure forms beginning no later than 1991 and continuing through 1998. CFR paid a monthly fee to CRS for the preparation of the D-2's and related services provided to CFR. Said monthly fee was increased from $2,000 per month to $3,000 per month in approximately early 1994.

E. Agents and employees of CFR provided CRS with the information necessary to prepare the D-2s. As a general practice, agents and employees of CFR prepared for each check a voucher describing the amount and purpose of the check. The information on the vouchers was used by CRS to prepare the D-2s. On occasion, when a CFR check was written or issued by defendant RYAN or other authorized agents of CFR without a corresponding voucher,

the purpose of the expenditure was listed on the check or was otherwise made known to CRS in order to prepare the D-2s.

Applicable Law and Duties

F. Defendant RYAN had a legal duty and obligation, under the Internal Revenue Code and regulations and rules issued thereunder, to report accurately all income that he had received during a particular year on the annual joint income tax return that he filed.

G. Defendant RYAN was permitted under Illinois law to use CFR funds for personal expenditures, but was required under the Internal Revenue Code and regulations and rules issued thereunder, to report as income on his joint income tax return CFR expenditures made for any personal purposes.

H. Defendant RYAN was not permitted, under the Internal Revenue Code and regulations and rules issued thereunder, to shift tax liability for his income to nominees or third parties by having the income payments made in the name of nominees or third parties.

I. Defendant RYAN was required, under the Internal Revenue Code and regulations and rules issued thereunder, to report as income on his joint tax returns any income, including payments, cash, bribes or gratuities that he received by virtue of his official position.

The Corrupt Endeavor

3. Beginning in approximately January of 1991 and continuing through approximately December of 2002, at Chicago and elsewhere in the Northern District of Illinois, Eastern Division, and elsewhere,

GEORGE H. RYAN, SR.,

defendant herein, corruptly obstructed and impeded and endeavored to obstruct and impede the

Internal Revenue Service in the due administration of Title 26, United States Code, namely the correct reporting of income and identification, assessment, and collection of taxes and tax penalties due the United States.

Citizens For Ryan Funds

4. It was part of the corrupt endeavor that on numerous occasions, defendant RYAN used CFR funds to pay his and certain family members' personal expenses and to provide personal gifts (including payments for travel related expenses) for the benefit of third parties, and misled and knowingly failed to inform the CFR agents and employees, CRS, and other outside firms preparing the D-2s for CFR of the numerous personal expenses he had incurred and personal gifts that he had purchased with CFR funds.

5. It was further part of the corrupt endeavor that defendant RYAN, acting in concert with other agents and employees of CFR, and others, caused income that he was receiving from both CFR and third parties to be diverted, paid and allocated to others, including family members, thereby depriving the IRS of accurate information as to his true income as well as the true income of the individuals to whom he diverted, paid and allocated his income.

6. It was further part of the corrupt endeavor that in order to conceal personal expenditures of CFR funds, defendant RYAN wrote, and caused agents and employees of CFR to write, false and misleading notations on CFR checks issued to family members indicating that expenditures were for "consulting" or "campaign work" when, in truth and fact, the expenditures were gifts to family members.

7. It was further part of the corrupt endeavor that during the period from July 1996 through August 1997, defendant RYAN caused CFR checks totaling $55,000 to be issued to

RYAN Relative One, purportedly for campaign-related services, knowing that RYAN Relative One performed no services for said money and that the payments were gifts directed by RYAN.

8. It was further part of the corrupt endeavor that by misleading and knowingly failing to inform the CFR agents and employees, CRS, and other outside firms preparing the D-2s for CFR of the numerous personal expenses he had paid and personal gifts that he had given with CFR funds, defendant RYAN caused D-2s to be filed on behalf of CFR which falsely described numerous personal expenses and gifts as being campaign or political expenses.

9. It was further part of the corrupt endeavor that during the period from on or about August 7, 1998 through on or about November 6, 1998, defendant RYAN issued and caused to be issued four CFR checks totaling $6,000 payable to Individual 2.

10. It was further part of the corrupt endeavor that to avoid public disclosure on the D-2s of the gifts that he was giving to family members with CFR money, defendant RYAN only gave CFR money directly to family members who did not have the same surname (Ryan) and used third parties to funnel CFR funds to one or more family members who shared his surname.

11. It was further part of the corrupt endeavor that defendant RYAN and agents and employees of CFR used CRS to funnel CFR funds to one or more RYAN family members whose surname was Ryan. In or after 1994, when CRS increased its monthly fee to CFR by $1,000 per month, CRS, at CFR's direction, began making a monthly payment of $1,000 to one or more RYAN family members who provided little or no service to either CRS or CFR.

12. It was further part of the corrupt endeavor that on numerous occasions, agents or employees of CFR issued IRS Form 1099s to the family members and associates of defendant RYAN who had received monetary gifts of CFR funds, which Form 1099s listed the CFR

payments made to them as "non-employee compensation," thereby concealing and misrepresenting the true nature of said payments.

13. It was further part of the corrupt endeavor that each year, defendant RYAN provided and caused to be provided to his accountant a list of the personal expenses that had been paid with CFR funds, knowing that said list was prepared in reliance on the D-2's and knowing further that as a result of his concealment and deceit, said list substantially understated the actual amount of personal expenses that he had paid, and gifts that he had given, using CFR funds.

Gramm Campaign Payments

14. It was further part of the corrupt endeavor that, with respect to a 1995-96 primary campaign of then Texas Senator Phil Gramm, who was a candidate for president of the United States (the "Gramm campaign"), defendant RYAN met with Fawell and Richard Juliano, another high-ranking SOS Office official, to plan their participation in the Gramm campaign effort.

15. It was further part of the corrupt endeavor that, in planning a primary campaign budget for the Gramm campaign in Illinois, defendant RYAN proposed that certain individuals be given "consulting" payments related to Gramm campaign.

16. It was further part of the corrupt endeavor that defendant RYAN, with the assistance of Fawell, determined that RYAN, through certain of his family members, Fawell and Juliano would split the "consulting" payments from the Gramm campaign.

17. It was further part of the corrupt endeavor that defendant RYAN, with the assistance of Fawell and Udstuen, recruited Alan Drazek to participate in the Gramm campaign through his company, American Management Resources. In order to conceal the financial

benefits that defendant RYAN and Fawell were to receive, RYAN, Fawell and Juliano used AMR as a conduit to funnel the "consulting" payments they were receiving. As further part of the effort to conceal, at no time did RYAN, Fawell or Juliano disclose to the Gramm campaign that Fawell or RYAN would be financial beneficiaries of the AMR payments.

18. It was further part of the corrupt endeavor that, from in or about September 1995 to in or about March 1996, defendant RYAN, Fawell and Juliano caused over $32,000 in payments to be made from the Gramm campaign through AMR to individuals and entities RYAN, Fawell and Juliano designated. RYAN directed his share of the "consulting" payments to certain family members, who did not perform bona fide services for the Gramm campaign.

19. It was further part of the corrupt endeavor that defendant RYAN concealed the benefits he received from the Gramm campaign by a) omitting the income on his 1995 and 1996 Statement of Economic Interest forms; and b) omitting the Gramm campaign related income from his original and amended 1995 and 1996 federal and state tax returns prior to the public disclosure of the Gramm campaign payments during the course of the Grand Jury Investigation.

20. It was further part of the corrupt endeavor that, in 2002, in amending, for the second time, his 1995 and 1996 federal and state tax returns to disclose the Gramm payments, RYAN made false and misleading statements by indicating that it was the Gramm campaign's idea for RYAN to receive funds related to the Gramm campaign.

Use of Cash

21. It was further part of the corrupt endeavor that defendant RYAN obtained and failed to report cash and other financial benefits as income on his federal and state tax returns.

22. It was further part of the corrupt endeavor that defendant RYAN spent cash that

he received from third parties for his personal use, thereby minimizing any documentation of his personal expenses. Such personal expenditures of cash included cash expenditures on frequent gambling trips to various casinos, cash expenditures relating to out-of-state trips and cash expenditures for gifts to and for the benefit of RYAN family members and others.

Receipt of Money from Political Supporters

23. It was further part of the corrupt endeavor that on more than one occasion, defendant RYAN received money from political supporters which he deposited into his personal account and used for personal expenses without advising any agents or representatives of CFR, and thereby knowingly caused said payments to be omitted from the D-2s filed by CFR. Defendant RYAN failed to advise his accountants that he had received such payments and failed to report said payments as income on his federal tax returns.

24. It was further part of the corrupt endeavor that in order to conceal payments in the amount of $2,000 made to him by Individual 1 in approximately September of 1997, defendant RYAN directed Individual 1 to make out four $500 checks to defendant RYAN and specified RYAN family members, which Individual 1 then did. Defendant RYAN failed to report said payments as income on his tax returns and, until the issue was raised in an interview with federal law enforcement officials, failed to report said payments on his Statement of Economic Interest for the year 1997.

Filing of False Tax Returns

25. It was further part of the corrupt endeavor that on or about April 15, 1996, defendant RYAN filed a materially false individual income tax return, IRS form 1040, for the tax year 1995, in which he knowingly understated his actual gross income.

26. It was further part of the corrupt endeavor that on or about April 15, 1997, defendant RYAN filed a materially false individual income tax return, IRS form 1040, for the tax year 1996, in which he knowingly understated his actual gross income.

27. It was further part of the corrupt endeavor that on or about April 15, 1998, defendant RYAN filed a materially false individual income tax return, IRS form 1040, for the tax year 1997, in which he knowingly understated his actual gross income.

28. It was further part of the corrupt endeavor that on or about April 15, 1999, defendant RYAN filed a materially false individual income tax return, IRS form 1040, for the tax year 1998, in which he knowingly understated his actual gross income.

29. It was further part of the corrupt endeavor that on or about February 19, 1998, after defendant RYAN was an announced candidate for Governor, RYAN filed amended tax returns, IRS Forms 1040X, for the years 1995 and 1996, in which he increased the amount of his reported income for 1995 and 1996 based on additional personal expenditures of CFR funds, but still omitted substantial income that he had received and diverted to family members or others.

30. It was further part of the corrupt endeavor that on or about December 21, 2002, after publicity about his family members receiving money in connection with the presidential campaign of Phil Gramm, defendant RYAN filed second amended tax returns, IRS Forms 1040X, for the years 1995 and 1996, in which he included the income he had received from the presidential primary campaign and falsely stated to the Internal Revenue Service that it was the presidential primary campaign's idea for defendant RYAN to receive funds personally related to the presidential primary campaign.

31. It was further part of the corrupt endeavor that on or about December 21, 2002,

defendant RYAN filed a materially false amended income tax return, IRS form 1040X, for the tax year 1997, in which he understated his actual gross income.

32. It was further part of the corrupt endeavor that defendant RYAN caused family members and other recipients of gifts that he had given to file income tax returns that overstated their income based on the inclusion as income of money or gifts given to them by defendant RYAN.

All in violation of Title 26, United States Code, Section 7212(a).

COUNT NINETEEN

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 1-24 of Count Eighteen of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about February 17, 1998, in the Northern District of Illinois, Eastern Division, and elsewhere,

GEORGE H. RYAN, SR.,

defendant herein, willfully made and subscribed, and caused to be made and subscribed, an amended joint United States Individual Income Tax Return (Form 1040X with schedules and attachments) for the calendar year 1995, which return was verified by a written declaration that it was made under the penalties of perjury, and filed with the Internal Revenue Service, which return he did not believe to be true and correct as to every material matter, in that the defendant listed his adjusted gross income as being $120,542.00, whereas, in truth and fact, as the defendant well knew, his adjusted gross income was substantially in excess of said amount;

In violation of Title 26, United States Code, Section 7206(1).

COUNT TWENTY

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 1-24 of Count Eighteen of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about February 17, 1998, in the Northern District of Illinois, Eastern Division, and elsewhere,

GEORGE H. RYAN, SR.,

defendant herein, willfully made and subscribed, and caused to be made and subscribed, an amended joint United States Individual Income Tax Return (Form 1040X with schedules and attachments) for the calendar year 1996, which return was verified by a written declaration that it was made under the penalties of perjury, and filed with the Internal Revenue Service, which return he did not believe to be true and correct as to every material matter, in that the defendant listed his adjusted gross income as being $137,908.00, whereas, in truth and fact, as the defendant well knew, his adjusted gross income was substantially in excess of said amount;

In violation of Title 26, United States Code, Section 7206(1).

COUNT TWENTY ONE

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 1-24 of Count Eighteen of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about April 10, 1998, in the Northern District of Illinois, Eastern Division, and elsewhere,

GEORGE H. RYAN, SR.,

defendant herein, willfully made and subscribed, and caused to be made and subscribed, a joint United States Individual Income Tax Return (Form 1040 with schedules and attachments) for the calendar year 1997, which return was verified by a written declaration that it was made under the penalties of perjury, and filed with the Internal Revenue Service, which return he did not believe to be true and correct as to every material matter, in that the defendant listed his adjusted gross income as being $106,486.00, whereas, in truth and fact, as the defendant well knew, his adjusted gross income was substantially in excess of said amount;

In violation of Title 26, United States Code, Section 7206(1).

COUNT TWENTY TWO

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations in paragraphs 1-4 of Count One and paragraphs 1-24 of Count Eighteen of this indictment are hereby realleged and incorporated herein as if fully set forth herein.

2. On or about April 13, 1999, in the Northern District of Illinois, Eastern Division, and elsewhere,

GEORGE H. RYAN, SR.,

defendant herein, willfully made and subscribed, and caused to be made and subscribed, a joint United States Individual Income Tax Return (Form 1040 with schedules and attachments) for the calendar year 1998, which return was verified by a written declaration that it was made under the penalties of perjury, and filed with the Internal Revenue Service, which return he did not believe to be true and correct as to every material matter, in that the defendant listed his adjusted gross income as being $102,640.00, whereas, in truth and fact, as the defendant well knew, his adjusted gross income was substantially in excess of said amount;

In violation of Title 26, United States Code, Section 7206(1).

FORFEITURE ALLEGATIONS

The SPECIAL APRIL 2002 GRAND JURY further charges:

1. The allegations contained in Count One are hereby realleged for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 1963.

2. As a result of their violations of Title 18, United States Code, Section 1962(d),

GEORGE H. RYAN, SR. and
LAWRENCE E. WARNER,

defendants herein:

(a) have acquired and maintained interests in violation of Title 18, United States Code, Section 1962, which interests are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1);

(b) have interests in, and property and contractual rights which afforded a source of influence over, the enterprise named and described herein, which the defendants operated controlled, conducted and participated in the conduct of in violation of Title 18, United States Code, Section 1962, and which interests are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(2); and

(c) have property constituting and derived from proceeds that the defendants obtained, directly and indirectly, from the racketeering activity, in violation of Title 18, United States Code, Section 1962, which property is subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(3).

3. The interests of the defendants subject to forfeiture to the United States pursuant to Title 18, United States Code, Sections 1963(a)(1), (a)(2) and (a)(3), include, but are not limited to,

the following:

(a) at least $3.1 million;

(b) Defendant WARNER's interest in Joliet Maple LLC, including but not limited to, the real property having a Permanent Index Number of 07-11-500-011, commonly known as 605 Maple Road, Joliet, Illinois;

(c) Defendant WARNER's interest in BL Mannheim Inc., including but not limited to, the real property having a Permanent Index Number of 15-09-300-100, commonly known as 405 N. Mannheim Road, Bellwood, Illinois;

4. To the extent that the property described above as being subject to forfeiture pursuant to Title 18, United States Code, Section 1963, as a result of any act or omission of the defendants:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 1963(m), to seek forfeiture of any other property of the defendants up to the value of the property described as being subject to forfeiture.

5. The defendants are jointly and severely liable for the forfeiture obligations as alleged above.

All pursuant to Title 18, United States Code, Section 1963.

A TRUE BILL:

The Rev. Dr. David C. Nelson

Foreperson

Patrick J. Fitzgerald

United States Attorney

No. 02 CR 506

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

LAWRENCE E. WARNER and
GEORGE RYAN SR.

SUPERSEDING INDICTMENT

Violations:
Title 18 United States Code, Sections 2, 1001, 1341, 1346, 1951, 1956 and 1962 , Title 26, United States Code Sections 7206, and 7212; and Title 31 United States Code, Section 5324

A true bill,

The Rev. Dr. David C. Nelson

Foreman

Filed in open court this 17TH day of December A.D. 2003

MICHAEL W. DOBBINS
Clerk

By: Donna Kuenzel
Deputy Clerk

Bail, $ _____

PC 880.320

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 02 CR 506
v.	)	Judge Rebecca R. Pallmeyer
	)	
LAWRENCE E. WARNER and	)	
GEORGE H. RYAN, SR.	)	

UNITED STATES' MOTION FOR PRETRIAL RULING ON JURY INSTRUCTIONS RELATED TO MAIL FRAUD ALLEGATIONS

THE UNITED STATES OF AMERICA, through its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully moves this Honorable Court to rule pre-trial to permit the Government's attached, proposed jury instructions related to the mail fraud allegations in this case. In support, the United States submits as follows:

I. Introduction

The indictment in this case charges defendants Ryan and Warner together with seven counts of mail fraud (Counts Two, Three, Four, Five, Seven, Eight, and Nine), and defendant Ryan separately with two additional counts of mail fraud (Six and Ten), in violation of Title 18, United States Code, Sections 1341, 1346, and 2. According to the indictment, as part of the mail fraud scheme, defendant Ryan performed and authorized official acts to benefit the financial interests of himself, defendant Warner and others (Count 2 at ¶ 4), and defendant Ryan received personal and financial benefits from Warner and others while knowing that such benefits were provided with intent to influence and reward Ryan in the performance of official acts (Count 2 at ¶ 5). Details regarding the anticipated proof in support of those allegations have been provided in previous filings before this Court, including the Government's extensive Santiago proffer.

Since indictment, and especially recently, defendant Ryan repeatedly has suggested that he will be exonerated because (he claims) there is no evidence of his corruptly receiving cash in exchange for specific official acts. For example, on the web site dedicated to his defense (www.georgeryanfund.com), defendant Ryan's counsel identified "three reasons why the jury will find Ryan not guilty," the first of which is that "[a]fter five and half years, the government does not have one single witness that will testify that Ryan received corrupt payment as charged." Similarly, in recent media interviews about this case, defendant Ryan has "said he is confident he will be exonerated at his upcoming corruption trial because the government doesn't have one witness that says they gave him a 'corrupt dollar'." *Ryan Confident he will be exonerated at upcoming trial,* Chicago Sun Times, July 22, 2005 (Attachment A). *See also, e.g., Former Governor Ready for Trial,* CBS 2 Chicago WBBM-TV, July 27, 2005 (Attachment B) (Ryan stated: "I'm pretty limited to what I can say about the case, but I know that Dan Webb said at the time of the indictment that the federal government can't name one person who gave me a corrupt dollar. And I think that's an important thing for the public to know.")

The Government disagrees with defendant's characterizations of the proof as it relates to corrupt payments. Regardless, however, the law does not require such evidence of cash or a specific quid pro quo to establish liability for "honest services" mail fraud under sections 1341 and 1346. The Government has prepared proposed jury instructions that accurately state and reflect the law as to the mail fraud allegations. (Attachment C). To avoid unwarranted and improper remarks in opening statements and during trial, the Government requests that the Court rule pre-trial to permit those instructions or otherwise provide the parties appropriate pretrial guidance regarding these critical issues.

Importantly, the Government here does not suggest that defendants should be precluded from arguing any perceived infirmities in the Government's case, including lack of specific quid pro quo evidence between official acts and benefits to Ryan and others as alleged. Arguing insufficient evidence is a proper and expected form of advocacy, and the Government does not seek to undermine such advocacy. That said, what is clearly *improper* would be for the defense to argue or suggest to the jury that "corrupt dollars" for contracts or other specific quid pro quo evidence is a *prerequisite* to a finding of guilt on the particular mail fraud charges here. Such a suggestion or argument would be a flat misstatement of the law and, accordingly, should not be permitted.

II. Discussion

It is well established in the Seventh Circuit that a specific quid pro quo nexus is not a prerequisite to federal criminal liability in the public corruption context. *See United States v. Martin*, 195 F.3d 961 (7th Cir. 1999)(court upheld conviction of public official accepting various gifts and promises from a vendor on basis that a "reasonable jury could find that the public official accepted gifts from a vendor 'intending to be influenced or rewarded in connection with official action'"); *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998)(breach of fiduciary duty for private gain is actionable under the mail fraud statutes); *United States v. Genova*, 333 F3d 750, 759 (7th Cir. 2003)(upholding honest services mail violation rooted in failure to disclose kickbacks on Statement of Economic Interest forms); *United States v. Hausmann*, 345 F.3d 952 (7th Cir. 2003)(finding that "under the intangible-rights theory of federal mail or wire fraud liability, a valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed.); *United States v. Issacs*, 493 F.2d

1124 (7th Cir. 1974)(upholding conviction of former Illinois Governor Otto Kerner on mail fraud and other charges in connection with Kerner's official acts, including passing legislation favorable to companies owned by individual who tendered Kerner company stock at a fraction of stock's true worth). *See also United States v. Warner*, 292 F. Supp. 2d 1051, 1060 (N.D. Ill. 2003) (citing the Seventh Circuit's opinions in *Hausmann*, *Bloom*, and *Genova*).

Other circuits, including the First, Third, and Eleventh, have upheld public corruption prosecutions rooted in similar theories, including and especially theories rooted in the failure of a public official to disclose a financial interest or relationship affected by his official actions. *See, e.g., United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998)(discussed below); *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996)(*Sawyer I*)(discussed below); *United States v. Sawyer*, 239 F.3d 31 (1st Cir. 2002)(*Sawyer II*)(undisclosed financial relationship between official and vendor is actionable under mail fraud statute)[1]; *United States v. Panarella*, 277 F.3d 678, 692-93 (3d Cir. 2002)(noting that honest services fraud typically occurs in two scenarios: bribery, and failure to disclose conflict of interest resulting in personal gain, and holding that "where a public official conceals a financial interest in violation of state criminal law and takes discretionary action in his official capacity that the official knows will directly benefit the concealed interest, the official has deprived the public of his honest services, regardless whether the concealed financial interest improperly influenced the official's actions."); *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001)(in upholding honest services mail fraud conviction where defendant, a Philadelphia Department of Licenses and

[1]In *Sawyer I*, the First Circuit embraced the prosecutive theory but overturned the verdict due to faulty jury instructions. In *Sawyer II*, which followed after Sawyer was re-charged and subsequently plead guilty, the First Circuit again upheld the prosecutive theory, after the district court vacated the plea by granting a writ of coram nobis.

Inspections employee, steered business to his girlfriend who, as an "expediter," assisted business owners in applying for proper permits with defendant's department, court stated that "[d]uties to disclose material information affecting an official's impartial decision-making and to recuse himself exist within th[e] fiduciary relationship [between a public servant charged with disinterested decision-making and the public he serves] regardless of a state or local law codifying a conflict of interest."); *United States v. Hasner*, 340 F.3d 1261 (11th Cir. 2003)(upholding honest services conviction rooted in failure to disclose economic relationship between official and vendor); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997)(in upholding mail fraud conviction the court stated, "When a government officer decides how to proceed in an official endeavor . . . his constituents have a right to have their best interests form the basis of that decision. If the official instead secretly makes his decision based on his own personal interests--as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest--the official has defrauded the public of his honest services."); *Unites States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999)(noting that "Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest.").

No circuits have required the quid pro quo prerequisite to mail fraud liability that defendant seems to suggest in his pretrial statements.

The facts and analysis of the *Woodward/Sawyer I* cases cited above are particularly pertinent here. Defendant Woodward was a Massachusetts state representative and, from 1985 to 1991, a member of the State's Joint Committee on Insurance ("the Committee"). *Woodward*, 149 F.3d at 51. During that same time frame, defendant Sawyer was a lobbyist for John Hancock Life Insurance company ("Hancock") who was responsible for lobbying the Massachusetts legislature, including

the Committee, on behalf of Hancock and the insurance industry. *Id.* Defendants Woodward and Sawyer also happened to be close friends, who for years had socialized and traveled together, including doing so well before Woodward served on the Committee. *Id.* at 53

Throughout the time Woodward was on the Committee, Sawyer was "one of the four most active lobbyists" on behalf of life insurance companies seeking favorable rulings from the Committee. *Id.* at 52. As such, Sawyer saw Woodward 2-3 times per week and met with Woodward more often than any other lobbyist. *Id.* at 52. Woodward repeatedly supported Hancock's positions in his capacity as co-chair of the Committee and "for the most part, conformed with the way Sawyer and Hancock wanted" the Committee to rule. *Id.* at 53.

Meanwhile, Sawyer picked up Woodward's tab for shared meals and entertainment. *Id.* at 52. From 1984 through 1992, Woodward accepted in excess of $9,000 in gratuities from Hancock and an insurance lobbying association, about $8,740 of which came through Sawyer in the form of meals, rounds of golf, and other entertainment. *Id.* at 52. Defendant Woodward, as a public official, was obligated under Massachusetts law to disclose gifts from any source in excess of $100 on annual Statement of Economic Interest forms. *Id.* at 54. Woodward failed to report the golf, meals, and other benefits from Sawyer on those annual forms. *Id.* at 54.

At separate trials, both Woodward and Sawyer were convicted of, among other things, honest services mail fraud in connection with that conduct. On appeal, Woodward argued that the evidence was insufficient to support "honest services" charges. *Id.* at 53. In rejecting that argument, the First Circuit acknowledged a spectrum of viable honest services cases, including cases that do not have a strict quid pro quo component:

> We explained that, prior to *Sawyer I*, honest services fraud had typically been found in two types of circumstances: 1) bribery where a legislator was paid for a particular decision or action; and 2) failure to disclose a conflict of interest, resulting in personal gain. *Sawyer I*, 85 F.3d at 724. As to the latter, we noted that 'a public official has an affirmative duty to disclose material information to the public employer. When an official fails to disclose a personal interest in a matter over which she has decision making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation.' *Id.* (citing *United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987)). 'Thus, undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services. *Sawyer I* expanded category (1) from quid pro quo bribery to include a more generalized pattern of gratuities to coax "ongoing favorable official action." *Sawyer I*, 85 F.3d at 730.

Woodward, 149 F.3d at 55. As to defendant Sawyer, the court applied those principles and determined that "while Sawyer may not have provided the legislators with direct kickbacks or commissions arising out of the specific official action, he may have intended the legislators generally to treat preferentially Hancock's interests, knowing that the free meals, entertainment, and golf would continue so long as favorable official acts were made." *Sawyer*, 85 F.3d at 730. As to defendant Woodward, the court noted that "the question becomes whether the jury could reasonably have found that Woodward intended to steal his honest services from the public," and then found that it could. *Woodward*, 149 F.3d at 56.

Similarly, here, defendants Ryan and Warner are alleged to have engaged in a scheme involving a pattern of financial benefits intended to influence defendant Ryan's official actions and, as part of that scheme, to have covered up and failed to disclose that financial relationship through various acts of deception, including false and incomplete Statements of Economic Interest forms, lobbyist registration forms, and other misrepresentations to the public, state regulators, and federal investigators. As in *Sawyer/Woodward* and the litany of other cases cited above, there is no prerequisite of a quid pro quo or "corrupt dollars" connection here; rather, the defendants' concealed

financial relationship affected by official action may form the basis for mail fraud liability. *Id.* *See also Antico*, 275 F.3d at 264 (holding that where defendant, a city employee, steered business to his girlfriend in connection with permits overseen by defendant's department, the defendant "owed the City a duty to disclose this financial arrangement, the failure of which constitutes honest services fraud.") The attached instructions accurately address the mail fraud elements and related fiduciary concepts at issue here, and thus should be given to the jurors in this case.

III. Conclusion

For the foregoing reasons, the United States respectfully requests that the Court rule pre-trial to permit the Government's attached, proposed jury instructions related to the mail fraud allegations in this case or otherwise provide the parties appropriate pretrial guidance regarding such instructions.

Respectfully submitted,

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CHICAGO SUN-TIMES
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NEWS

Ryan confident he will be exonerated at upcoming trial

July 22, 2005

BY ASSOCIATED PRESS

Former Gov. George Ryan said he is confident he will be exonerated at his upcoming corruption trial because the government doesn't have one witness that says they gave him a "corrupt dollar."

"They've torn at the very fiber of my life and my family and friends, they haven't got one witness that said they gave me a corrupt dollar or they paid me off in any fashion with money and so I think there are several things that will come out in the trial that will be worthwhile," Ryan told Chicago's WGN-TV in an exclusive interview broadcast Thursday night.

Ryan is accused of accepting free vacations and other perks while doling out favors such as lucrative state contracts and leases to lobbyist friends, including Lawrence Warner, starting in 1990 when he was elected secretary of state, according to a federal indictment.

The charges are an outgrowth of a seven-year federal investigation that began with an inquiry into drivers licenses sold in exchange for bribes and expanded into a full-blown corruption probe focusing on Ryan's tenure as secretary of state and later governor.

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Ryan and Warren are scheduled to go on trial together Sept. 15. Both have pleaded not guilty.

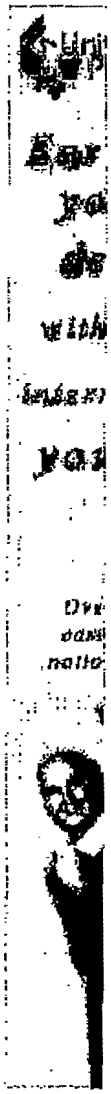
"You know, it's not unusual for people in public life to be helpful to their friends after they're elected ... people that supported them in public life. It happens in every level of government. It happens from the president down to the local government people," he said from his home in Kankakee.

Ryan said he couldn't get into specifics of the case, but he defended Warner.

"I've known Larry Warner for a good many years and I'm sure that he hasn't done anything illegal and feel confident that he hasn't. I'm sure he'll be exonerated in the trial as well," Ryan said.

The former governor said the federal investigation had no impact on his decision not to run for a second term.

"From the time that I decided to run for governor, my wife and I had an understanding that it would be a one-term governorship" and that they would keep that their secret, he said.



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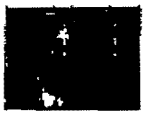
Former Governor Ready For Trial

Ryan Says He Feels Confident He Will Be Exonerated



Jay Levine
Reporting

(CBS) KANKAKEE, Ill Former Illinois Governor George Ryan is speaking out about his federal indictment on corruption charges.

"It's torn at the very fiber of my family, my friends and myself," Ryan said.

The former governor told CBS 2 Chief Correspondent Jay Levine that his eight-year ordeal will end in September when he finally gets his day in court.

George and Lura Lyn Ryan are back home now in the Kankakee neighborhood where they've lived all their lives. Now they are facing the fight of their lives.

Ryan told CBS 2 News that he will not come to some kind of agreement with prosecutors to avoid putting himself and his family through a trial.

"You have to have done something wrong to do that. I have done nothing wrong," Ryan said.

"I'm pretty limited to what I can say about the case, but I know that Dan Webb said at the time of the indictment that the federal government can't name one person who gave me a corrupt dollar. And I think that's an important thing for the public to know," he said.

Ryan's lawyers won't let him answer specific questions about the case or the potential witnesses,

who could be close aides and advisers, even his children.

"How are you going to be able to handle a trial in which very own children are going to called to testify against you?" Levine asked.

"I just want to say we have a very close family. They'll all be there in spirit and physically," Ryan said. "Our family is very strong and very strong-willed and we are all looking for opportunity for this trial to proceed and conclude."

Ryan is proud of his decades of public service, off getting tough on drunk drivers, capital punishment and rebuilding Illinois.

Has he faced the fact that he could go to jail?

"Look, I am very upbeat," he said. "My wife and I and my family are very upbeat on the outcome of this trial and feel very confident I'll be exonerated."

Ryan will spend much of the next two months preparing for the trial. After that, he hopes to continue his campaign to abolish the death penalty -- an effort which has taken him from coast to coast and around the world since he left office.

"You have to have done something wrong to do that. I have done nothing wron

CBS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 02 CR 506
	)	
LAWRENCE E. WARNER and GEORGE H. RYAN, SR.	)	Honorable Rebecca R. Pallmeyer

RYAN'S RESPONSE TO UNITED STATES' MOTION FOR PRETRIAL RULING ON JURY INSTRUCTIONS RELATED TO MAIL FRAUD ALLEGATIONS

In announcing the Indictment in this case, the United States Attorney declared publicly that "the state of Illinois was for sale," and the government's pleadings, including the *Santiago* proffer, contain direct allegations of corrupt *cash* going to George Ryan. Now, on the eve of the trial, concerned that it may not be able to prove such allegations, the government has tendered jury instructions that purport to relieve the prosecution of *any* obligation to prove personal gain by Ryan through a misuse of his public office. Simply extraordinary. The prosecutors are seeking to redefine the legal requirements of honest services mail fraud to eliminate elements that they fear they *cannot* prove, namely that Ryan misused his office for private gain.

The theory of honest services mail fraud that underpins the government's proposed jury instructions is wholly divorced from legal reality. The Seventh Circuit has consistently held that honest services mail fraud consists of a *misuse of public office for private gain*. *See, e.g., United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998). If a public official misuses his office but in no way personally benefits from that abuse of position, there is *no* mail fraud. *See, e.g., United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997). If a public official receives a personal benefit — whether proper or not — but in no way misuses his office in connection with that benefit, there is *no* honest services violation. *Bloom*, 149 F.3d at 655.

public official that is the essence of honest services mail fraud. *That* is the federal crime. *Id.* The words used to characterize the relationship between the *personal gain* and the *misuse of office* — "specific quid pro quo nexus" or "quid pro quo" or "nexus" or "connection" — are beside the point. The fact is that the law requires the government to prove a relationship between these two elements to sustain an honest services mail fraud prosecution. Thus, Ryan is entitled not only to explain to the jury the fact that the government cannot prove a relationship between any of Ryan's official acts and any corrupt dollar — but also to inform the jury that such proof *is* a prerequisite to a finding of guilt.

In addition and contrary to the government's apparent assumption, Ryan's defense goes further: while Ryan intends to show that the government cannot prove Ryan received any corrupt dollar, Ryan also intends to show that the government cannot link *any* benefit received by Ryan to any official act. Without such a link, the government's case fails. Without such a link, there is no basis for mail fraud. The government's proposed instructions seek to relieve it of this obligation of proving that Ryan personally benefited through a misuse of his public office. That is not the law, and the government's proposed jury instructions are erroneous.

There is more: the government's proposed mail fraud instructions are replete with other errors and omissions. Without attempting to parse each proposed instruction to illustrate every inaccuracy, several are worthy of mention to demonstrate the fundamental legal flaws in the government's proposed instructions. For example, the proposed instruction on breach of fiduciary duty would improperly permit a jury to convict a defendant of a federal crime based on civil state law violations in the absence of proof of criminal intent. Indeed, the state law duties themselves are not even accurately set forth, and the government has neglected to include the myriad of exceptions set out in those state statutes. Similarly, the government has omitted any

instruction on the necessity of finding a single scheme — an issue which this Court has already indicated would need to be carefully addressed in the jury instructions and verdict forms. 8/11/04 Order at 37 ("To be sure, drafting appropriate jury instructions and verdict forms in this complicated case will require particular care and attention").

The government's motion, however, does not join these issues, and they are better left for another day, when specific objections to jury instructions may be ironed out in light of the evidence adduced at trial. Accordingly, Ryan reserves the right to object to each and every instruction proposed by the government, and will address in this response only the issue raised in the government's motion: the undeniable legal requirement that the government prove that Ryan received a personal gain through a misuse of his public office.

I. HONEST SERVICES MAIL FRAUD REQUIRES A MISUSE OF OFFICE FOR PRIVATE GAIN

The government's argument and proposed jury instructions suggesting that it need not prove a relationship between a defendant's misuse of office and private gain — indeed, its stunning assertion that it need not prove private gain at all — are flatly inconsistent with controlling Seventh Circuit law. The Seventh Circuit has held that in the public corruption context a deprivation of "honest services" consists of misuse of public office for private gain: "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud. . . . Misuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime." *Bloom*, 149 F.3d at 655 (internal quotation omitted); *cf. United States v. Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003) ("[T]his Court has suggested that liability under this theory may nonetheless result where a defendant misuses his fiduciary relationship (or information acquired therefrom) for personal gain.").

Other courts have articulated a similar standard — including the cases cited in the government's motion. *See, e.g., United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) ("The crux of the [honest services] theory is that when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest"); *United States v. Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) ("[w]hen a public official, instead, secretly makes decisions based on his own personal interests, the official defrauds the public of his honest services"); *United States v. Antico*, 275 F.3d 245, 263 (3d Cir. 2001) (failure to disclose financial arrangement which "provided a tangible benefit" to defendant constituted honest services mail fraud); *United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) ("Illicit personal gain by a government official deprives the public of its intangible right to the honest services of the official"). *United States v. Espy*, 989 F. Supp. 17, 26 (D.D.C. 1997) ("[U]ndisclosed, biased decision making for personal gain . . . constitutes a deprivation of honest services").[1]

The core holding of *Bloom* is that in an honest services prosecution the government *is required* to prove that the defendant received a "private" or "personal" gain in connection with a "misuse of public office." 149 F.3d at 655. Without that causal connection, there is *no* honest services violation. *See Czubinski*, 106 F.3d at 1071. In *Czubinski*, the defendant was an IRS employee who was caught accessing the IRS database to view the tax returns of numerous social acquaintances and other taxpayers in violation of his authority as a Contact Representative. He was convicted under the wire fraud statute on an intangible rights

[1] Similarly, the First Circuit cases cited by the government require a misuse of office for private gain — consistent with the Seventh Circuit's decision in *Bloom*. *See United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996); *United States v. Woodward*, 149 F.3d 46, 54 (1st Cir. 1998); *United States v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001). Even *United States v. Panarella*, 277 F.3d 678, 692-93 (3d Cir. 2002), which is openly critical of *Bloom* and relied upon by the government, describes an honest services violation as consisting of a misuse of office for personal gain.

theory. *Id.* The First Circuit reversed his conviction after concluding that "Czubinski did [nothing] more than knowingly disregard IRS rules by observing the confidential information he accessed." *Id.* at 1072. The court held that this action, although committed by a government employee through the use of his government-owned computer, did not fall within the honest services provision of the wire fraud statute: "Czubinski was not bribed or otherwise influenced in any public decision making capacity. Nor did he embezzle funds. *He did not receive . . . any tangible benefit.*" *Id.* at 1077 (emphasis added).

Nothing in the Seventh Circuit's recent decision in *United States v. Spano*, No. 03-1111, 2005 WL 2100391 (7th Cir. Sept. 1, 2005) (Ex. 1), alters the *Bloom* standard. Judge Easterbrook — *Bloom*'s author — joined the court's opinion in *Spano*. Indeed, *Spano* is a textbook example of a misuse of public office for private gain: "as a reward for her participation" in the scheme to defraud, Cicero town president Betty Loren-Maltese "received accelerated reimbursement and . . . reimbursement of 100 percent of the medical expenses incurred by members of her family." 2005 WL 2100391, at *2. Plainly the Seventh Circuit required some sort of causal connection between Loren-Maltese's misuse of office (placement of Cicero's employees' health benefits) and Loren-Maltese's improper receipt of a personal benefit (favorable reimbursement of medical expenses).

The very words the Seventh Circuit used to describe the honest services mail fraud in *Spano* ("reward for . . . participation") necessitate such a casual connection: the universally accepted definition of the word "reward" denotes some sort of exchange. *See, e.g.*, *American Heritage Dictionary* ("Something given or received in recompense for worthy behavior or in retribution for evil acts"); *Oxford American Dictionary* ("a return or recompense for service . . ."); *Black's Law Dictionary* ("something of value, usu. money, given in return for

some service or achievement"). Indeed, this is not the first time that the Seventh Circuit has used the word "reward" to describe the connection required between the misuse of office and the personal gain in an honest services prosecution. *See United States v. Martin*, 195 F.3d 961, 965 (7th Cir. 1999) (affirming a mail fraud conviction where, as the government describes in its motion, a public official received gifts and promises of future benefits "from a vendor 'intending to be influenced or rewarded in connection with official action'" (Gov't Mot. at 5)). *Spano*'s "reward" (read *personal gain*) for participation in a scheme to defraud (read *misuse of office*) looks very close to the *quid pro quo* that the government so vigorously disclaims.

As the Seventh Circuit held in *Bloom*, it is *that* connection between the misuse of public office and the officeholder's private gain that is the essence of honest services mail fraud: "*that* separates run of the mill state-law fiduciary duty . . . from federal crime." 149 F.3d at 655 (emphasis added). Significantly, *Bloom* was an interlocutory appeal affirming the dismissal of an honest services mail fraud charge precisely because the government failed to "charge that [Bloom] misused his office for private gain." *Id.* The legal deficiency in the *Bloom* indictment is the same deficiency that pervades the government's proposed instructions here: they fail to instruct the jury that an honest services violation exists only if the government proves beyond a reasonable doubt a misuse of public office for private gain.

The instructions proposed by the government could lead a jury to convict a defendant of honest services mail fraud in the absence of proof of a misuse of office for personal gain. These instructions do not conform to the controlling Seventh Circuit law on honest services mail fraud as articulated in *Bloom*, *Martin* and *Spano*, because either they fail to mention either misuse of office or private gain or they suggest that the jury could convict under a

standard other than misuse of public office for personal gain (*see* Gov't Inst. Nos. 6, 7, 9, 11, 12). Accordingly, these instructions are erroneous.

II. THE LAW REQUIRES AN EXPLICIT *QUID PRO QUO* IN CERTAIN HONEST SERVICES MAIL FRAUD PROSECUTIONS

The government's sweeping contention that "a specific quid pro quo nexus is not a prerequisite to federal criminal liability" is *wrong*. Gov't Mot. at 3. As we detailed in a previously filed motion[2], there is ample authority that requires a *quid pro quo* in certain mail fraud prosecutions. Indeed, the government in this case has already conceded as much in response to another motion:

> While Warner objects to a lack of specific quid pro quo . . . *a specific quid pro quo nexus is not a prerequisite (outside the campaign contribution context)* to the broader allegations relating to the low digit plates and other government benefits conferred upon Warner.

7/8/05 Gov't Resp. to Warner's Mot. *In Limine* at 7 (emphasis added). That concession from the government is consistent with the policy expressed in the United States Attorneys' Manual on bribery, extortion and illegal gratuity charges involving campaign contributions:

> *Campaign Contributions*
>
> PRACTICE TIP: Where the transaction represents a *bona fide* campaign contribution, prosecutors must normally be prepared to prove that it involved a *quid pro quo* understanding and thereby constituted a "bribe" offense actionable under section 201(b).
>
> COMMENT: This same distinction between bribes, gratuities and lawful campaign contributions has recently been applied to some of the Federal prosecutive theories that are currently used to address bribery and corruption by state and local public officials. For example, in *McCormick v. United States*, 500 U.S. 257 (1991) the Supreme Court held that the Hobbs Act (18 U.S.C. § 1951) did

[2] *See* Ryan's Motion *In Limine* To Preclude Evidence Related To Official Actions Benefiting Campaign Contributors Absent A *Quid Pro Quo* And To Strike The Allegations Regarding The Same From The Indictment (filed 9/6/05).

> not apply to a series of campaign contributions that were made with a general intent to curry favor with a state senator and to thank him for his support. Noting that campaign contributions are a necessary part of the American political process, the Court held that when an allegedly corrupt payment represents a *bona fide* campaign contribution, the prosecution must prove the existence of a *quid pro quo*.

United States Attorneys' Criminal Resource Manual § 2046. For the government now to represent to this Court in its current motion that "*a specific quid pro quo is not a prerequisite*" and to tender proposed jury instructions predicated on this same theory is surely erroneous. It is *contrary* to the government's previously stated position in this case, *contrary* to the United States Department of Justice Criminal Resource Manual, and *contrary* to controlling case law.

A. A *Quid Pro Quo* Is Required Where Mail Fraud Charges Are Predicated On The Receipt Of A Campaign Contribution

The official acts of an elected officer that inure to the benefit of his or her constituents, some of whom were campaign contributors, cannot constitute a federal crime absent a showing that those official acts were part of a specific *quid pro quo*. Without such a requirement, every politician in America would be subject to indictment. Political campaigns have always been funded by private contributions. Elected officials have always taken official actions to benefit their constituents, some of whom undoubtedly contributed to the elected officials' campaigns. These actions are not remotely criminal, but rather exemplify the American political process. Criminal liability arises only where contributions are given and accepted in exchange for specific official action — part of a *quid pro quo*.

The United States Supreme Court has decided this issue in reversing the conviction of a politician holding that proof of a *quid pro quo* is required to support an extortion conviction. *McCormick v. United States*, 500 U.S. 257, 272 (1991). The Court elaborated upon

the risks of criminal prosecutions based upon campaign contributions, explaining that Congress could not have intended to criminalize how politics has long been practiced:

> Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."

Id.

The Seventh Circuit has echoed the Supreme Court's concerns about federal prosecutions based upon campaign contributions: "People vote for candidates and contribute to the candidates' campaigns because of those candidates' views, performance, and promises. *It would be naïve to suppose that contributors do not expect some benefit — support for favorable legislation, for example — for their contributions.*" *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (emphasis added). The *Allen* court applied the *McCormick* rationale to a bribery prosecution predicated on the receipt of campaign contributions, and explained:

> [A]bsent some fairly explicit language otherwise, accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe.

Id.

Other federal courts have applied the *McCormick* rationale to honest services mail fraud cases in the campaign contribution context. For example, in *United States v. Marlinga*, No. 04-80372, 2005 WL 517964 (E.D. Mich. Mar. 2, 2005) (Ex. 2), the government's indictment alleged that "while running for election to the United States House of Representatives in the 2000 Congressional race, Marlinga, the former Macomb County Prosecuting Attorney,

participated in *quid pro quo* schemes to accept campaign contributions in exchange for prosecutorial assistance in two cases. . . ." *Id.* at *1. The court in *Marlinga* recognized the necessity of proving a *quid pro quo* arrangement in the campaign contribution context: "the Government has not persuasively shown that Roberts' presumably lawful offer of assistance with a different campaign is relevant to whether a *quid pro quo* was reached in the *Moldowan* matter." *Id.* at 3; *see also United States v. Triumph Capital Group, Inc*, 260 F. Supp. 2d 444, 461 (D. Conn. 2002).

The government's reliance upon an apparent misreading of *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999), is telling. Judge Posner in the *Martin* case actually recognized that a *quid pro quo* should be required in connection with prosecutions of elected officials based on campaign contributions:

> It is easy to see how the next step in "intangible rights" thinking would be to argue that an elected official who receives a donation to his campaign fund and afterward fails to prevent the donor from obtaining favorable treatment in dealing with the government is defrauding the government of its right to his loyalty. We are speaking not of a case in which there is either an explicit quid pro quo or even some positive act by the official to assist the donor, but merely of a case in which it can be proved (though this will often be impossible to do with the certitude required in a criminal case) that the official, had he not received the donation, would have taken positive steps to try to prevent the donor from receiving favorable treatment. . . . *But the courts have made clear that criminal inducement of a legislator to take particular action cannot be inferred from the legislator's acceptance of campaign contributions from interests urging the action* . . . or from his acceptance of lobbyists' hospitality.

Id. at 965-66 (emphasis added) (citations omitted). *Martin* ultimately upheld the conviction of a public official given the evidence from which a jury could "infer with the requisite certitude that the government employee had been *bribed* (including with the implicit promise of a future job in the private sector) *to engage in acts within the scope of his employment* to assist the person who

had bribed him to commit those acts, and as a result deprived his employer of the latter's right to the employee's honest services." *Id.* at 966 (emphasis added). Thus, under Judge Posner's analysis in *Martin*, the *quid pro quo* requirement should apply with equal force to an intangible rights prosecution based on campaign contributions for the same reason it applies to bribery and extortion: without such a requirement, any campaign contribution might constitute a violation of federal criminal law.

The government does not cite a single case from the Seventh Circuit or elsewhere that has ever permitted an honest services mail fraud prosecution predicated on the receipt of a campaign contribution to proceed absent a *quid pro quo*. None of the cases cited by the government address campaign contributions. *See, e.g., Bloom*, 149 F.3d at 650 (an alderman's legal advice to a private client); *United States v. Genova*, 333 F.3d 750, 754 (7th Cir. 2003) (a mayor's receipt of kickbacks in exchange for a town's legal work); *Hausmann*, 345 F.3d at 954 (private attorney's kickback scheme); *United States v. Isaacs*, 493 F.2d 1124, 1131 (7th Cir. 1974) (a governor's receipt of bribes for official action); *Panarella*, 277 F.3d at 680-81 (a state senator's failure to disclose over $330,000 in consulting fees from a business interest); *Antico*, 275 F.3d at 253-254 (Department of Licenses and Inspections employee steered business to girlfriend in lieu of making child-support payments); *Hasner*, 340 F.3d at 1265-67 (Housing Finance Authority chairman failed to disclose conflicting business interests); *Sawyer*, 85 F.3d at 730 (pattern of gratuities to a public official). Indeed, two of the cases cited by the government actually affirmed mail fraud convictions based on the existence of an express *quid pro quo*. *See Lopez-Lukis*, 102 F.3d at 1166 (a county commissioner board member was charged with accepting payments from a lobbyist to secure board action favorable to the lobbyist's clients — a *quid pro quo*); *deVegter*, 198 F.3d at 1326 (a county financial advisor was charged with

accepting payment from a banking firm "in return for improper intervention and assistance" in securing county business — again, a *quid pro quo*).

In short, the government has failed to acknowledge that the great weight of authority — from the Supreme Court, the Seventh Circuit, lower federal courts, the United States Department of Justice Manual and even the government's earlier concessions in *this case* — has recognized the absurdity of convicting public officials solely for taking official action in favor of campaign contributors. *See McCormick*, 500 U.S. at 272; *Martin*, 195 F.3d at 965-66; *Allen*, 10 F.3d at 411; *Marlinga*, 2005 WL 517964, at *3; *Triumph Capital*, 260 F. Supp. 2d at 461; *United States Attorneys' Criminal Resource Manual* § 2046; 7/8/05 Gov't Resp. to Warner's Mot. *In Limine* at 7.

The government has alleged a variety of official discretionary actions not tied to any specific contribution or other *quid pro quo* in an effort to convict Ryan for exactly what the law permits — taking official action in favor of campaign contributors absent a *quid pro quo*.[3] Reflecting this misguided theory of prosecution, the government's proposed jury instructions would permit a jury to convict a defendant of honest services mail fraud predicated on the receipt of a campaign contribution in the absence of a *quid pro quo*. As such, those instructions fail to conform to the law and are erroneous. *See* Gov't Inst. Nos. 6, 7, 9, 11, 12.

B. A *Quid Pro Quo* Is Required Where Federal Criminal Charges Are Predicated On The Receipt Of A Gift

Similar to campaign contributions, the receipt of gifts by a public official does not violate federal law unless those gifts were accepted in exchange for a promise to take a specific

[3] The specific allegations made by the government regarding official acts taken by Ryan in the campaign contribution context, and in the absence of any *quid pro quo* allegation, are set forth in Ryan's Motion *In Limine* To Preclude Evidence Related To Official Actions Benefiting Campaign Contributors Absent A *Quid Pro Quo* And To Strike The Allegations Regarding The Same From The Indictment (filed 9/6/05).

official action. The government's proposed instructions fail to make such a distinction, thus inviting the jury to convict Ryan merely for receiving legitimate gifts from people who benefited from Ryan's official actions. As with campaign contributions, public officials regularly receive gifts out of friendship, as an expression of thanks, or to promote goodwill. Public officials also regularly take actions that have the effect of benefiting constituents, some of whom may have given the public official gifts. This alone is no crime — for a crime to exist the public official must have accepted the gifts in exchange for taking official action to benefit the donor.

The Supreme Court has recognized that criminal liability cannot attach to a public official's receipt of gifts absent evidence of an agreement that the gifts were given in exchange for some specific official action. In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 400-02 (1999), a trade association was convicted of violating the federal gratuity statute for giving approximately $5,900 in various gifts to the Secretary of Agriculture, whom the trade association had an interest in influencing. The indictment did not allege any connection between the gifts and official actions taken by the Secretary of Agriculture. *Id.* at 402. The district court instructed the jury that "[t]he government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all." *Id.* at 403. The Supreme Court affirmed the reversal of the district court, holding that to establish a violation of the federal gratuity statute "the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Id.* at 414. Without such a requirement, federal law would criminalize all manner of gifts conferred upon public officials:

> It would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act – such as the replica jerseys given by championship sports teams each year during ceremonial White House visits . . . . Similarly, it

> would criminalize a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school.

Id. at 406-07. Clearly such acts are not criminal: "When, however, no particular 'official act' need be identified, and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing examples from being prosecuted." *Id.* at 408.

The lower federal courts have similarly recognized the critical distinction between a bribe and a legitimate gift. Indeed, the Ninth Circuit in a public corruption case approved a specific jury instruction to this effect. *See United States v. Frega*, 179 F.3d 793, 807 (9th Cir. 1999). The First Circuit's opinions in the *Woodward/Sawyer* cases similarly illustrate the need to define the line between what is a legal gift to a public official and what constitutes a violation of federal law:

> The practice of using hospitality, including lavish hospitality, to cultivate business or political relationships is longstanding and pervasive. . . . It may well be that all such hospitality should be flatly prohibited by law, but if Sawyer had this limited intent – to cultivate friendship rather than to influence an official act – the federal statutes here involved would not be violated.

Sawyer, 85 F.3d at 741. Indeed, the court emphasized the importance of instructing the jury that it must find an intent to influence an official act:

> [W]here the difference between lawful and unlawful turns primarily on intent, and the lawful conduct is itself most unattractive, we think the jury needs to be told specifically that the defendant has not violated the bribery component of the Travel Act (or committed honest services fraud) if his intent was limited to the cultivation of business or political friendship. Only if instead or in addition, there is an intent to cause the recipient to alter her official acts may the jury find a theft of honest services or the bribery predicate of the Travel Act. Absent some explicit explanation of this kind, the conventional charge will be slanted in favor of conviction.

Id.

A public official cannot be convicted for the receipt of gifts intended merely to cultivate a business or political friendship. Thus, similar to the campaign contribution context, a public official's receipt of a gift must be part of a *quid pro quo* in order to support a mail fraud prosecution. To the extent that the government's tendered instructions would permit a defendant to be convicted of honest mail fraud services predicated on the receipt of a gift in the absence of an explicit *quid pro quo*, those instructions fail to conform to the law and are in error. *See* Gov't Inst. Nos. 6, 7, 9, 11, 12.

III. PRIVATE GAIN IS AN ELEMENT OF HONEST SERVICES MAIL FRAUD

In a supplement to its motion, the government has tendered two additional instructions (Gov't Inst. Nos. 11 and 12) supposedly based on the Seventh Circuit's recent decision in *Spano*. These additional instructions — like many of the government's other mail fraud instructions — conflict with *Bloom* and its progeny. *Bloom*, *Martin* and *Spano* itself hold that honest services mail fraud consists of a misuse of public office for private gain. Nothing in *Spano* eliminated the "private" or "personal" gain element of honest services mail fraud. Indeed, the *Spano* court noted that the defendant in that case received a specific personal gain: accelerated reimbursement and 100 percent reimbursement of medical expenses. 2005 WL 2100391, at *2.

To be sure, the "personal" or "private" gain required to sustain an honest services prosecution does not always equate to personal profit. The promise of something of value other than financial compensation *can* be a "gain." *See, e.g., United States v. Munson*, No. 03 CR 1153, 2004 WL 1672880, at *1 (N.D. Ill. July 28, 2004) (Ex. 3). Significantly however, a "personal gain" in the absence of a misuse of office will not support an honest services violation.

See, e.g., United States v. McNeive, 536 F.2d 1246, 1246 (8th Cir. 1976) (no mail fraud violation where city plumbing inspector accepted gratuities for issuing plumbing permits because no evidence that gratuities disadvantaged city in any respect or that they deterred inspector from conscientiously performing his administrative (nondiscretionary) duties); *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) (reversing mail fraud conviction of state representative who introduced friend's architectural firm to public officials responsible for awarding state architectural contracts in return for 10 percent commission from contracts because defendant had no control in awarding the contracts which were shown to be awarded on merit). Indeed, these cases reinforce the basic teaching of *Bloom*: there must be some link between the misuse of office and the personal gain realized by the defendant.

The instructions proposed by the government could lead a jury to convict a defendant of honest services mail fraud in the absence of proof of personal gain. As such, the instructions do not conform to *Bloom*, *Martin*, *Spano* or other controlling precedent, and as such they are erroneous. *See* Gov't Inst. Nos. 6, 7, 9, 11, 12.

CONCLUSION

Therefore, George H. Ryan, Sr. respectfully requests that this Court deny the government's motion for pretrial ruling on jury instructions related to mail fraud allegations.

Respectfully submitted,

GEORGE H. RYAN, SR.

One Of His Attorneys

Dated: September 15, 2005

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Bradley E. Lerman
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CERTIFICATE OF SERVICE

I, an attorney, certify that I have served RYAN'S RESPONSE TO UNITED STATES' MOTION FOR PRETRIAL RULING ON JURY INSTRUCTIONS RELATED TO MAIL FRAUD ALLEGATIONS upon the parties listed below at the addresses shown by messenger this 15th day of September, 2005.

AUSA PATRICK COLLINS
AUSA JOEL LEVIN
United States Attorney's Office
219 S. Dearborn St., 5th Floor
Chicago, IL 60604

EDWARD M. GENSON
GENSON & GILLESPIE
53 W. Jackson Blvd., Suite 1420
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(Rev. 03/05)

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case Number: 02-CR-506-4**
George H. Ryan, Sr.	)	**Judge: Rebecca R. Pallmeyer**
	)	

Dan K. Webb, Defendant's Attorney
Joel R. Levin, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) 1, 2-5, 6, 7-8, 11-13, 18, 19-22 of the Second Superseding Indictment.

THERE WAS A:

judgment of acquittal as to count(s) 9, 10 of the Second Superseding Indictment. The defendant is acquitted and discharged as to these counts.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §1962(d)	Racketeering	11/15/2002	1
18 U.S.C. §1341	Mail Fraud	11/15/2002	2-8
18 U.S.C. §1001(a)(2)	Making Materially Fraudulent Statements & Representations	11/15/2002	11-13
18 U.S.C. §7212	Obstruct/Impede Administration of Internal Revenue Service	11/15/2002	18
26 U.S.C. §7206(1)	Filing False Income Tax Returns	11/15/2002	19-22

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **78 Months on Count 1.**

As to Count 2 - 8 & 11 - 13, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **60 months.** As to Count 18 - 22, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **36 months, all to run concurrent.**

The Court recommends to the Bureau of Prisons:

Placement at Oxford facility.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction to Supervised Release, said periods to run concurrent as follows:

Counts	1-8, 11-13, 18-22	a period of	1 year(s) Supervised Release.

The defendant shall report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of supervised release that apply in this case.

Based on the defendant's inability to pay, the costs of incarceration are waived.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(As set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court:

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment. restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$1,600	Fine Waived	$603,348	$19,000

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Restitution is ordered in the amount of $603,348.00

The interest requirement on restitution is waived.

Restitution to be paid as listed below.

Name of victim entitled to restitution (mailing address noted for public entities only)	Restitution Ordered	Priority
Ms. Donna M. Leonard, Executive Counsel Illinois Secretary of State's Office, 17 North State Street Chicago, Illinois 60602	$603,348	100%

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority payment column above. Pursuant to 18 U.S.C. § 3664(I), all non-federal victims shall be paid in full prior to the United States receiving payment. Pursuant to 18 U.S.C. § 3664(j), if a victim has received compensation from insurance or any other source with respect to a loss, restitution shall be paid to the person who provided or is obligated to provide the compensation. All restitution to victims required by the order shall be paid to the victims before any restitution is paid to such a provider of compensation.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

- Pursuant to 18 U.S.C. §§ 3613(b) and ©) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:

In installments:

Monthly installments of 10% of net monthly income over a period of 24 months, to commence fifteen days after the date of this judgment.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

FORFEITURE

Forfeiture is ordered as provided in the attached preliminary order of forfeiture.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: **before 2:00 P.M. on January 4, 2007.**

Date of Imposition of Judgment/Sentencing: September 6, 2006

REBECCA R. PALLMEYER
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 15th day of September, 2006

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 CR 506 - 4	DATE	9/11/2006
CASE TITLE	USA vs. George H. Ryan, Sr.		

DOCKET ENTRY TEXT

Motion of the United States for entry of an agreed preliminary order of forfeiture (865) granted. IT IS ORDERED, ADJUDGED and DECREED: That, pursuant to the provisions of 18 U.S.C. §§ 1963(a)(1), (2), and (3), c), and Fed. R. Crim. P. 32.2 and as agreed by defendants Lawrence Warner and George Ryan, all right, title, and interest of defendants Warner and Ryan in funds in the amount of $1.7 million, are hereby forfeited to the United States of America for disposition according to law. The court shall retain jurisdiction in this matter to take additional action and enter further orders as necessary. Enter Agreed Preliminary Order Of Forfeiture.

■ [For further detail see separate order(s).] Docketing to mail notices.

	Courtroom Deputy Initials:	ETV

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 02 CR 506
	)	The Hon. Rebecca R. Pallmeyer
LAWRENCE WARNER et. al.,	)	

AGREED PRELIMINARY ORDER OF FORFEITURE

This cause comes before the Court on motion of the United States for entry of a preliminary order of forfeiture as to specific property pursuant to the provisions of Title 18, United States Code, Sections 1963(a)(1), (2), and (3), and Fed R. Crim. P. 32.2, and the Court being fully informed hereby finds as follows:

(a) On December 23, 2003, a grand jury returned a multiple-count, second superseding indictment (the "indictment") against Lawrence Warner and George Ryan, alleging that these defendants were involved in a racketeering enterprise, pursuant to the provisions of 18 U.S.C. § 1962(d), among other violations;

(b) The indictment sought forfeiture to the United States of interests and property the defendants obtained pursuant to the provisions of 18 U.S.C. §§ 1963(a)(1), (2) and (3), including:

1. at least $3.1 million;

2. Defendant WARNER's interest in Joliet Maple LLC, including but not limited to, the real property having a Permanent Index Number of 07-11-500-011, commonly known as 605 Maple Road, Joliet, Illinois;

3. Defendant WARNER's interest in BL Mannheim Inc., including but not limited to, the real property having a Permanent Index Number of 15-09-300-100, commonly known as 405 N. Mannheim Road, Bellwood, Illinois;

(c) Pursuant to Title 18, United States Code, Section 1963(m), the indictment also sought forfeiture of any substitute property of the defendants WARNER and RYAN up to the value of the property described as being subject to forfeiture;

(d) On or about May 22, 2002, a temporary restraining order was entered against certain funds held in bank accounts controlled by defendant WARNER. On or about July 8, 2002, this Court entered an agreed order modifying the restraining order to allow for the release of the WARNER bank accounts upon the execution of a Security Agreement between WARNER and the government relating to WARNER's interest in real property located at 3201 S. Harlem in Berwyn, Illinois (the "Berwyn property") to secure any potential forfeiture liability;

(e) A jury trial was held and on April 17, 2006, a verdict of guilty was returned against defendants WARNER and RYAN on all counts, including the racketeering offenses, thereby making certain property subject to forfeiture to the United States pursuant to 18 U.S.C. §§ 1963(a)(1), (2), and (3);

(f) Defendants WARNER and RYAN waived their rights to have the forfeiture allegations in the indictment considered by the jury and agreed to have the Court resolve all issues regarding the forfeiture allegations in the indictment;

(g) The parties have agreed to resolve the forfeiture liability with the entry of a forfeiture judgment in the amount of $1.7 million, because funds in that amount are subject to forfeiture pursuant to 18 U.S.C. § 1963 as a result of the defendants' convictions. Further, the defendants have agreed to the entry of a preliminary order of forfeiture so that these funds in the amount of $1.7 million can be disposed of according to law. The terms and conditions of this preliminary order of forfeiture shall be part of the sentence imposed;

(h) It is further agreed that from the forfeiture judgment, funds in the amount of $_____ shall be credited to the restitution obligation as determined to be owing by the Court at the imposition of sentence. Accordingly, the payment of $1.7 million will satisfy completely defendants WARNER and RYAN's forfeiture and restitution obligations;

(i) As funds in the amount of $1.7 million are agreed to be subject to forfeiture, the government requests that this Court enter an agreed preliminary order of forfeiture, pursuant to 18 U.S.C. § 1963, forfeiting all right, title, and interest defendants WARNER and RYAN may have in the foregoing funds to the United States for disposition according to law to discharge the defendants' joint and several forfeiture liability arising from their convictions;

(j) Within 90 days of the entry of the preliminary order of forfeiture, defendant WARNER will provide a cashier's check in the amount of $1.7 million made payable to the United States Seized Asset Management Account. Upon receipt of the funds, the United States will release the lis pendens on the Berwyn property and will relinquish any right, title or interest therein. Defendant WARNER agrees that the funds used to satisfy this forfeiture judgment shall not be subject to claims by any third party. The parties agree that any interest on the judgment will be waived on the funds during the 90-day period;

(k) Further, it is agreed by the United States and the defendants that as part of the agreed forfeiture judgment neither party will appeal any issues relating to the forfeiture judgment or the calculation of the judgment amount making it final as to all parties. Upon entry of a final order of forfeiture as described below, the United States shall be permitted to dispose of the funds subject to forfeiture according to law. In the event that either defendant prosecutes an appeal or in the event that the criminal conviction as to either WARNER or RYAN is reversed on appeal, WARNER and

RYAN nonetheless each expressly waive any right, title or interest in the $1.7 million in forfeited funds, and said funds will remain the property of the United States to be disposed of according to law;

(l) Joliet Maple LLC and BL Mannheim Inc. are now defunct and WARNER no longer has any interest in either entity. The United States moves to dismiss the forfeiture allegations seeking to forfeit WARNER's interest in Joliet Maple LLC and BL Mannheim Inc.;

(m) Pursuant to the provisions of 18 U.S.C. § 1963(l)(1), upon entry of this agreed preliminary order of forfeiture and receipt of payment as agreed, the United States shall publish notice of this order and of its intent to dispose of the property according to law. The government may also, pursuant to statute, to the extent practicable, provide written notice to any person known to have alleged an interest in the property that is the subject of the preliminary order of forfeiture. As to the restitution component judgment amount as determined by the Court, the Office of the Secretary of State shall be notified and receive the portion of the judgment calculated as restitution;

(n) Further, in the event that defendant WARNER willfully fails to pay the forfeiture judgment on the schedule and in the manner set forth above, the United States shall seek the forfeiture of the property alleged to be subject to forfeiture in the second superseding indictment;

(o) Further, pursuant to the provisions of 18 U.S.C. § 1963(l)(2), any person, other than the defendants, asserting an interest in the property that has been ordered forfeited to the United States may, within thirty days of the final publication of notice or this receipt of notice under paragraph (m), whichever is earlier, petition the Court for a hearing to adjudicate the validity of this alleged interest in the property. The hearing shall be held before the Court alone, without a jury;

(p) Following the Court's disposition of all third party interests, the Court shall, if appropriate, enter a final order of forfeiture as to the property which is the subject of this preliminary order of forfeiture, which shall vest clear title in the United States of America;

(q) Pursuant to 18 U.S.C. §§ 1963(a)(1), (2), and (3), and Fed R. Crim. P32.2, the United States requests that the terms and conditions of this preliminary order of forfeiture shall be part of the sentence imposed against defendants WARNER and RYAN, and made part of any judgment and commitment order entered in this case against them.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED:

1. That, pursuant to the provisions of 18 U.S.C. §§ 1963(a)(1), (2), and (3), (c), and Fed R. Crim. P. 32.2 and as agreed to by defendants LAWRENCE WARNER and GEORGE RYAN, all right, title, and interest of defendants WARNER and RYAN in funds in the amount of $1.7 million, are hereby forfeited to the United States of America for disposition according to law. It is further ordered,

2. That, pursuant to the provisions of 18 U.S.C. §§ 1963(a)(1), (2), and (3), (c), and Fed. R. Crim. P. 32.2 a joint and several forfeiture judgment is entered in the amount of $1.7 million against defendants WARNER and RYAN. It is further ordered,

3. That, within 90 days of the entry of this preliminary order of forfeiture, defendant WARNER will provide a cashier's check in the amount of $1.7 million made payable to the United States Marshal Service Seized Management Account. Said funds will be deposited into an escrow account held by the United States Marshal. Upon receipt of the funds, the United States shall release the *lis pendens* on the real property commonly known as 3201 S. Harlem, Berwyn, Illinois and will relinquish any right, title or interest therein. Interest shall be waived for the 90 day period. It is

further ordered,

4. That, in the event that defendant WARNER willfully fails to pay the forfeiture judgment on the schedule and in the manner set forth above, the United States reserves the right to seek forfeiture of the property alleged to be subject to forfeiture in the second superseding indictment. It is further ordered,

5. That, the parties agreed that from the forfeiture judgment, funds in the amount of $103,348.00 shall be credited to the restitution obligation as determined to be owing by the Court at the imposition of sentence. Accordingly, the payment of $1.7 million will satisfy completely defendants WARNER and RYAN's forfeiture and restitution obligations. It is further ordered,

6. Pursuant to the provisions of 18 U.S.C. § 1963(l)(1), upon entry of this preliminary order of forfeiture and receipt of payment as agreed, the United States shall publish notice of this order and of its intent to dispose of the property according to law. The government may also, pursuant to statute, to the extent practicable, provide written notice to any person known to have alleged an interest in the property that is the subject of the preliminary order of forfeiture. As to the restitution component judgment amount as determined by the Court, the Office of the Secretary of State shall be notified and receive the portion of the judgment calculated as restitution. It is furthered,

7. That, pursuant to the provisions of 18 U.S.C. § 1963(l)(2), any person, other than the defendants, asserting an interest in the property that has been ordered forfeited to the United States may, within thirty days of the final publication of notice or this receipt of notice under paragraph six (6), whichever is earlier, petition the Court for a hearing to adjudicate the validity of this alleged interest in the property. The hearing shall be held before the Court alone, without a jury. It is

further ordered,

8. That, following the Court's disposition of all third party interests, the Court shall, if appropriate, enter a final order of forfeiture as to the property which is the subject of this preliminary order of forfeiture, which shall vest clear title in the United States of America. It is further ordered,

9. That, the terms and conditions of this preliminary order of forfeiture entered by the Court are made part of the sentence imposed against defendant WARNER and RYAN and included in any judgment and commitment order entered in this case against them. It is further ordered,

10. This Court shall retain jurisdiction in this matter to take additional action and enter further orders as necessary to implement and enforce this forfeiture order.

REBECCA R. PALLMEYER
United States District Judge

DATED: Sept. 11, 2006

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 06-3517 & 06-3528

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAWRENCE E. WARNER and
GEORGE H. RYAN, SR.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 02 CR 506-1, 4—Rebecca R. Pallmeyer, *Judge.*

ARGUED FEBRUARY 20, 2007—DECIDED AUGUST 21, 2007*
OPINION PUBLISHED SEPTEMBER 6, 2007

Before MANION, KANNE, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* This appeal comes to us after an investigation that lasted for years and a jury trial that lasted more than six months. In the end, the two defendants, former Illinois Governor George H. Ryan, Sr., and his associate Lawrence E. Warner, were convicted on various criminal charges. The case attracted a great deal of public attention, and thus the district court handling the trial had to deal with a number of problems, some of which were common and others less so. The fact that the

* This opinion was originally released in typescript on August 21, 2007.

trial may not have been picture perfect is, in itself, nothing unusual. The Supreme Court has observed more than once that "taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial." *United States v. Lane*, 474 U.S. 438, 445 (1986) (quoting *United States v. Hasting*, 461 U.S. 499, 508-09 (1983)). It is our job, in this as in any other criminal appeal, to decide whether any of the court's rulings so impaired the fairness and reliability of the proceeding that the only permissible remedy is a new trial.

Defendants Warner and Ryan raise eight grounds on appeal, six of them common and one argument unique to each. Their primary emphasis is on specific issues about the jury. They contend that the verdict was tainted by jurors' use of extraneous legal materials. They characterize the dismissal of a juror as an "arbitrary removal of a defense holdout." They object to the substitution of jurors after deliberations had begun. They also raise claims unrelated to the jury, including the arguments that the exclusion of certain evidence was an "erroneous exclusion of exculpatory evidence," that the prosecution failed to identify an "enterprise" for purposes of its charges under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, and that the mail fraud charges were grounded in an "unconstitutionally vague criminal statute," see 18 U.S.C. § 1346. Warner additionally objects to the joinder of his trial with Ryan's, and Ryan argues that certain grand jury testimony violated his attorney-client privilege.

Some potential issues, we note, are not before us. The defendants do not argue that the problems with the jury had a cumulative, prejudicial effect, even though they made this argument in their motion for a new trial before the district court. Nor do they claim that the evidence was insufficient to support any of the charges on which

they were convicted. Rather, their appeal is focused on particular alleged procedural and legal errors. As we would in any case, we review only those issues presented to this court. We conclude that the district court handled most problems that arose in an acceptable manner, and that whatever error remained was harmless. We therefore affirm the convictions.

I

The facts of this case are well-known, and so we recite only what is necessary to understand the issues on appeal. In December 2003, a grand jury returned a 22-count indictment against Warner and Ryan. After a lengthy trial, on April 17, 2006, a jury found Warner and Ryan guilty on all counts. On September 18, 2006, the district court set aside the jury's verdict with respect to two separate mail fraud counts against Ryan and then entered judgment against both defendants on the remaining counts. The court sentenced Warner to 41 months' imprisonment and Ryan to 78 months' imprisonment. The defendants both filed timely notices of appeal on September 20, 2006.

The story behind this case began in November 1990 when Ryan, then the Lieutenant Governor of Illinois, won election as Illinois's Secretary of State. He was re-elected to that post in 1994. Throughout Ryan's two terms in that office, Warner was one of Ryan's closest unpaid advisors. One of Ryan's duties as Secretary of State was to award leases and contracts for the office, using a process of competitive bidding for major contracts and selecting leases based on the staff's assessments of multiple options. Improprieties in awarding four leases and three contracts form the basis of the majority of the RICO and mail fraud counts against Warner and Ryan, as these leases and contracts were steered improperly to Warner-controlled entities. The result was hundreds of thousands

of dollars in benefits for Warner and Ryan. These benefits included financial support for Ryan's successful 1998 campaign for Governor of Illinois.

Prospective jurors for the trial in this case filled out a 110-question, 33-page form, which covered among many other topics the subjects of their criminal and litigation histories, their knowledge of the investigation of Ryan, and their awareness of Ryan's positions on public issues. Counsel for all parties and the court reviewed the questionnaires for four days; *voir dire* consumed another six days. The district court seated 12 jurors and eight alternates. The trial lasted six months. The prosecution presented approximately 80 witnesses against the defendants. In the end, the evidence supporting the jury's verdict was overwhelming. We give only a few examples here from the extensive record that was created. To begin with, the evidence showed that Ryan steered an $850,000 four-year Secretary of State's office lease to Warner for a property that Warner had recently purchased for just $200,000. Ryan took regular Jamaican vacations paid for by a currency-exchange owner to whom Ryan later steered a $500,000 six-year Secretary of State's office lease. Ryan took a Mexican vacation paid for by an individual to whom Ryan later steered another Secretary of State's office lease and a lobbying contract worth nearly $200,000 for virtually no work. Warner received more than $800,000 for helping a company land a major Secretary of State's office contract without registering as a lobbyist and added another of Ryan's friends into the arrangement at Ryan's request before the contract was awarded. Finally, and remarkably, despite evidence showing that they were enjoying a very nice lifestyle, Ryan's and his wife's total withdrawals from their bank accounts averaged less than $700 per year for 10 years.

The jury retired on March 13, 2006. This jury deliberated for eight days. During their deliberations, the jurors

were allowed occasional breaks so that some jurors could smoke outside. At the same times, some of the other jurors would go outside for fresh air or walk up and down the courthouse stairwells for exercise. No one formally objected to the court about these activities. On at least one occasion, the court noted that the jurors were accompanied by court personnel when on breaks. Putting media accounts and testimony that the district court discredited to one side, there is no basis in the record to conclude that any deliberations took place when the jurors were separated from one another.

It was not long before problems arose. On Monday, March 20, 2006, Juror Ezell sent the court a note, also signed by the foreperson, complaining that other jurors were calling her derogatory names and shouting profanities. The court conferred with counsel and responded with a note instructing the jurors to treat one another "with dignity and respect." Two days later, the court received a note from Juror Losacco signed by seven other jurors, asking if Juror Ezell could be excused because she was refusing to engage in meaningful discourse and was behaving in a physically aggressive manner. The court again conferred with counsel, noting that "[Losacco] has not told us anything about the way the jury stands on the merits. She really has not." The next morning the court responded with a note, which began, "You twelve are the jurors selected to decide this case." The note then reiterated that the jurors were to treat each other with respect and reminded them of their duties.

On the eighth day of deliberations, a few hours after the court responded to the Losacco note, media reports surfaced claiming that one of the jurors had given untruthful answers on the initial juror questionnaire regarding his criminal history. The court stopped the jury's deliberations while it looked into the new allegations. After a background check confirmed that Juror Pavlick had not disclosed a felony DUI conviction and a misdemeanor

reckless conduct conviction, the court questioned him individually. The court asked counsel if there would be any objection to dismissing Pavlick. Neither the prosecutor nor Ryan's counsel voiced any objection when Warner's counsel moved to dismiss Pavlick or when the court granted that motion.

It turned out that Juror Ezell's record was also problematic. A background check turned up seven criminal arrests, an outstanding warrant for driving on a suspended license, and an arrest under a false name, "Thora Jones." The fingerprints of the "Thora Jones" arrestee matched Ezell's, and it turned out that the name "Thora Jones" might belong to Ezell's daughter, who also has a significant criminal history. The government told the court that it would have moved to excuse Ezell for cause had it known during *voir dire* that she had given law enforcement officers false booking information, as the Ryan-Warner case also involved charges of providing false information to law enforcement officers. The court replied that "I suspect there would not have been an objection [to that cause challenge]. She would have been excused." The court proceeded to question Ezell, who acknowledged her untruthfulness. Even then, however, she was not forthcoming about her use of the name "Thora Jones" or about her daughter's criminal history. The court concluded that "some of the answers she just gave me . . . aren't truthful." Warner's counsel agreed that Ezell should be excused, while Ryan's counsel took no position initially. When the government moved to dismiss Ezell, Ryan's counsel objected to the standard employed but did not object to the decision to remove Ezell based on her untruthfulness.

The court also questioned a number of other jurors. It turned out that Jurors Gomilla and Talbot both had filed for bankruptcy in the mid-1990s, but neither included

this information in response to a question about whether they had ever appeared in court or been involved in a lawsuit. That question, however, appeared in a section entitled "Criminal Justice Experience." Several other jurors had also left that question blank: Juror Svymbersky, an alternate, who stole a bicycle at age 18 or 19 in 1983 and thought that the charges had been expunged; Juror Rein, who was arrested for assault for slapping his sister in 1980, but never appeared in court; Juror Casino, who had three arrests that he had not remembered when filling out the questionnaire, because they occurred 40 years earlier, in the 1960s, when he was in his early 20s; and Juror Masri, an alternate, who reported a 2000 DUI conviction but had said nothing about a 2004 DUI conviction or about his conditional discharge or probation in September 2005.

The defense argued that Svymbersky, Rein, Casino, and Masri should be dismissed for dishonesty, while the government took the position that all four were fit to serve. The district court initially was inclined to excuse Svymbersky and Masri, but it chose to re-interview Casino and Svymbersky, who both again stated that they had not recalled the incidents when filling out their questionnaires. The district court credited the testimony of Svymbersky, Rein, and Casino, concluding that they did not lie to the court. The district court did not credit Masri's testimony and excused him; no one objected. (We acknowledge the dissent's concern that the court did not state explicitly that it was granting the defendants' motion to excuse Masri for cause. Looking at the record as a whole, however, it is clear that this is what the court did. There was no other motion related to Masri pending, and the court had stated that jurors would be dismissed only for cause. If the court was not excusing Masri for cause, but instead seating alternates out of order, Masri would have remained an alternate as opposed to being excused. More importantly,

though, no one has objected to the characterization of Masri's dismissal as one based on cause.)

In light of the dismissals, it became necessary to seat alternates Svymbersky and DiMartino on the jury in place of Ezell and Pavlick. At that point, as authorized by FED. R. CRIM. P. 24(c)(3), the court decided that the reconstituted jury would need to start its deliberations from scratch. It questioned each of the remaining original jurors to ensure that they understood their obligation to disregard whatever had gone on before and to begin deliberations anew, and that they felt capable of doing so. They all answered yes. The court then re-read its instructions to the reconstituted jury, adding a new one to allay defense concerns with the questioning about the jurors' criminal histories. The new jury began deliberating on March 29, 2006. After 10 days' work, it returned guilty verdicts on all counts on April 17, 2006.

After the verdict, dismissed juror Ezell publicly criticized the jury and the verdict. On April 25, 2006, defense counsel asked the court to conduct a formal inquiry into her comments. On April 26, the court held a hearing on the motion in open court, during which the government noted that "nothing that [Ezell] has said . . . indicated any extraneous influence occurred." The court determined that "the allegations that Ms. Ezell appears to be making [do not] constitute the kind of misconduct [that would require an inquiry]." At some point later that day or the next day, defense counsel learned through new media reports that Ezell had alleged that Juror Peterson had brought "case and law" into the jury room about removing a juror for failing to deliberate. Defense counsel filed a new motion for an inquiry, which the court granted. On May 5, 2006, the court opened its inquiry into Ezell's allegations, interviewing both Ezell and Peterson. Ezell told the court that she had previously forgotten about "the case law" to explain why she had not previously men-

tioned the incident. Peterson acknowledged bringing into the jury room an article published by the American Judicature Society (AJS) (which she found by conducting a Google search of the term "deliberating") about the substitution of jurors and a handwritten note recording her own thoughts about the duty to deliberate. She read a portion of the article and the handwritten note to the rest of the jurors. The court concluded that these two excerpts "did not prejudice the outcome" and ultimately denied the defendants' motion for a new trial on that (and several other) grounds.

II

Both Warner and Ryan assert that the court's ruling on this "extraneous evidence" was wrong, prejudicial, and requires a new trial. A preliminary question that influences the rest of the analysis is whether either one, or both, of these items should be characterized as "extraneous" evidence. The district court concluded that the AJS article was, but that Juror Peterson's personal note was not.

A

Read in isolation, Peterson's note is hard to criticize. It said:

> You have the right to speak your opinion, but you have responsibility to use the facts[,] the testimony to support your opinion to seriously consider [sic]. If you don't use evidence and testimony to support your opinion your [sic] not being responsibly [sic].

The proper characterization of this note is a question of fact, which we review for clear error. *United States v. Mancillas*, 183 F.3d 682, 695 (7th Cir. 1999). Juror Peter-

son told the district court that her handwritten statement came from her own, independent thoughts. The district court credited that testimony, noting the lack of overlap between the subject of the AJS article and Peterson's note, as well as the similarities between Peterson's note and the court's instructions to the jury on their duty to deliberate.

Credibility findings are "binding on appeal unless the district judge has chosen to credit *exceedingly* improbable testimony." *United States v. Hubbard*, 61 F.3d 1261, 1278 (7th Cir. 1995) (emphasis in original). There is no reason to question the district court's assessment of Juror Peterson's explanation about the note, let alone any indication that Peterson's account was "exceedingly improbable." The defendants' trial counsel were present when the district court discussed the note with Peterson and were permitted to ask questions. The defendants imply that Peterson could not have composed the note without assistance from external sources, apparently on the theory that it expressed concepts beyond the capability of a kindergarten teacher (which is Peterson's profession). We cannot imagine why either we or the district court was required to draw any such inference, which is more than a little patronizing. Thus, the defendants are left only with the fact that Peterson put her thoughts on paper. Had she simply spoken those words to the jury without writing them first, FED. R. EVID. 606(b) would bar any consideration of them at all. We conclude that the district court did not err in determining that this note was not extraneous information and did not require any further action.

B

The AJS article was indisputably extraneous information in the jury room. It dealt generally with the subject of

juror removal and substitution. The excerpt that Peterson read to the jury was the following:

> But other bases for substitution raise serious questions about the sanctity of the deliberative process, primarily allegations by some jurors that another juror is unwilling or unable to meaningfully deliberate, or is unwilling to follow the law. Such an allegation requires a hearing where the judge must decide the tricky question whether the juror is truly unfit to serve, or is merely expressing an alternative viewpoint that will likely result in a hung jury. Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss that juror and substitute an alternate juror.

In essence, Peterson's act of reading that paragraph introduced new instructions into the jury room about the deliberative process, beyond those given by the court. There is no doubt that this should not have happened. The only question is whether it is such a fundamental error that it requires automatic reversal, or if it is subject to harmless error analysis.

The Supreme Court has repeatedly stressed the fact that so-called structural errors—those that fall outside the boundaries of harmless error analysis—are few and far between. Most recently, the Court found that a constitutional error in failing properly to apply the rule of *Blakely v. Washington*, 542 U.S. 296 (2004), was subject to harmless error analysis. See *Washington v. Recuenco*, 126 S.Ct. 2546 (2006). The Court explained:

> We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.'" *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). "'[I]f the

> defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. at 8 (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal.

126 S.Ct. at 2551 (footnote deleted). In a footnote, the Court reviewed the six "rare" areas where automatic reversal occurs: complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *Id.* at n.2. It also recalled that its earlier decision in *Neder* had involved defective jury instructions, and that it had applied harmless error analysis there. *Id.* at 2551.

The defendants do not contend that anything that *Recuenco* recognized as structural error occurred here. Instead, their argument is about jury instructions and external influences on the jury. The Court repeatedly has subjected challenges to external influences on jurors to harmless error analysis. In *United States v. Olano*, 507 U.S. 725, 738 (1993), it wrote that "[w]e generally have analyzed outside intrusions upon the jury for prejudicial impact." The Court summarized its "'intrusion' jurisprudence" by stating that "[d]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). Under *Neder* and similar cases, the introduction of the excerpt from the AJS article into the jury room is subject to harmless error analysis.

In evaluating it in this light, we bear two things in mind. First, we have held, and we reaffirm, that district courts

"retain . . . substantial discretion over the determination of whether the prejudice arising from the unauthorized contact is rebutted or harmless." *United States v. Sababu*, 891 F.2d 1308, 1335 (7th Cir. 1989); see also *Evans v. Young*, 854 F.2d 1081, 1084 (7th Cir. 1988). The relevant question is thus whether the court abused its discretion in making that determination. *Sababu*, 891 F.2d at 1334. Second, context matters. Many cases in which extraneous information made its way into the jury room involve evidence relevant to the defendant's guilt or innocence. See, *e.g.*, *United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996) (unadmitted transcript of admitted recording that labeled one speaker as the defendant although identification was in dispute); *Sababu*, 891 F.2d at 1332-33 (unadmitted transcript of defendant's unadmitted recorded conversation with a co-defendant); *United States v. Bruscino*, 687 F.2d 938, 941 (7th Cir. 1982) (*en banc*) (Bureau of Prisons document about the defendant's possible membership in a prison gang and a newspaper article about the case). The excerpt from the AJS article did not. Compare *United States v. Estrada*, 45 F.3d 1215, 1226 (8th Cir. 1995), *vacated on other grounds*, 516 U.S. 1023 (1995) (differentiating between external information that merely supplements the court's instructions and factual evidence not developed at trial).

We first consider whether the district court applied the proper legal standard for its inquiry. A district court's failure to use the proper legal standard is an abuse of discretion. *United States v. Austin*, 103 F.3d 606, 609 (7th Cir. 1997). A district court also abuses its discretion if the record contains no evidence on which the court could have relied or if its findings of fact are clearly erroneous. *United States v. Jain*, 174 F.3d 892, 899 (7th Cir. 1999).

This court has looked to the Supreme Court's decision in *Remmer v. United States*, 347 U.S. 227, 228 (1954), in

order to develop a legal standard in this area. *Sababu*, 891 F.2d at 1335. In *Remmer*, the Court considered the case of a juror who supposedly was offered a bribe for a vote to acquit. 347 U.S. at 228. The FBI was brought in to question the juror, and the district court concluded that the bribe was a joke, but the defendant was never told about the allegation. *Id.* *Remmer* held that

> [i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.

Id. at 229. The Court also said, however, that "[t]he presumption is not conclusive, but the burden rests heavily on the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.* It cautioned that inquiries of jurors about extraneous influences must strike a balance between the need to ensure that no prejudice has occurred and the need to let jurors deliberate unimpeded. *Id.*

District courts have some flexibility in structuring an inquiry into this kind of problem. *Bruscino*, 687 F.2d 938 at 940. Sometimes the circumstances are such that the *Remmer* presumption does not even apply. Thus, in *Whitehead v. Cowan*, 263 F.3d 708, 723 (7th Cir. 2001), we held that it did not apply to the publication of jurors' names and addresses by the media. *Whitehead* also suggested that "no *Remmer* hearing is necessary" where a "comment heard by a juror was ambiguous and innocuous." 263 F.3d at 725-26. We need not explore when a hearing may not be essential, however, since the district

court held one here. The general rule is that the district court "'should determine the circumstances [surrounding the improper contact] and the impact thereof on the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.'" *Sababu*, 891 F.2d at 1335 (quoting *Remmer*, 347 U.S. at 230).

The defendants argue that this standard does not adequately protect the deliberative process. They urge the adoption of a standard under which "any reasonable possibility of prejudice" from the external influence automatically entitles a defendant to a new trial. This, however, would represent a significant extension of the law. In our view, such an extension is not warranted and would in fact be inconsistent with the Supreme Court's approach to harmless error. If the district court is able to take remedial measures that remove the possibility of prejudice, or if it finds after a hearing that the Government has rebutted the presumption of prejudice, no new trial is required.

The district court described the approach it took to this issue as "a two-pronged inquiry." It said that it would determine "whether there was an extraneous influence on the jury, [and] whether from an objective perspective . . . what happened was prejudicial." The parties agreed to the judge's approach. Moreover, in the court's memorandum and order denying the defendants' motion for a new trial, the district court explicitly discussed the requirements and holdings of *Remmer*, *Bruscino*, and *Sababu*, among other cases, concluding that "[p]rejudice to the defendants is presumed . . . but is rebutted if there is no reasonable possibility that the verdict was affected by the contact." We are confident, in light of these statements, that the court identified the correct legal standard for its inquiry.

C

The question remains whether the court abused its discretion in applying the law. In *United States v. Sanders*, 962 F.2d 660 (7th Cir. 1992), we suggested a nonexclusive list of considerations that throw light on the question of prejudice. These factors "include [1] the extent and nature of the unauthorized contact, [2] the power of curative instructions, and [3] the responses of the jury." *Id.* at 669. We will follow that checklist here, understanding, of course, that in the end this type of inquiry simply helps to ensure that neither the district court nor we have overlooked anything important.

As we noted earlier, the AJS article was unrelated to the facts of the case or the defendants' guilt, and thus was less likely to prejudice the jury's evaluation of the central issues in the case. Furthermore, only the jurors who sat on the original jury were exposed to the article, and their exposure was brief.

The district court rejected the defendants' speculation that Peterson "believed this document was some sort of trump card in an ongoing dispute with [Juror] Ezell." The testimony was in conflict about how severe that dispute was: Ezell claimed that she cried after the AJS article was read to the original jury, while Peterson testified that no one responded emotionally at all. The district court concluded that the article "did not sway the course of deliberations" during the first jury's deliberations when it was read, nor (more importantly) did it "play any role in the reconstituted deliberations." In reaching this conclusion, the district court credited Peterson's testimony that Ezell did not change her approach to the deliberative process after the excerpt was read, and Peterson's testimony that she did not refer to the article at all during the reconstituted jury's deliberations. The defense cannot point to any evidence showing that the

district court's conclusions about credibility of the jurors regarding the external information were clearly erroneous.

The district court also concluded that the AJS article "does not state or imply that jurors must reach any decision," and could not "lead a reasonable juror to change his or her determination for fear of punishment." Rather, based on the court's instructions about deliberations, the "jurors may have reasonably believed, even without consulting extraneous material, that they could be removed if they refused to 'deliberate.'" This differs significantly from the situation faced by the Ninth Circuit in *United States v. Rosenthal*, in which a juror asked an attorney friend whether she had "any leeway" in following the court's instructions on the law, and her friend advised her that she "could get into trouble" if she strayed from the instructions, which implies a more severe penalty than simply being removed from a jury. 454 F.3d 943, 950 (9th Cir. 2006).

We now come to what may be the most powerful reason for concluding that Peterson's reading of the paragraph from the AJS article did not prejudice the defendants: it occurred during the deliberations of the initial jury, and the district court took measures to assure that the new jury could and would put Round 1 behind them. After dismissing Ezell and Pavlick, the district court asked each one of the remaining original jurors individually if he or she could disregard the previous deliberations and start over. For example, the court asked one juror, "If I were to tell you that today we are bringing some other jurors back and you must start all over, is that something you think you can do?" and "Could you, do you believe, to the best of your ability, put out of your mind all the discussion that's happened in the last few days with your fellow jurors?" The juror responded, "Yes, I can. Put it over and just start new." The court continued, "Just start as though it never happened before?" The juror replied,

"Yes." The court followed up yet again, "Any concerns about how—the difficulty that that would present for you?" The juror responded, "None whatsoever. I have no problems with it."

We approved a similar manner of proceeding in *Sanders*. There, "[the contacted juror] explicitly testified that she could put this incident behind her and continue to serve impartially as a juror." *Sanders*, 962 F.2d at 670. We concluded that "[b]ecause of this explicit testimony and the careful inquiry of the district court, we are unable to say that the district court abused its discretion in accepting Juror Layton's sworn statements and allowing the trial to continue." *Id.* *Sanders* compared this situation with "pretrial voir dire," about which "the Supreme Court has held that the test for determining impartiality in a prospective juror is whether he or she can 'lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" *Id.* at 670, n.10 (quoting *Murphy v. Florida*, 421 U.S. 794, 800 (1975)).

The court did not specifically instruct the remaining jurors to disregard the AJS article (as it had not yet come to light), but still the court trod carefully to avoid prying into the jury's earlier internal deliberations. This is because FED. R. EVID. 606(b) provides that

> [u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

The rule did not technically apply at the time of the new instructions to the remaining jurors, as the jury had not yet reached a verdict. The rule is based, however, on the

"long-recognized and very substantial concerns [that] support the protection of jury deliberations from intrusive inquiry." *Tanner v. United States*, 483 U.S. 107, 127 (1987). The court reasonably took care to abide by the spirit of the rule because the original jurors were going to return as part of the reconstituted jury. If by its inquiry the court sent the implicit message that future deliberations might not be secret, then we would be facing a different set of problems with the reconstituted jury's verdict.

Following the juror interviews, the district court made a precautionary statement to the new jury before instructing it:

> You may have heard by now that two of the original jurors in this case were excused from further jury service. I want you to know, as I've told some of you already, that the circumstances that brought about the fact that these two jurors were excused, *those circumstances were not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations*, those of you who were here. Rather, the inquiry was generated by members of the media. . . . I want you to know that in attempting to reach verdicts in this case you are answerable only to your own conscious [sic]. It is your job, and your job alone, to find the facts in this case and to apply the law that I have given you. . . . The fact that there have been circumstances that led to two jurors being excused should not in any way enter into your deliberations. . . . [I]t is imperative that you completely put your prior deliberations out of your mind. You must treat this case as if the prior deliberations did not occur. *You also should not discuss or mention any statements or comments made during the prior deliberations when you begin these new deliberations.*

(emphasis added).

There is a general presumption that juries follow their instructions. See, *e.g.*, *Penry v. Johnson*, 532 U.S. 782, 799 (2001) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)); see also *United States v. McClinton*, 135 F.3d 1178, 1189 (7th Cir. 1998). This presumption is overcome only if there is an "overwhelming possibility" that the jury was unable to follow the instructions. *Greer v. Miller*, 483 U.S. 756, 767 n.8 (1987). Here, it is hard to imagine instructions that would be better tailored to the issue of the AJS article, as well as to the other concerns about the original deliberations that the defendants allege. (The defendants' assertion that some of the jurors believed that they "could force the removal of a fellow juror" also fails in light of these instructions and the court's credibility findings.) During the post-trial proceedings, the district court once again concluded that "the court believes that the jurors who deliberated to verdict in this case were diligent and impartial. . . . They sat attentively through nearly six months of evidence. . . . The court believes these jurors made every effort to be fair, even amid extraordinary public scrutiny." This assessment is entitled to deference from us.

D

The defendants make one final argument about the alleged external influences on the jury. They claim that the district court "*acknowledged* presumptive prejudice, [but] it effectively required a showing of *actual* prejudice." We do not see it that way. The defendants are forgetting that there is a middle ground, in which the court finds presumptive prejudice, but it then goes on to find that the government has rebutted that presumption. After interviewing both Ezell and Peterson, the district court stated, "I am comfortable, based upon what I have heard, at least at this point, that the jurors' brief consideration

of that material did not [cause] prejudice." The court did not conclude that the defendants lost because they failed to show actual prejudice, or that it was their burden to do so. It found that the government satisfied *its* burden to show that there was no prejudice, as it is entitled to do under *Remmer*. For all of these reasons, the district court did not abuse its discretion in concluding that the extraneous information at issue did not prejudice the defendants.

III

At the outset of the trial, the district court empaneled eight alternates to the jury. In the end, most of these alternates were necessary to provide the defendants with a full jury. By the time the trial reached the jury deliberation stage, one juror had been excused for inability to serve—Juror McFadden, who was dismissed on the court's own motion because she had a medical condition that made her repeatedly fall asleep during the trial.

The revelations of the possible criminal records of some of the original jurors led, as we have said, to the district court's decision to excuse Jurors Pavlick and Ezell and to replace them with alternates. Defendants raise five arguments relating to the process of removal and replacement: first, they accuse the district court of misleading defense counsel about the standard that would be used for removing jurors; second, they assert that the court applied an arbitrary standard for dismissals; third, they claim that the prosecution knew that Ezell was a holdout juror for the defense at the time it moved for Ezell's removal; fourth, they speculate that the removal of Ezell chilled pro-defense jurors; and finally, they fear that the investigation into the jurors' backgrounds biased the jurors against the defense.

A

The most important question for purposes of this part of the appeal is whether the district court correctly decided to rely on the standard established in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), for assessing these various challenges to the jury. In *McDonough*, the Supreme Court held that an inaccurate answer on a jury questionnaire discovered after the verdict was returned could be grounds for a new trial only if the "correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. Defendants claim that this standard is inappropriate for pre-verdict removals because *McDonough* rested on the need for finality in a given jury's verdict. The implication of their position is that it is actually impossible to remove a juror for cause once deliberations have started. This is not the case, as FED. R. CRIM. P. 24(c)(3) illustrates. Furthermore, most of the interests in finality recognized by *McDonough* have already accrued by the time a fully tried case is submitted to a jury. We can see no sense in a rule that forces the court to sit by idly, knowing that it ought to remove a juror, just so that the jury can return a verdict and the facts of *McDonough* will be replicated. The district court was correct to turn to *McDonough* for guidance on how to resolve the problems that had arisen.

B

The next question is whether the district court applied this standard consistently. When the possibility arose that some sitting jurors would need to be removed because of their criminal records, the court asked the attorneys for their thoughts on the standard to apply to possible removals. All attorneys responded with arguments to the court. Less than an hour later, the court

informed counsel that it saw a difference between jurors such as Pavlick and Ezell, for whom there were significant disparities between the questionnaires and their recent criminal histories, on the one hand, and jurors such as Casino, who may simply have forgotten long past criminal histories or may not have understood what was required to be disclosed.

In the end, the district court concluded and repeatedly stated that the appropriate action would be to excuse any juror for whom the newly acquired information would have led to a challenge for cause by one of the parties that the court would have granted. The court announced that it would follow that standard even if the result was to reduce the number of jurors below the number required to reach a verdict. This is precisely what *McDonough* calls for: changing the composition of the jury after the time for peremptory challenges has expired only if the "cause" standard is met. When faced with a post-trial argument about a juror, the Supreme Court has focused on the question whether a district court's ruling "result[ed] in the seating of any juror who should have been dismissed for cause," not on whether some other jury might also have been impartial. *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000).

Before Ezell was dismissed, the district court asked defense counsel if they were accepting its standard. The court again clarified the standard being used, stating that a juror's saying only that she did not understand a question, or a juror acknowledging that she may not have answered everything truthfully, might not be excusable solely for that reason. The government agreed and noted that even if it might have made a challenge for cause, the decision would have been the court's in the end. The defense counsel stated their disagreement "that that's the standard that should be applied," and again expressed a preference for removing any juror "the Court has found . . .

not [to be] truthful." When all was said and done, however, this was just a discussion about how to apply the *McDonough* standard to these facts. The court recognized this: in its order denying defendants' motion for a new trial, it reiterated that it had applied the *McDonough* standard to removing the contested jurors.

Ignoring this extensive exchange, the defendants claim that "the district court never made any findings with respect to any juror that would have constituted a valid challenge for cause." The record does not support that assertion. The dismissal of Ezell provides a good example. After explaining the applicable standard, the district court said, "Let's just start with the use of an alias. I think that probably would have been a basis for cause. . . ." Prior to Ezell's dismissal, the government told the district court that it would have challenged her for cause had it known that "she has an arrest with a false name" because "[h]ow somebody who gives law enforcement officers false information upon an arrest can possibly be an impartial juror in this case, where one of the charges is giving false information to law enforcement officers, is well beyond me." The prosecution added, "Judge, there would not have been a contest" and that it was "[n]ot even an issue" because the government would always challenge for cause under such circumstances. The court responded that "if . . . there would have been a cause challenge, I suspect there would not have been an objection. She would have been excused."

Soon after saying that, the court questioned Ezell about her arrest under a false name and concluded that her response was not forthcoming. As the court put it, "[Ezell] has never told us the truth about the [false] name Thora Jones." After listening to the attorneys' arguments, the court said, "I think she has concealed a great deal of information. And the critical question is, had this ques-

tion been answered, would it have been grounds for cause? I can't imagine that the answer is anything other than yes. I think I have to excuse her." This is enough to convince us that Ezell was removed because she would have been removable for cause. This case is not like *United States v. Harbin*, where the district court told the parties that jurors would be removed only for cause once trial began, but then it allowed the prosecution to use a peremptory challenge to remove a juror during the trial. 250 F.3d 532, 547 (7th Cir. 2001). Based on the lengthy discussions among the court, the prosecutors, and defense counsel, it is apparent that everyone knew that the court was using the *McDonough* standard.

The defendants try to undermine this conclusion by arguing that the prosecution did not raise challenges for cause against all jurors with criminal convictions or family members with extensive criminal histories. To the extent that this is accurate, this argument would sway us only if the government did not challenge jurors with the same types of criminal histories as those who were struck for cause during deliberations. *Cf. Coulter v. McCann*, 484 F.3d 459, 465 (7th Cir. 2007) (reiterating the established principle that when defense counsel claims that prosecutors have used a peremptory strike for an impermissible reason, it is necessary to show a "similarly situated venireperson" who was not struck). In this case, the defense has pointed to no comparable jurors who were not struck. No other juror had committed, as Ezell had, conduct with such significant similarities to the charged conduct at issue in the case.

Pavlick's dismissal during deliberations stemmed from an undisclosed felony DUI conviction during Ryan's tenure as Secretary of State. The Illinois Secretary of State sets many significant drunk driving policies, and this case dealt with locations of the Secretary's local motor vehicles administration facilities that might have con-

nected Pavlick's conviction to Ryan's office. In fact, it appears that there was some action taken by the Secretary of State against Pavlick while Ryan was serving in that office. The conviction, coupled with Pavlick's negative association with Ryan's office, provide ample grounds for dismissal for cause. Even Warner's counsel stated, "[w]e have a real concern with a convicted felon sitting with a deliberating jury for eight days." There was no argument from any attorney before the district court that Pavlick would not have been removed for cause had he been honest during *voir dire*. Also, the only juror with similar convictions to Pavlik's—alternate Masri—was also dismissed. Again, the district court was entitled to remove Pavlick under the *McDonough* standard.

Other jurors also found themselves under the court's scrutiny. Alternate juror Svymbersky failed to disclose a 23-year-old conviction charge for purchasing a stolen bicycle, explaining that he had not thought of it when filling out his questionnaire. The court ultimately believed this explanation. Juror Casino had three arrests (including one conviction) in the 1960s. He too testified that he did not remember these incidents when filling out the questionnaire. The district court remarked after interviewing Casino that "[t]his juror is as credible as any juror I have ever had." The court listened to the attorneys argue about Casino and then said, "somebody who really, truly doesn't remember it and hasn't gotten in any trouble since, it seems to me could hardly have a bias." Juror Rein was arrested in 1980 for assault for slapping his sister, but never appeared in court for the charge and thought that the matter had been expunged from his record. He testified that he did not recall the event when he filled out his questionnaire. By contrast, alternate juror Masri had reported a DUI conviction in 2000 but had not disclosed another DUI conviction in 2004 or that he was on probation in September 2005. The district

court ultimately allowed the defendants' cause challenge against Masri, and we have already noted the similarities between Pavlick's and Masri's criminal records. Although one of Masri's DUI misdemeanor convictions came out during *voir dire*, that one did not occur while Ryan was the Secretary of State, and therefore it is not unreasonable that neither party would have moved to remove him for cause for that conviction alone. Only when it turned out that there were multiple, recent convictions, and that Masri was trying to hide them, did the likelihood that he would have been removed for cause become significant.

Looking at these other jurors (apart from Ezell and Pavlick), we view the district court's conclusion that only Masri could have faced a valid challenge for cause as reasonable. A district court has no obligation to grant a challenge every time it turns out that a venireperson has a criminal record. It has the discretion to determine, based on all the facts, whether dismissal for cause is necessary. *United States v. Ray*, 238 F.3d 828, 937 (7th Cir. 2001). We conclude that the district court applied the *McDonough* standard consistently in considering whether to excuse each of the jurors with undisclosed criminal histories.

C

Next we address the defendants' claim that the prosecution knew that Ezell was a defense holdout and that this was the real reason why Ezell was dismissed. The record does not support this contention. Three jurors were dismissed (Pavlick, Ezell, and Masri) after the investigations into their questionnaires. The district court concluded that "I have genuine concerns that Mr. Pavlick and Ms. Ezell . . . may very well have been motivated to get on the jury." Indeed, the strongest cases for challenges for cause were against these two jurors.

We cannot find any basis in the record to conclude that the district court dismissed Ezell because of her view of the evidence or that the prosecution tricked the district court into dismissing Ezell for cause based on its belief about Ezell's view of the evidence. The district court was troubled immediately after Ezell's criminal history was disclosed. We have no doubt that the district court's reasons (which we have already reviewed) for dismissing Ezell for cause were genuine.

Because of this, it does not matter what the prosecution may have suspected about Ezell's views on the evidence in this case. It is the court's actions that count when a decision is within the discretion of the court, not counsel's motivations for supporting or opposing the court's actions. So long as the court was not hoodwinked into believing there was cause where there was none (and it was not), the removal was proper. Without belaboring the point, we note finally that there is no serious basis in the record supporting the defense's speculation that the prosecution somehow knew that Ezell was a "defense" juror and that it was trying to bounce her from the jury for that reason. At best, everyone was guessing. These hunches fall far short of supporting the defendants' argument that the prosecution knew Ezell's view of the evidence, let alone sought her dismissal for that reason.

D

The defendants also contend that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations." Based on our discussion above, we believe that the instructions that the court gave to the reconstituted jury prevented any chilling of pro-defense views in the new jury. It is also worth noting that the jurors who served on both juries would have recalled that when the court initially received the note about Ezell, it

responded by instructing the jury that "you twelve are the jurors selected to decide this case." This instruction also operated to prevent any potential chilling of pro-defense views (or any other dissenting views). Moreover, the first juror dismissed after that response from the court was Pavlick, who had signed the note, not Ezell.

E

The defendants' last argument relating to the jury is that the background checks on jurors that the court ordered when word of the criminal backgrounds hit the media prejudiced the defense. The government rightly points out that the defense asked for many of these checks. Although this comes close to waiving this point for appeal, we are willing to assume that the defense's waiver was not complete. Nevertheless, the district court's specific instructions to the reconstituted jury, as well as its repeated admonitions to avoid media coverage of the trial, precluded any bias against the defense by preventing the jurors from knowing about the extent of the background checks. The defendants' only real support for their argument comes from Juror Losacco's testimony that she was "scared" during her interview. But this trepidation appears to have resulted from the number of lawyers in the room during her interview rather than any feeling that she needed to serve the prosecution's interest or risk punishment. Therefore, we see no abuse of the court's discretion in its decision to call for the background checks.

In summary, the defendants' complaints about the court's handling of the jury are unsupported by the law and the record. The district court properly employed the *McDonough* standard in determining whether jurors should be removed, in determining whether a misstatement was made on the juror questionnaires and the reasons for the misstatement, and in focusing on whether

the undisclosed information would have supported striking that juror for cause. With careful consideration and full attention to all counsels' arguments, the district court applied that standard consistently and openly to all of the jurors and alternates. The court did not dismiss Ezell because she was a "holdout," nor were jury deliberations chilled because of the way in which Ezell was removed. Finally, the record suggests no reason to think that the reconstituted jury was biased against the defendants because of the court's inquiries.

IV

The defendants next argue that the replacement of jurors after eight days of deliberations deprived them of their right to a fair trial before an impartial jury. One major strike against this argument is the fact that since its amendment in 1999, FED. R. CRIM. P. 24(c) has allowed for the removal of deliberating jurors. Although the defendants contend that the government has the burden of showing that a juror replacement during deliberations is not prejudicial, this burden allocation is not supported by the text of Rule 24(c)(3), which states:

> *Retaining Alternate Jurors.* The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

So long as the two explicit conditions of the rule—ensuring that the alternate does not discuss the case prior to replacing an original juror and instructing the jury to restart deliberations—are satisfied, the decision to re-

place deliberating jurors rests firmly within the district court's discretion.

We have held that "[r]emoving [a] questioned juror and replacing her with an alternate" is reviewed for abuse of discretion. *United States v. Sandoval*, 241 F.3d 549, 552 (7th Cir. 2001). There is nothing in the text of Rule 24(c)(3) to suggest that a different approach is required for reviewing removals that occur during deliberations. The Fifth Circuit employed an abuse of discretion standard for juror removals during deliberations, although it is not clear whether the trial in that case took place before or after the Rule 24 amendment came into force; it concluded that a district court abuses its discretion in the context of juror removal only "if the juror was discharged without factual support or for a legally irrelevant reason." *United States v. Edwards*, 303 F.3d 606, 631 (5th Cir. 2002) (internal quotation marks and citations omitted).

The defendants urge us to rely on cases that pre-date Rule 24's amendment. They argue that we must reverse the conviction if "the record indicates a reasonable possibility of prejudice" from the removal of the juror during deliberations. *United States v. Register*, 182 F.3d 820, 843 (11th Cir. 1999). The flaw in this argument is that *Register* based its holding on "the letter of Rule 24(c)," which at that time stated that "[a]n alternate juror who does not replace a regular juror *shall be discharged* after the jury retires to consider its verdict." *Id.* (emphasis added). The court wrote that the rule "do[es] not apply a *per se* reversal standard to Rule 24(c) violations, [but rather] . . . the harmless error test and reverse[s] . . . only where there is a reasonable possibility that the district court's violation of Rule 24(c) actually prejudiced [the defendant] by affecting the jury's final verdict." *Id.* at 842. Thus, *Register* undertook a prejudice inquiry only be-

cause the district court had no discretion under the old Rule 24(c) to retain alternate jurors.

Under the amended Rule 24(c), the district court has discretion to retain alternates during deliberations. We think it most useful to look to our general approach to Rule 24 to decide whether the court properly removed Ezell and Pavlick. Only where a district court fails to comply with the non-discretionary requirements of Rule 24(c)(3) should our review require a prejudice inquiry like that in *Register*. Otherwise, "if the record shows some legitimate basis for th[e] decision [to replace a juror], there is no abuse of discretion." *United States v. Humphrey*, 34 F.3d 551, 557 (7th Cir. 1994). The defendants have the burden of demonstrating on appeal that there was no legitimate basis in the record for the district court to remove Ezell and Pavlick and replace them with alternates.

The defendants claim that the jurors were incapable of following the court's instructions to begin anew, but we have already rejected that argument. They also point to the fact that the jury had sought and received guidance from the court during its original deliberations, and they charge that the jury "resorted to misconduct in an effort to force the removal of a holdout defense juror," about which we have little more to say. The defendants also refer to unsubstantiated reports in the media that the jury had already deliberated to verdict on several counts to demonstrate that there was no basis in the record for the district court to seat the two alternate jurors.

We have no intention of deciding this case based on anything but what is properly in the record. The only allegation that we need address is the one of jury misconduct, and it is easily rejected. The district court, based on its assessments of the jury's notes to the court, concluded that there was no concerted effort to remove any juror based on her viewpoint. This conclusion, which is sup-

ported by the record, provides all the basis this court needs to affirm the district court's decision to order substitutions of jurors.

The defendants complain that we have no way of knowing whether the jury really started its deliberations anew, as the court told it to do. They also charge that the record reveals a likelihood that empaneled alternate DiMartino discussed the case with outsiders while the first jury's deliberations were ongoing. We have no quarrel with the Eleventh Circuit's practical observation that "the further along deliberations proceed, the more difficult it becomes to disregard them and begin anew." *United States v. Kopituk*, 690 F.2d 1289, 1310-11 (11th Cir. 1982). *Kopituk* also held, however, even before the amendment to Rule 24, that even though

> the jury spent a total of approximately five days deliberating prior to substitution of the alternate . . ., the jurors' individual assurances that they could and would begin deliberating anew, combined with the fact that the jury deliberated for a full week subsequent to substitution of the alternate juror, is sufficient indication that the jurors were able to and did in fact obey the court's extensive instructions regarding their duty to eliminate all prior deliberations from their minds and begin with a clean slate.

Id.; see also *Edwards*, 303 F.3d at 631 (dismissing a juror after 11 days of deliberations, although not discussing seating an alternate); *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (overturning verdict where reconstituted jury deliberated for only 29 minutes). In the case before us, the original jury deliberated for eight days and the reconstituted jury deliberated for ten. As in *Kopituk*, there is nothing here to suggest that the jurors did not obey the court's instructions and begin deliberations anew. Indeed, the reconstituted jury even requested additional instructions from the court on

specific counts in the indictment during its deliberations that the original jury had not sought.

The record also gives no reason to be especially concerned about alternate DiMartino. She testified before being seated that every time someone would approach her about the case while the first jury was deliberating, she would cut them off immediately. When asked by the court if there was anything she had heard that could "interfere with your ability to become—to start fresh with the jury," she replied, "No . . . because, like I said, we never sat down and had a conversation and discussed anything, what they heard or anything. . . . I would just go, 'Please don't talk about it to me,' I said, 'I am still involved.'" As the district court made clear in its denial of defendants' motion for new trial, it found these statements to be credible. We have no reason to second-guess that factual determination.

Rule 24(c) therefore furnishes no basis for a finding that the district court abused its discretion in replacing jurors Ezell and Pavlick with alternate jurors DiMartino and Svymbersky. Defendants have made no showing that this replacement of jurors does not fall squarely within the allowable bounds of the new Rule 24. As they confess in their brief, they seek a holding that "almost any decision to substitute [during deliberations is] prejudicial." This cannot be the proper standard under the new Rule 24(c).

V

Moving, at last, away from the jury issues, the defendants claim that the district court erred in excluding evidence that showed Ryan's good faith, Ryan's lack of fraudulent intent, and the reasonableness of Ryan's belief about the bona fides of the transactions at issue in

this case, including those that involved Warner. We review a district court's evidentiary decisions for abuse of discretion. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). Mail fraud is a specific intent crime, and so defendants are entitled to introduce evidence of good faith or absence of intent to defraud. *United States v. Longfellow*, 43 F.3d 318, 321 (7th Cir. 1994). This court, however, "do[es] not require that any evidence, no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith." *Id.* at 321-22.

A

The first evidentiary dispute arose when Ryan wanted to introduce evidence to the effect that his successor as Secretary of State, Jesse White, had renewed some of the leases and contracts at issue here. The district court excluded this evidence as irrelevant. It reasoned that "the naked act of some other official, whether he preceded or followed Ryan in office, does not shed any light on what Ryan himself intended when he took that same act, absent evidence that Ryan actually considered the official's act." It continued, "[t]he decision to renew a lease is, moreover, one influenced by many factors other than the decision to enter into a lease in the first place." The question for us is whether this decision was an abuse of the district court's discretion.

Many of the leases at issue here involved property for long-term operations, such as DMV locations and a police department office. These are not the type of facilities that the state can pack up every few years and move just because rent is slightly cheaper a few blocks away. Thus, a later administrative decision to renew such a lease shows only that the lease is not so disadvantageous

to the state that it outweighs the costs that would be required to move to a new location. It sheds no light on whether the original lease or contract was proper.

In making its determination, the district court was not applying any sort of "inflexible rules." In *Riordan v. Kempiners*, one of the cases the defendants cite, the district court had drawn a line in time and prohibited all evidence that developed after a specific date. 831 F.2d 690, 698 (7th Cir. 1987); see also *CERAbio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 993 (7th Cir. 2005) (holding that evidentiary exclusions should be made based on the substantive value of the evidence rather than the date of the evidence). The district court's ruling here, in contrast, was based on the substance of the evidence that would be offered and the court's evaluation of the probative value of that evidence.

The limited nature of the district court's ruling becomes even more evident when one sees that it did not even apply to all evidence post-dating the leases and contracts. Both the prosecution and defense provided experts to assess the soundness of the contracts and leases at issue in this case. The government's expert offered only a retrospective analysis of the extent to which some of the subject leases reflected fair market value. The defense expert, in contrast, appears to have based his opinion in part on an analysis of leases and properties that were not available until years after the leases at issue were awarded.

Defendants therefore had the opportunity to justify the contracts and leases at issue using economic analysis and expert testimony; they were not deprived of the opportunity to assess these deals with the benefit of hindsight. This means as well that the defense was not arbitrarily foreclosed from putting forth relevant evidence, the error criticized in *CERAbio*, 410 F.3d at 994.

The defendants' argument that prosecution witness Glen Good's testimony unfairly crossed some temporal line fails because there was no such line. The proper comparison, in any event, is not between Good's testimony and evidence that Secretary White renewed the leases. It is between Good's testimony and the defendants' evidence about lease decisions and the results of those decisions during Ryan's tenure as Secretary of State. Good, who was in charge of property maintenance during Ryan's term in office, testified about the soundness of particular lease decisions during Ryan's tenure. Good's testimony also rebutted the argument that Ryan made lease decisions only on the basis of recommendations from his staff. Ryan was free at trial to introduce evidence about his decision-making process for the leases and contracts in question, and he took advantage of that opportunity. The defense was also allowed to cross-examine Good extensively (over the government's objection) about the information he omitted from his reports about certain various properties at issue in this case.

It is conceivable that another court would have reached different conclusions about the relevance of this excluded evidence, but that does not mean that the district court abused its discretion here. We conclude that its ruling was one that it reasonably could have made, that it was not a result of arbitrary line-drawing, and thus that it did not give rise to reversible error.

B

The district court used a similar rationale to exclude evidence of rate increases made by other Illinois Secretaries of State. The defendants claim that the district court "refused to admit defense evidence showing that such rate increases were a regular practice of the SOS." This mischaracterizes the district court's holding. The specific

rate increases by other officials were excluded where they played no role in Ryan's rate increase. The court allowed Ryan to introduce evidence that his predecessor (and his predecessor's advisors) recommended a rate increase as overdue, but held off on the increase for election reasons. This type of evidence is arguably probative because it provides support to Ryan's contention that the increase was a sound policy decision. See *Longfellow*, 43 F.3d at 322.

The defendants claim that the rate hikes approved by other Secretaries of State were "evidence of the routine practice of [an] organization[ ]" and should have been allowed as evidence under FED. R. EVID. 406. A "routine practice," however, requires more repetition and mechanization than the occasional rate decisions here displayed. See Advisory Committee Notes for Rule 406 (emphasizing the need for a "repeated specific situation" before something qualifies as "habit"). The Note comments that "[e]quivalent behavior on the part of a group is designated 'routine practice of an organization' in the rule." The practice that the defense wanted to demonstrate here was not the type of "regular response to a repeated specific situation" required for admission under Rule 406. Here again, we conclude that the district court did not abuse its discretion by excluding the proffered evidence.

C

Finally, the defendants challenge the exclusion of certain policy decisions that Ryan made while in office. The defense argues that "the prosecution attacked Ryan at trial as [a] 'greedy,' 'shameless' politician who treated his public offices as 'personal kingdoms' in which he was 'pillaging the state, stealing from the taxpayers' in breach of the public's trust." Ryan, they argue, was entitled to an opportunity to correct this impression. If these quotes

had come from the government's case-in-chief, then they might have a point. But they did not. The quoted statements come from the prosecution's closing argument. The government did not use evidence of Ryan's general dishonesty in its case-in-chief; it focused on the bad faith associated with the criminal acts charged in this case. The district court permitted Ryan to introduce evidence of many of his policy accomplishments and goals. It also allowed him to call numerous character witnesses, who testified about such achievements as strengthened drunk driving laws, improvements in the state library system, the development of an organ donor registry, and reform of Illinois's death penalty laws. The government's closing argument was therefore an allowable response.

The defendants also point to a particular government witness, Patrick Quinn, whom the defense sought to impeach through his opposition to Ryan's death penalty work. The district court was prepared to allow the defense to impeach Quinn, but it was willing to permit reference only to a "public policy" disagreement, not to the death penalty. Ryan chose not to impeach the witness. The defendants have not shown how they were prejudiced by this limitation.

In a more general argument, the defendants contend that had the jury been able to view the charged acts alongside the excluded evidence of Ryan's policy work, it would have seen that the evidence overall "did not fairly indicate the existence of a scheme to defraud." *Worthington v. United States*, 64 F.2d 936, 942 (7th Cir. 1933). The link between the excluded evidence and the charged acts, however, is not so direct.

Had it existed, evidence that Ryan steered leases or contracts away from his financial benefactors might have cast some doubt on the existence of the conspiracy and scheme charged. But Ryan's work on issues of importance

to the public, such as the death penalty, important and admirable though it may have been in many people's eyes, does nothing to show that Ryan was not at the same time accepting financial benefits in exchange for other specific, official actions. So long as the government did not allege specifically that *all* of Ryan's acts as Governor were for his own financial gain, the district court was within its rights to exclude discussion of various official acts that were wholly disconnected from the charges in this case. Courts have held that excluding evidence of satisfied customers is not an abuse of discretion in cases charging a defendant with a fraudulent scheme. See, *e.g.*, *United States v. Elliott*, 62 F.3d 1304, 1308 (11th Cir. 1995). Excluding evidence of activities even further removed from the charged acts is not an abuse of discretion either.

VI

In the next part of their appeal, the defendants raise a question of law: is it permissible for the government to charge and prove the State of Illinois itself is an "enterprise" for RICO purposes, and secondarily, did the district court err when it instructed the jury that the State of Illinois is a "legal entity." We consider these arguments in turn.

A

The question whether a state may be an "enterprise" for purposes of a RICO prosecution is one of first impression. The defendants' first reason for arguing that it cannot be relies on the remedies allowed under RICO. The statute provides for remedies including court-ordered "dissolution or reorganization of any enterprise," 18 U.S.C. § 1964(a). Since it is obvious that no court would have the

power to disband a sovereign state, the defendants argue that the remedial provisions of the law implicitly mean that the state cannot be a RICO enterprise.

The only problem with this attack is that the Supreme Court rejected it long ago:

> Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept. Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions.

United States v. Turkette, 452 U.S. 576, 585 (1981). RICO provides a menu of remedies; it does not matter if one or more of the items on that menu might be unavailable in a particular case. Instead, what is important, according to *Turkette*, is that Congress meant the term "enterprise" to be "inclusive." 452 U.S. at 586.

This court has held that other public bodies, which similarly cannot be dissolved, may be the "enterprise" through which a RICO conspiracy or operation proceeds. See, *e.g.*, *United States v. Murphy*, 768 F.2d 1518, 1531 (7th Cir. 1985) (the Circuit Court of Cook County); *United States v. Lee Stoller Enters., Inc.*, 652 F.2d 1313, 1318-19 & n.9 (7th Cir. 1981) (*en banc*) (RICO enterprise can be a public body, citing cases). We conclude that for purposes of defining a RICO "enterprise" there is no difference between the state and its subdivisions.

The defendants next argue that comity interests prevent the use of a state as a RICO enterprise in a criminal case. The only court to consider directly whether a state can be a RICO enterprise was the District Court of Maryland. *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976). The defendants urge us to accept the reasoning

in *Mandel*, which found that the State of Maryland was not a RICO enterprise in the prosecution of a Maryland governor. 415 F. Supp. at 1021. District court opinions have no authoritative effect on this court, so we look to the analysis of district courts only to inform, rather than instruct, our decisions. *RLJCS Enters. v. Prof'l Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 494, 499 (7th Cir. 2007).

It is enough to note that *Mandel* did not limit its analysis to states as potential RICO enterprises. The district court there expressed concern about the possibility of finding that *any* public entity was a RICO enterprise. 415 F. Supp. at 1020. Since *Mandel* was decided, the Fourth Circuit has criticized its analysis on several occasions. *United States v. Long*, 651 F.2d 239, 241 (4th Cir. 1981); *United States v. Altomare*, 625 F.2d 5, 7 (4th Cir. 1980); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980). In each of these cases, the Fourth Circuit explicitly rejected the rationale of *Mandel*. *Long*, for example, referred to *Altomare* and *Baker*, noting that "[i]n two recent RICO cases . . . we have indicated our disapproval of that [*Mandel*] decision. We have held, in accord with the majority of the cases, that RICO should be construed to include public entities as enterprises." 651 F.2d at 241.

Long justified the use of major governmental entities as RICO enterprises in indictments, stating that "[n]either the Act nor the courts' interpretation of it support the contention that its enforcement threatens the discretion state officials must exercise in the discharge of their duties[, but instead] . . . [t]he Act sustains, rather than threatens, the integrity of the South Carolina Senate," which was the named RICO enterprise in that case. 651 F.2d at 241. Our sister circuits have reached similar conclusions about the use of governmental entities as

RICO enterprises. See, *e.g.*, *United States v. Angelilli*, 660 F.2d 23, 33 (2d Cir. 1981) ("[W]e view the language of § 1961(4), defining enterprise, as unambiguously encompassing governmental units, and we consider that the purpose and history of the Act and the substance of RICO's provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public governmental entities."); *United States v. Frumento*, 563 F.2d 1083, 1091 (3d Cir. 1977) (comparing the Commonwealth of Pennsylvania to a major corporation and concluding that if the RICO enterprise concept does not reach governmental entities, then "private business organizations legitimately owned and operated by the states . . . would be open game for racketeers"); *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993) ("We adopt the view of seven circuit courts and hold that a governmental entity may constitute an 'enterprise' within the meaning of RICO.").

The decision that came closest to addressing the issue at hand is the Sixth Circuit's *en banc* opinion in *United States v. Thompson*, 685 F.2d 993 (6th Cir. 1982). There the court held that "The Office of the Governor" could be the enterprise in a RICO prosecution. *Id.* at 998-1000. The court supported its conclusion as follows:

> It seems clear to us that those who played the leading roles in the enactment of the RICO statute thoroughly understood organized crime's impact upon government entities. Senator McClellan, the chief sponsor of this bill and chairman of the committee which drafted it, said: "To exist and to increase its profits, Mr. President, organized crime has found it necessary to corrupt the institutions of our democratic processes, something no society can tolerate." Further, he said, "For with the necessary expansion of governmental regulation of private and business activity, its power to corrupt has given organized crime greater control

> over matters affecting the everyday life of each citizen."
>
> . . .
>
> Representative St. Germain told the House that "the greatest danger from organized crime lies not in its provision of illegal goods and services, but in its penetration of the country's legitimate institutions."

Id. at 1000 (internal citations omitted).

The Sixth Circuit noted its concern that an indictment naming the governor's office as a RICO enterprise could be unnecessary and disruptive in some cases, and it recommended that prosecutors should try to avoid such charges in the future if possible. The court suggested that a modified indictment might work better in similar, future cases, based on the RICO definition of "enterprise" as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* (quoting 18 U.S.C. § 1961(4)). The court stated that "the language which could and we believe preferably should have been employed, would have alleged that the three defendants constituted a 'group of individuals associated in fact although not a legal entity which made use of the Office of Governor of the State of Tennessee' for the particular racketeering activities alleged in the indictment." *Thompson*, 685 F.2d at 1000.

We endorse the Sixth Circuit's call for caution. We also agree with the Sixth Circuit's ultimate conclusion that the prosecution's approach to this issue in cases such as *Thompson* and the case at hand may often not be absolutely necessary under RICO, but it is not forbidden. Some cases, however, are exceptional, and ours is one of them. In such a case, the prosecution may have no real alternative to naming the state as the RICO

enterprise. (This of course does not mean that the state itself has violated any federal law; it may instead be a victim of the overall scheme, as are many RICO enterprises.) In such a case, the use of the state as the RICO enterprise in the indictment is analogous to the courts' treatment of the state as a market participant in a dormant commerce clause case. If the CEO of a major corporation, who ascended to that position from other senior executive positions, engaged in comparable activities, we would not only accept but expect a RICO conspiracy indictment with the corporation itself named as the RICO enterprise, even knowing that the overwhelming majority of employees, shareholders, and consumers of the corporation were innocent of wrongdoing. The situation here is the same.

In this case, the prosecution thought that it had identified an ongoing scheme to defraud the State of Illinois through the illegal use of two of the most significant executive branch offices of the state and of the state's electoral processes during Ryan's campaign for Governor in 1998. The scheme revolved around an elected official throughout his tenure in these two offices—Secretary of State and Governor—and during the time he was a candidate for the latter office. No legal rule prohibited the prosecution from concluding that there was no single entity or office that it could have identified, short of the state as a whole, that would have encompassed the enterprise that was used by the defendants. In these unusual circumstances, comity interests do not override the broad language of RICO, as interpreted in *Turkette*. The district court did not err by allowing the state to be the RICO enterprise in this RICO conspiracy prosecution.

B

We now turn to the district court's instructions to the jury on the question of the state as a RICO enterprise. All the district court said was that the State of Illinois is a "legal entity." Whether that is correct or not is a question of law, and as such, it was not one that could have been left for the jury to decide. See *United States v. Lee*, 439 F.3d 381, 388 (7th Cir. 2006) (upholding the district court's inclusion of a definition of "organization" in its instructions where the statute required that "the Government must prove . . . that the defendant uttered or possessed a counterfeit and forged security of an organization"). The district court told the jury that the government had to prove three things, including that the State of Illinois was an enterprise. Some "persons" (legal or real) may be "entities," but they still may not meet the statutory definition of "enterprise." See, *e.g.*, *Turkette*, 452 U.S. at 582 (examining the characteristics of a criminal structure to determine whether it was an "enterprise" under RICO). Nevertheless, because governmental or public entities fit within the definition of "enterprise" for purposes of RICO, this court has often rejected objections to jury instructions that a governmental entity is an "enterprise." See *United States v. Hocking*, 860 F.2d 769, 778 (7th Cir. 1988) ("In light of our clear precedent, appellant's claim that the district court erred in instructing the jury that the IDOT is an 'enterprise' within the reach of § 1962(c) is rejected."); see also James Morrison Mecone *et al.*, *Racketeer Influenced and Corrupt Organizations*, 43 AM. CRIM. L. Rev. 869, 881 (2006) ("When the enterprise under consideration is a legal entity, the enterprise element is satisfied by the mere proof that the entity does in fact have a legal existence."). We conclude, therefore, that the district court did not err when it accurately informed the jury that the State of Illinois is a legal entity.

VII

The next argument that Warner and Ryan present is that the term "intangible right to honest services" in the mail fraud statutes under which they were convicted, 18 U.S.C. §§ 1341 (basic mail fraud), 1346 (definition of "scheme or artifice to defraud" includes deprivation of intangible right to honest services), is unconstitutionally vague. The district court's instructions to the jury, they continue, "mirrored" this vagueness.

The constitutionality of a statute is an issue of law that is reviewed *de novo*. *United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003). The defendants acknowledge that this court recently upheld the constitutionality of the "intangible right to honest services" term in the federal mail fraud statute. *Hausmann*, 345 F.3d at 958. The constitutionality of § 1346 has repeatedly been challenged, and every circuit to address this issue has upheld it, even though the rationales have differed. See, *e.g.*, *United States v. Rybicki*, 354 F.3d 124, 132 (2d Cir. 2003) (*en banc*); *United States v. Bryan*, 58 F.3d 933, 941 (4th Cir. 1995); *United States v. Gray*, 96 F.3d 769, 776-77 (5th Cir. 1996); *United States v. Brumley*, 116 F.3d 728, 732 (5th Cir. 1997) (*en banc*); *United States v. Frost*, 125 F.3d 346, 370-71 (6th Cir. 1997); *United States v. Frega*, 179 F.3d 793, 803 (9th Cir. 1999); *United States v. Welch*, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003); *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995). There have been dissenting opinions in two circuits' opinions on this issue. *Rybicki*, 354 F.3d at 162-64 (Jacobs, J., dissenting); *Brumley*, 116 F.3d at 742-47 (Jolly & DeMoss, JJ., dissenting) (objecting to the statute only as applied in that case).

Given this unanimity on the central point, our concern here is only with the question whether the district court's instructions properly reflected this court's approach to the details of the claim. Previous holdings on

this issue are not necessarily dispositive because "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Powell*, 423 U.S. 87, 92 (1975). "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Posters 'N' Things, LTD v. United States*, 511 U.S. 513, 525 (1994). If the defendants could not have known that the conduct underlying their convictions could be considered "depriv[ing] another of the intangible right of honest services," 18 U.S.C. § 1346, then the statute is void for vagueness as applied here.

In *Hausmann*, we held that

> under the intangible-rights-theory of federal mail or wire fraud liability, a valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed.

345 F.3d at 956. In *United States v. Bloom*, we similarly concluded that "[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime." 149 F.3d 649, 655 (7th Cir. 1998). The opinion continued, "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain." *Id.* at 656-57.

In the present case, we are facing the same type of conduct that was before the court in *Hausmann* and *Bloom*. The defendants claim that the jury instructions

in this case contradicted the holdings in those two cases, but we disagree. Those cases do not require the jury to find a violation of a specific state law in order to convict. The court told the jury that "the government [must] prove[ ] beyond a reasonable doubt that the public official accepted the personal financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." The court continued that the receipt of "personal or financial benefits . . . does not, standing alone, violate the mail fraud statute. . . . Instead that receipt violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making." The court also told the jury that "[n]ot every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation."

The portion of the jury instructions quoted by the defendants about "conflict of interest" is taken out of context, as the jury instructions explicitly stated that a conflict of interest violated the statute only "if the other elements of the mail fraud statute are met." The district court explained that the government must also show that the public official allowed or accepted the conflict of interest with the understanding or intent that she would perform acts within her official capacity in return.

We are unpersuaded that the references to state law in the jury instructions were phrased in a way that makes the use of the mail fraud statute here unconstitutional. Many of the state law provisions in the instructions explained what kinds of financial transactions are not prohibited for state officials. This explanation was more likely to undermine than to assist the prosecution in showing the defendants' intent to deprive Illinois citizens of Ryan's honest services. The other cited provisions of Illinois law identified for the jury various ways

in which a public official could "misuse his fiduciary relationship," but the instructions as a whole unambiguously required the prosecution to prove that misuse of the office was intended for personal gain, as *Bloom* and *Hausmann* held.

We also note that this court in *Bloom* did not call the relevant section of the mail fraud statute a "common-law federal crime[ ]," as defendants suggest. It merely analogized this section to common law crimes on the way to concluding that the "intangible right" term needs clear boundaries. 149 F.3d at 656. A court's interpretation of a term in a federal criminal statute does not create a federal common law crime.

Although the intangible rights theory of federal mail fraud may have its problems when applied to other fact settings, it is not unconstitutionally vague as applied here. The district court here focused the jury on the important points needed for conviction, and in so doing, gave instructions consistent with *Hausmann* and *Bloom*.

VIII

We turn, now, to Warner's assertion that the court erred by permitting the joinder of his trial with Ryan's and denying his motion for severance. This court has construed FED. R. CRIM. P. 8, which governs joinder in criminal trials, "broadly to allow liberal joinder in order to enhance judicial efficiency." *United States v. Stillo*, 57 F.3d 553, 556 (7th Cir. 1995). We have repeatedly stated that "joint trials are beneficial not only for efficiency but because they limit inconvenience to witnesses, avoid delays in bringing defendants to trial, and allow the 'total story' to be presented to a single jury." *Id.* at 557. We review misjoinder claims *de novo*. *United States v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003).

A

Joinder is proper, under Rule 8(b), if the defendants "are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Under the rule, "[t]he defendants may be charged in one or more counts together or separately"; all defendants "need not be charged in each count." Rule 8(b) is satisfied when the defendants are "charged with crimes that well up out of the same series of such acts, but they need not be the same crimes." *United States v. Pigee*, 197 F.3d 879, 891 (7th Cir. 1999), see also *United States v. Stewart*, 433 F.3d 273, 314 (2d Cir. 2006); *United States v. Eufrasio*, 935 F.2d 553, 567 (3d Cir. 1991). "[T]he mere fact that two conspiracies have overlapping memberships will not authorize a single indictment if the conspiracies cannot be tied together into one conspiracy, one common plan or scheme," but a "conspiracy and its cover-up are parts of a common plan." *United States v. Velasquez*, 772 F.2d 1348, 1353-54 (7th Cir. 1985).

Whether there was an error in joining a defendant is determined by looking only at the indictment. *Lanas*, 324 F.3d at 899. In this case, the final indictment contained 22 counts. Count One was the RICO conspiracy for which both Warner and Ryan were charged. Count Two was the mail fraud scheme, which is listed in Count One as a racketeering act and a means and method of the RICO conspiracy; again, it charged both Warner and Ryan. Of the remaining 20 counts, both were charged in six (Counts Three, Four, Five, Seven, Eight, and Nine), Ryan alone was charged in ten (Count Six, Counts Ten through Thirteen, and Counts Eighteen through Twenty-Two), and Warner alone was charged in four (Counts Fourteen through Seventeen). (The defendants were acquitted on Counts Nine and Ten.)

Examining the indictment, we see that both defendants were charged in the RICO conspiracy and the mail fraud scheme, the two primary courses of conduct charged in the indictment. The mail fraud scheme was also part of the RICO conspiracy. In *Velazquez*, the court found misjoinder of one count because "[t]he indictment does not relate those charges to any of the charges against the other defendants named in the indictment, and the defect is not merely a technical oversight in pleading." *Velasquez*, 772 F.2d at 1353. By contrast, in this case, all of the conduct in Counts One through Seventeen relates to the charges in either the RICO conspiracy, mail fraud scheme, or both, which are charged against both Warner and Ryan.

The only charges unconnected to these two schemes appear in Counts Eighteen to Twenty-Two, Ryan's tax fraud charges. This court has held that "[j]oinder of a tax evasion count is appropriate when it is based upon unreported income flowing directly from the activities which are the subject of the other counts." *United States v. Anderson*, 809 F.2d 1281, 1288 (7th Cir. 1987). The tax fraud scheme charged in Count Eighteen was specifically related to Ryan's campaign committee "Citizens For Ryan." The factual allegations in Count Eighteen recount Citizens For Ryan's diversion of funds to pay for Ryan's and his family's personal expenses, "thereby depriving the IRS of accurate information as to his true income." The allegations of Count One, the RICO conspiracy charge, state that Ryan was obligated by law to report on his federal and state tax returns all expenditures by Citizens For Ryan that were made for personal expenses. Count One also states that part of the *modus operandi* of the RICO conspiracy was the provision of "personal and financial benefits to, and for the benefit of, defendant Ryan, Ryan family members, third parties affiliated with Ryan, and Citizens For Ryan . . . for the

purpose of influencing and rewarding Ryan in the exercise of Ryan's official authority." From the language of the indictment, we can see that the tax fraud scheme and the RICO conspiracy scheme are part of "the same series of acts or transactions, constituting an offense or offenses." FED. R. CRIM. P. 8(b). Many of the same underlying facts—the movement of funds through Citizens For Ryan, for example—are necessary to prove both claims. All of this is enough to explain why we find no improper joinder of the charges against Warner with those against Ryan.

B

Because joinder was proper under Rule 8(b), Warner must show that he has suffered from "prejudicial joinder," which is distinct from misjoinder. "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." FED. R. CRIM. P. 14(a). In order to prevail on his argument that the district court erred in denying his motion for severance under FED. R. CRIM. P. 14(a), it is necessary (though not sufficient) for Warner to show prejudice. *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993); see also *United States v. Souffront*, 338 F.3d 809, 831 (7th Cir. 2003) (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)). "Limiting instructions . . . often will suffice to cure any risk of prejudice," and tailoring relief from prejudice is left to the district court's discretion. *Zafiro*, 506 U.S. at 539-41. Where joinder of defendants was proper, "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a

reliable judgment about guilt or innocence." *Id.* at 539. "Actual prejudice" does not exist just because "separate trials would have given a defendant a better opportunity for an acquittal." Rather, the defendant must have been "deprived of his right to a fair trial." *United States v. Rollins*, 301 F.3d 511, 518 (7th Cir. 2002). The denial of a motion for severance is reviewed for abuse of discretion. *Id.*

Warner argues he suffered prejudice because the joinder violated his substantial rights in multiple ways. He objects first to the fact that his case was linked at all with Ryan's, but this argument goes nowhere, as the indictment demonstrates that the charges against him were closely connected with those against Ryan. Had he been tried separately, he would not have enjoyed the status of "an unknown businessman," as he suggests; he would have still faced charges as a co-conspirator that centered around the activities of the former Governor. Therefore, Warner cannot show that the publicity around Ryan's trial affected his substantial rights in this case.

Next, Warner alleges that Ryan's out-of-court statements to the FBI were testimonial and therefore his constitutional right to confrontation was violated. These statements were not admitted for the truth of the matter asserted, however, and therefore are not hearsay and do not implicate the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). There was also no *Bruton* issue, because the statements admitted at trial were not inculpatory and did not amount to a confession from Ryan. *Bruton v. United States*, 391 U.S. 123, 127 (1968). The district court excluded the statements that it viewed as potentially inculpatory, including all of Ryan's statements to the FBI naming Warner except those with innocuous or uncontested references.

Warner also contends that significant portions of the evidence introduced against Ryan could not have been

introduced against him in his own trial. The record does not bear this out. Much of the evidence with which Warner takes issue described acts that were part of the conspiracy charged against both defendants in Count One or the scheme charged against both defendants in Count Two. "[E]vidence of one participant's actions in furtherance of a scheme to defraud is admissible against the other participants in that scheme, just as it is in a conspiracy case." *United States v. Adeniji*, 221 F.3d 1020, 1027 (7th Cir. 2000).

The only significant evidence that was unrelated to the charges against Warner was some evidence pertaining to Ryan's tax fraud scheme. Yet even these acts derived from a common set of facts that made up the RICO conspiracy and mail fraud scheme. Therefore, much of the evidence of "a decade of state business, as well [as] . . . Ryan's lifestyle and personal and political campaign finances," was properly part of the evidence that was admissible against Warner because of Counts One and Two. For these reasons, the district court's denial of Warner's proposed limiting instruction for the tax counts was appropriate. The tax evidence relating only to Ryan was minor compared to the evidence presented to show the conspiracy and mail fraud scheme. The district court did not abuse its discretion in curing any possible prejudice from joinder through limiting instructions rather than severance. See *Zafiro*, 506 U.S. at 539.

Finally, Warner argues that the jurors were not following the court's instructions generally and therefore the limiting instructions were ineffective. We are reluctant to call into question the institution of the jury in this way. As we said in *United States v. Hedman*, we may examine "whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant" in considering

whether severance was improperly denied. 630 F.2d 1184, 1200 (7th Cir. 1980) (internal quotation marks omitted). Nothing in this record convinces us that this jury was either unable or unwilling to follow the careful instructions that the district court gave. Warner does not claim that there was insufficient evidence to convict him on any of the charges against him (although we note the district court threw out Ryan's convictions on two counts for insufficiency of the evidence).

We conclude that Warner has not shown actual prejudice resulting from the joinder of his case with Ryan's. To the extent that there was a risk of prejudice, the district court took appropriate steps to exclude evidence, restrict the use of evidence, and provide specific limiting instructions to the jury. It did not abuse its discretion under Rule 14(a) by denying Warner's motion for severance.

IX

Finally, Ryan alone also asks this court to hold that it was error to compel the former chief legal counsel in the Secretary of State's office to provide grand jury testimony about his work with then-Secretary of State Ryan. This compelled testimony, Ryan argues, violated his attorney-client privilege. We decline to consider this issue for two reasons. First, Ryan has failed to demonstrate what legally cognizable prejudice he suffered from that decision. It is also not clear what relief he is seeking for this alleged infringement of the privilege. Generally, a defendant challenging an indictment seeks to have the indictment dismissed, but the relief Ryan seeks in this appeal is a new trial. This would do nothing to correct an error in the indictment. The Supreme Court has held that a

> petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the

> defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt . . . [and therefore] any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

United States v. Mechanik, 475 U.S. 66, 69 (1986). Ryan suggests no reason why this general rule should not apply here. Even in cases where indictments can be dismissed, a court "may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988).

Ryan states in his brief that he "re-raise[s] the issue here to preserve it for further review." While parties are free to make a limited argument in order to preserve the issue for further review, they must say something to allow this court to consider the argument on its merits, even if they have every expectation that we will reject it. Ryan has not developed this point enough for us to give it meaningful consideration; we thus consider it waived. See *United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000).

Second, this court has already spoken on this point. Ryan was entitled to and did appeal the district court's determination in 2001 that the attorney-client privilege did not attach to his communications with the chief legal counsel in the Secretary of State's office. *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002). We considered and rejected this argument at that time. *Id.* at 295. That is the law of the case, and Ryan has given us no reason to deviate from it. See *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1291 (7th Cir. 1992). We acknowledge that the Second Circuit, in a different case involving communications between a governor and his counsel, has concluded that the privilege

applies. See *In re Grand Jury Investigation*, 399 F.3d 527, 535 (2d Cir. 2005). The Second Circuit acknowledged the tension between its holding and the decisions of three other circuits, including our court's 2002 decision. 399 F.3d at 533 (noting contrary decisions from the Seventh, Eighth, and D.C. Circuits); see generally *In re Lindsey*, 332 U.S. App. D.C. 357, 158 F.3d 1263 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). As matters now stand, three other circuits have weighed in on this issue, two of which agree with us. Even apart from law-of-the-case considerations, we respectfully decline to re-open that issue here.

X

We conclude with two final comments about this appeal. First, like all defendants who appeal their convictions, Ryan and Warner have presented certain arguments to this court, and they have elected not to present other arguments. At oral argument, there was some discussion of the argument that our dissenting colleague has emphasized—an argument that they chose not to raise: the allegation that members of the jury may have had too much freedom of movement and too much unsupervised time together, during which the opportunity to engage in premature discussions of the case may have arisen. Compare *United States v. Dellinger*, 472 F.2d 340, 373-74 & n.50 (7th Cir. 1972) (emphasizing need for thorough *voir dire* in presence of extensive pretrial publicity). Jury control measures, however, lie within the discretion of the district court judge; this is not an area in which a decision not to sequester, or a decision to permit jurors to walk around unsupervised, triggers such a strong presumption of error that we would have to reverse on that basis even in the absence of *both* (1) any objection at trial and (2) any complaint on appeal. See *Recuenco*, *supra*.

District courts have no duty to "sequester the jury. . ., *sua sponte*, in every case involving prejudicial publicity." *Margoles v. United States*, 407 F.2d 727, 732 (7th Cir. 1969). There is no presumption or rule that sequestration is ever necessary, although we do not dispute that it is a good idea in some high-profile cases, and may well have been the better course here. See *United States v. Carter*, 602 F.2d 799, 808 (7th Cir. 1979) (Tone, J., concurring) (noting this and suggesting such a rule may be preferable). Our opinion, then, should not be taken as necessarily approving of the practices the district court adopted for this case; on the other hand, without the proper objections and briefing, it would be improper for us even to reach the question of plain error arising from the lack of sequestration or tighter controls on the jury's activities. Managing a jury for a trial that spans six months is not easy. We can only emphasize that if any party has an objection to the way the district court is handling that challenge, it has an obligation to raise it, preferably early enough in the proceedings that the court can take prompt corrective measures. If Warner and Ryan believe that their counsel rendered constitutionally ineffective assistance by opting not to raise certain issues on appeal, they may raise that argument in post-conviction relief proceedings.

Our colleague in dissent believes that "there is a structural error because of the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation," specifically, the investigation of jurors during deliberations. Respectfully, we cannot agree that this provides a sound basis for reversal. First, many of the investigations were done at the request of the defense; defendants cannot embed a ground for automatic reversal into a case in this way. Second, neither the law nor the course of proceedings in the district court supports such a characterization.

Even if the facts about the investigations and any possible juror reactions and anxieties were clear, we do not read the Supreme Court's decisions as including these kinds of errors in the narrow "structural error" category. In *Remmer*, *supra*, the Supreme Court addressed the issue of possible juror bias after the court called in an FBI agent to question a juror about the incident without consulting with defense counsel. The Court remanded the case for a determination of whether "such contact with the juror was harmless to the defendant." 347 U.S. at 229. That is not the language of structural error; prejudice (or harm) is presumed and irrebuttable in structural error cases. Once we are in "harmless error" territory, the nature of the error, the strength of the government's case, and the actions the court took in response to problems are all relevant. We have already explained why we have found the errors that were properly called to our attention to be harmless, to the extent that error existed. The Supreme Court has repeatedly affirmed *Remmer* and held that "[d]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). As our own court has noted, "[we] afford deference to the trial court as the lower court has the primary responsibility to evaluate possible influences on the jury . . . [and a] decision to deny a motion for mistrial based on juror bias therefore is reviewed according to an abuse of discretion standard." *United States v. McClinton*, 135 F.3d 1178, 1186 (7th Cir. 1998) (Kanne, J.). Therefore, even if the defendants had argued that the problems with the jury that the dissent has described amounted to structural error, we would reject that characterization in favor of a harmless error analysis.

More importantly, however, there is the problem we have already noted of finding structural error in the absence of any such argument asking for such a finding

on appeal. Even when the Supreme Court's decisions call for structural error analysis, the factual basis for finding such error may be in dispute, as it is here. See, *e.g.*, *Bracy v. Schomig*, 286 F.3d 406, 409-11 (7th Cir. 2002) (*en banc*) (discussing the type of proof necessary to prove a trial judge's bias and, thus, structural error). *Remmer* tells us that an interrogation of a sitting juror by law enforcement is not structural error. Therefore, the investigation of sitting jurors is not always structural error, even though there may be a risk, as the dissent points out, that the investigation is psychologically disturbing to the jurors. Just as in *Bracy*, we would need to determine what facts were necessary to conclude that this type of juror investigation constituted structural error. Yet the defendants raise the juror investigation issue only as support for their argument that the removal of Ezell was improper. Unlike the dissent, we are unwilling to transform this modest point into an argument that the essential right to an impartial jury was violated. To repeat our earlier conclusion, the district court took every possible step to ensure that the jury was and remained impartial, and, through credibility findings and findings of fact, concluded that this one was.

Second, throughout their briefs, the defendants note that the district court judge described some of her rulings as "difficult" or "close calls." The impression they give is that this is some kind of signal that the court knew it was wrong. We draw no such inference. A district court's acknowledgment of the difficulty of an issue, if anything, is a sign that the court has given it full consideration. When all was said and done, the court made the necessary determinations of law, which we have reviewed *de novo*, and exercised its discretion, which we have reviewed deferentially. Counsel have argued in great detail every point that they chose to bring before us, and we have limited our review of the trial proceed-

ings to those issues. The high-profile nature of these proceedings gave rise to some unusual problems with the jury, but we are satisfied that the court handled them acceptably. For all of the reasons discussed above, the district court properly denied the defendants' new trial motion. We AFFIRM the judgments of the district court convicting both Warner and Ryan.

KANNE, *Circuit Judge*, dissenting. My colleagues in the majority concede that the trial of this case may not have been "picture-perfect"—a whopping understatement by any measure. The majority then observes that the lack of a picture-perfect trial "is, in itself, nothing unusual." I agree that from my experience this is a realistic proposition. There is rarely perfection in any human endeavor—and in particular jury trials. What we expect from our judicial system is not an error free trial, but a trial process that is properly handled to achieve a fair and just result. That fair and just result was not achieved in this case.

The basis for my dissent lies not in the exceedingly drawn out evidentiary phase of this trial but in the dysfunctional jury deliberations. As to this point, the majority has taken great pains—in twenty-nine pages—to declare the flood of errors regarding the jury deliberations to be merely harmless. To understand the influences that came into play for the jurors in this case, I believe it is necessary to place various factors in overall perspective. Some of the factors would be unremarkable in a routine criminal case and other factors are totally astounding in any case. The following are highlights in summary fashion:

- In a case that was tried over a six-month period, the jurors entered and exited the courthouse every day past scores of television and still cameras and reporters.
- The jurors used public elevators and brushed elbows with anyone who happened to be in them.
- Although the court's intent was not to make the jurors' names public, that effort was compromised when the jurors' names were used in the in-court voir dire.
- When jury deliberations were ready to commence in the most high profile case in Chicago in recent memory, there was no thought of sequestering the jury.
- During the initial eight days of deliberations an apparent holdout juror was purportedly threatened by other jurors with a charge of bribery.
- Legal research gained by a juror from the internet was—contrary to the court's instruction—brought into the jury room in an effort to persuade the recalcitrant juror to change her position.
- A reporter for the *Chicago Tribune* advised the district court during jury deliberations that the newspaper's research had disclosed major inconsistencies between answers in a jury questionnaire and public records.
- Based on the information provided by the *Chicago Tribune*, the district judge, in concurrence with all parties, requested the U.S. Attorney's Office to conduct a background check on all jurors.
- Jury deliberations were halted following the *Chicago Tribune* disclosure and the hiatus contin-

ued during the investigation of the jurors by the U.S. Attorney's Office.

- During the five-day hiatus in jury deliberations, the exposé by the *Chicago Tribune* was published revealing that, indeed, false answers had been given on a jury questionnaire and that the sitting jurors were now under investigation.
- Amidst questions raised by the district judge concerning the necessity of advising the jurors of their constitutional rights and their right to counsel, the individual examination of six sitting and three alternate jurors was begun.
- Through the judge's examination it was determined that a majority of jurors had provided false answers under oath and could face criminal prosecution. Many jurors who were interrogated told the district judge that they were scared, intimidated or sorry for what had occurred.
- During the course of the interrogations, the jurors were granted immunity from prosecution by the U.S. Attorney.
- Some jurors later hired lawyers in order to represent their own independent interests arising from their participation in the trial.
- Two jurors who provided untruthful answers were excused from further service while others so situated were retained.
- Before the hiatus in deliberation, jurors informed the court that they were having a conflict and yet after the interrogations the judge dismissed one of the jurors in the conflict without determining whether she was a holdout juror.

- Alternate jurors were seated, but not in the order required by Rule 24.
- After eight days of deliberation by the original jury, and five days in hiatus, a reconstituted jury deliberated for ten days and returned the verdicts in this case.

To describe the circumstances surrounding the jury management and jury deliberations summarized above as "nothing unusual" is to simply turn a blind eye to the realities of what occurred—in order to save the efforts expended during a six-month trial.

Having summarized the factors that played upon the jurors, I'll now turn to an analysis of the various errors that accumulated. The errors in this case can be subdivided and analyzed in two groups. First, there is a structural error because of the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation. Second, the multiple errors regarding jury management generally and jury deliberation, when viewed collectively, were so corruptive that the verdicts cannot stand.

The Jury Questionnaire Issue

Although the defendants raised issues relating to the effect of false answers to jury questionnaires and "fearful" jurors in the trial court, they did not argue those issues on appeal. Nevertheless, the matters concerning false responses to the jury questionnaires concern structural errors in the trial that are not governed by the plain error analysis provided in Rule 52(b) of the Federal Rules of Criminal Procedure.

In fact, the structural errors that exist here make this case "subject to automatic reversal" because they affect

the "framework in which the trial proceeds, rather than simply an error in the trial process itself." *Neder v. United States*, 527 U.S. 1, 8 (1999). "Such errors infect the entire trial process and necessarily render a trial fundamentally unfair. Put another way, these errors deprive the defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Id.* at 8-9. "Among these basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury." *Gomez v. United States*, 490 U.S. 858, 876 (1989) (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987); *Chapman v. California*, 386 U.S. 18, 23 (1967)).

As in this case, jurors take two oaths; the first requires them to answer questions truthfully in voir dire. The second requires that they faithfully perform their duties as jurors. A juror who violates either oath can face criminal prosecution. The Supreme Court has previously upheld the criminal conviction of a juror who intentionally lied during voir dire in order to gain entry onto, and then purposefully hang, the jury. *Clark v. United States*, 289 U.S. 1 (1933). Although *Clark* was decided almost seventy-five years ago, *the prosecution of jurors for misconduct still occurs today. See generally Dyer v. Calderon*, 151 F.3d 970, 973 n.1 (9th Cir. 1998) (*en banc*) ("We do not condone any lying by jurors; perjury is perjury."); *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989) (noting that jurors committing criminal misconduct can be prosecuted for perjury and contempt of court and can be subject to restitution claims from the government).

The government instituted this prosecution against defendants Warner and Ryan. But, of course, the government is also responsible for investigating and prosecuting

crimes involving juror misconduct. The inconsistent jury questionnaire answers given in this case could lead to criminal investigations and prosecutions.

The verdicts here were delivered by a jury whose number included some who themselves faced potential future criminal prosecution for their actions that occurred during this trial. Can sitting jurors fearing possible criminal investigations and prosecution for conduct involved in the case under consideration render valid verdicts?

In ruling on the defendants' post-trial motions in September of 2006, the district judge dismissed the concern of allowing jurors to return verdicts in the same trial in which their conduct might subject them to criminal investigation and prosecution. She concluded that "in spite of the difficulties generated by this very lengthy, high-profile trial, these jurors were diligent and impartial." R. 867 at pg. 65. "[I]t is implausible that the retained jurors would harbor any fears of prosecution. As for the remaining jurors, who were not specifically questioned about their questionnaires, they would have no reason to conclude that they were targets of any investigation." *Id.* at pg. 87.

Can this court, as a matter of common sense, accept the district court's factual determination that at least some jurors did not harbor fears of prosecution when they rendered their verdicts? Can the majority say that these jurors retained their capacity to render fair and impartial verdicts that can strip the defendants of their liberty and result in the defendants receiving significant prison sentences after the jurors themselves were the subject of an investigation?

In examining the district court's decision to allow these jurors to return verdicts, that decision should be examined in the extraordinary context that had developed. After serving for six months on an extremely high-profile

trial with overwhelming media and public scrutiny, and eight days into the deliberations, on Thursday, March 23, 2006, the jurors' deliberations were stopped. When they returned four days later on Monday, March 27th, the jury was not allowed to continue deliberating. Instead, six of the sitting jurors and three alternate jurors were interrogated by the district judge. They were called one-by-one into the judge's chambers. Questions regarding inconsistent answers on the jury questionnaire form were asked. Jurors Ezell and Pavlick were ultimately dismissed, to be replaced by the two alternates. Four of the six sitting jurors were retained. The jury deliberations were stopped during this two-day period and the reconstituted jury would not start the second round of deliberations until Wednesday, March 29th.

Much like children called into the principal's office, one could imagine the strain that this inquiry placed on both the jurors who were questioned and those who remained in the jury room unquestioned. It is noteworthy that in describing her experience in examining Juror Casino, the district judge stated, "Grilling Mr. Casino is one of the most distasteful things I have done in this job." Mar. 28, 2006 Tr. at pg. 24658, ln. 25 & pg. 24659, ln. 1. It is also reasonable to conclude that the jurors who were called into the judge's chambers began discussing their experience with the other jurors upon return to the jury room to figure out what was going on.

Even more telling is that the district judge on March 27th recognized, along with various counsel, the specter of juror prosecution lurking in the case and the impact this would have on the trial. March 27th and 28th are key days in the case because these are the two days that the district judge considered how to handle the juror questionnaire issue and thus it is worth examining closely the record from these two days. The district judge, shortly before her examination of then-sitting Juror Ezell, recog-

nized that the jurors faced possible criminal charges for juror misconduct when she observed:

> A concern I have, beginning with Ms. Ezell, is that if we were to bring Ms. Ezell in to ask questions of her regarding her failure to disclose this arrest record that she has and other issues—for example, the apparent use of an alias—**Do we have to advise her of her rights? Do we have to give her an opportunity to have counsel?** Because it does seem to me that we will be asking her potentially about **criminal conduct**, specifically **perjury** in connection with her responses to the questionnaires.

Mar. 27, 2006 Tr. at pg. 24366, lns. 16-24 (emphasis added). Prosecutor Collins added that "I do think to the extent there are consequences to a criminal prosecution [of the jurors] we would be recused from it if there was even contemplation of such a thing." Mar. 27, 2006 Tr. at pg. 24386, lns. 19-22.

Mr. Genson, an attorney for defendant Warner, added that his client was in a Catch-22 situation:

> Certainly, when I have a client that's charged essentially—at least that was a good deal of the closing argument—with concealing, hiding, there is charges of obstruction, false statements, the idea that I want to tell these jurors, "You have a right to a lawyer," is ludicrous. It doesn't help me to do that. I don't want to do it.
>
> On the other hand, I am suggesting to your Honor that perhaps we should. It's not to my interest to tell these jurors, or at least in my client's interests to tell these jurors, they need a lawyer. I mean, I don't need to introduce all those things given the charges against my client.
>
> But I do think it's a valid—if something happens in this case and if some other prosecutorial body, given

> that Mr. Collins said that they would be recused, decides to prosecute people for false statement and we haven't given them their rights, I mean, I just feel that—I think that's at least an issue that your Honor has to consider.

Mar. 27, 2006 Tr. at pg. 24404, ln. 25 & pg. 24405, lns. 1-17.

> The court recessed for lunch in the middle of its juror interrogation procedure on March 27th. After lunch, Mr. Collins informed the parties and the court that the U.S. Attorney had granted the jurors immunity.
>
> For the record, we did consult, your Honor, with the U.S. Attorney at the lunch break in terms of jeopardy any jurors would have going forward. And we did not address the issue in advance of Ezell and Pavlick, and I would make this of record.
>
> Our office—[U.S. Attorney] Fitzgerald has indicated that he believes that it's more important to get the candid information from the jurors than have them—the process chilled by them—any statements they say being used against them. And so he authorized me to make a statement that any statements these jurors make *going forward* would not be used against them.

Mar. 27, 2006 Tr. at pg. 24500, lns. 16-25 & pg. 24501, lns. 1-2 (emphasis added). Note that the immunity grant covered the jurors' statements "going forward." The record does not reflect whether the U.S. Attorney granted immunity to the jurors for their original conduct of their answers provided during voir dire on the questionnaire and therefore there is a potential that these jurors could still face criminal prosecution. The district court proceeded in questioning the jurors informally without an advisement of rights and without the presence of lawyers for the jurors.

Jurors who ultimately would render the verdicts now faced conflicts sufficient enough to have a federal district judge and several experienced attorneys consider whether these jurors needed to be advised of their constitutional rights. And we have an experienced prosecutor, the United States Attorney, who sees this situation as serious enough to grant immunity to the jurors. Yet these same jurors were returned to the jury room, instructed to begin anew their deliberations. The reconstituted jury ultimately rendered the verdicts in this case.

When the district judge wonders aloud whether warning jurors of their constitutional rights is required, when jurors could need their own lawyers, and when the U.S. Attorney is issuing immunity grants to jurors, it is impossible not to recognize the extraordinary nature of the case. These circumstances are not "usual" and far from the way our criminal justice system should work.

In addition, the district court's ruling from September 2006 that "it is implausible that the . . . jurors would harbor any fears of prosecution," R. 867 at pg. 87, is not supported by the record. Although counsel was not appointed for the jurors, individual jurors would obtain private counsel in this case. Juror Pavlick had previous representation and mentioned his attorney when he was interrogated individually by the district court. Jurors Peterson and Losacco would both later inform the court that they had obtained counsel. Several of the individual jurors questioned during this period recognized that they had made inconsistent statements on the juror questionnaire and some apologized for the mistake. Other jurors specifically mentioned that they were scared or intimidated by the situation.

Furthermore, this is not a situation in which the district court can solve the problem by saying that the jurors made an honest mistake. The decision as to wheth-

er to investigate and prosecute a case is not the district court's to make but rather the prosecutor's decision. Additionally, the question of whether a juror incorrectly but honestly answered a question or intentionally lied to get onto a jury is a question of fact for a *second* jury in a future criminal proceeding.

Despite recognizing the potential of "fearful" jurors, the district court was unwilling to declare a mistrial. In addressing the defendants' argument that the investigation had impacted the jurors' ability to be fair and impartial the district court responded:

> The . . . argument you are making is that we now have a bunch of fearful jurors. ***I just don't know how to address that.***
>
> Again, I understand that the defendants do have important interests to represent here. I have before me—nobody has called it this, but this is a motion for a mistrial at this point. If I grant this motion, these defendants are going to be tried again. I don't—I am just—I am really wondering whether if I grant the motion for a mistrial, I am effectively saying it isn't possible to pick a jury for this case.

Mar. 28, 2006 Tr. at pg. 24699, lns. 16-25 & pg. 24700, ln. 1 (emphasis added). The obvious—but onerous—way to address this situation was to declare a mistrial. In any event, the concern regarding the selection of a new jury should not have been a consideration. It is not difficult to understand the great pressure generated by a six-month trial to reach verdicts in this case. Nevertheless, jurors in fear of prosecution for conduct involved in the case on which they are sitting should not be allowed to render verdicts; their bias is inherent.

As a matter of law, biased jurors cannot be fair and impartial. Fair and impartial jurors are required as part

of the defendants' structural protection for a fair trial and therefore the defendants are entitled to an automatic reversal of their convictions. *Neder*, 527 U.S. at 9.

The majority responds that the defendants were afforded the structural protections of a fair trial before a fair and impartial jury and therefore any error relating to jury misconduct, improper influence of the jury and jury bias should be reviewed under harmless error. Maj. Op. 60. "The bias of a . . . juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." *United States v. Wood*, 299 U.S. 123, 133 (1936). As Chief Justice Marshall explained at the trial of Aaron Burr, there are certain situations in which a juror "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807). Although the "[u]se of the 'implied bias' doctrine is certainly the rare exception," *Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992) (per curium), as we recognized in *United States v. Polichemi*:

> The concept of implied bias is well-established in the law. Many of the rules that require excusing a juror for cause are based on implied bias, rather than actual bias. For example, a court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case. *See, e.g., United States v. Annigoni*, 96 F.3d 1132, 1138 (9th Cir. 1996); *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995). Such a juror may well be objective in fact, but the relationship is so close that the law errs on the side of caution.

219 F.3d 698, 704 (7th Cir. 2000) (Wood, D., J.); *see, e.g., Smith v. Phillips*, 455 U.S. 209, 221-24 (1982) (O'Connor,

J., concurring); *Conaway v. Polk*, 453 F.3d 567, 587-88 & n.22 (4th Cir. 2006) (noting that "implied bias [is] a settled constitutional principle" and providing citation to cases from ten different Circuits since 1982 recognizing the continuing applicability of the implied bias doctrine); *Brooks v. Dretke*, 418 F.3d 430, 430-31 (5th Cir. 2005) (overturning a conviction on the basis of implied jury bias when a juror faced a pending criminal charge filed by the same prosecutor's office that was prosecuting the case on which the jury was presiding); *Dyer*, 151 F.3d at 984 (citing *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P. 1610) (tracing the lineage of the implied bias doctrine to Sir Edward Coke's dicta in *Dr. Bonham's Case* in 1610)).

A biased juror "is a juror in name only" who taints the court and the jury's verdict making it a "mere pretense and sham." *Clark*, 289 U.S. at 11. The verdicts returned by these biased jurors should be vacated because only a jury composed of fair and impartial jurors can strip the defendants of their liberty. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

General Management of the Jury and Jury Misconduct

It is also necessary to review additional jury misconduct and the jury management decisions of the district judge. Errors of a nonstructural nature are analyzed under Federal Rule of Criminal Procedure 52, where errors raised by the defendants are reviewed under a harmless error standard and those not raised are reviewed under a plain error standard.

The majority determines that on appeal the defendants raised three specific issues about the jury: (1) that the verdict was tainted by the jurors' use of extraneous legal

materials; (2) that the dismissal of Juror Ezell was an arbitrary removal of a defense holdout, and; (3) that the substitution of jurors after deliberation had begun was prejudicial. Maj. Op. p.2. In addition, the majority notes that the defendants have not raised on appeal the issue of the cumulative and prejudicial effect of jury misconduct and therefore that issue is not before us—although raised below. *Id.*

The majority correctly observes that jury management or control measures properly lie within the discretion of the district judge. Maj. Op. p.58. Nevertheless, courts of appeal have supervisory authority in fashioning standards of criminal procedure to be followed by the district courts. WAYNE R. LAFAVE, et al., CRIMINAL PROCEDURE § 1.6(i) pg. 325 (2d ed. 1999).

I disagree with the narrowed scope of review advanced by the majority. What follows is a discussion of a more global look at the juror misconduct and jury management involved in this case.

Of course, as repeatedly pointed out, this court is guided by the Supreme Court's instruction that the defendants are guaranteed a right to a "fair trial," not a "perfect trial." *McDonough Power Equip. Inc. v. Greenwood*, 464 U.S 548, 553 (1984).

As to the internet research regarding the law, there is no dispute that Juror Peterson brought outside material into the jury room during deliberations while she and a number of jurors were in conflict with Juror Ezell. A number of jurors urged Juror Peterson to search the internet and bring back to the jury information on jury deliberation. Her research could be used to show Juror Ezell the "error of her ways." This entire episode was a deliberate disregard of the admonition of the court not to bring outside legal sources into the jury room.

Juror Peterson claims that the material was an American Judicature Society article about deliberations and she had no intent to inappropriately influence Juror Ezell. Juror Ezell disputes this claim, countering that the information related to bribery and was used to threaten her so that she would vote with the other jurors. Regardless, it is clear that Juror Peterson brought outside material into the jury room during the course of deliberations and used this material as part of the jurors' efforts to convince Juror Ezell to join them in returning a verdict.

In her post-trial ruling, the district court determined that the article on jury deliberation "did not pertain to any substantive issue in the Defendants' trial. It concerned only the process of deliberation, and the substance of the article did not contradict any instruction that this court gave to the jurors." R. 867 at pg. 81. Errors in the jury deliberation process raise issues of law no different than errors relating to substantive matters, such as obstruction of justice. Both procedural and substantive areas of law are equally important. Moreover, a court cannot hide behind saying that the unauthorized article contained a proper statement of the law. It is axiomatic that jurors are not allowed to bring any outside materials into deliberations regardless of whether they are a correct statement of the law. Jurors are restricted to receiving pronouncements on relevant law only from the trial judge.

The seriousness of this misconduct is demonstrated by the fact that Juror Peterson and Juror Losacco, who were involved in the conflict with Juror Ezell, both obtained private counsel to represent them on this issue. The record does not reflect whether Jurors Peterson and Losacco retained their attorneys during deliberations or after deliberations as Juror Ezell did not make a public allegation against Jurors Peterson and Losacco until after the verdicts had been returned. However, when the

district court conducted a post-verdict inquiry on this issue, both Jurors Peterson and Losacco appeared through their respective counsel.

The jurors originally sent notes informing the district court that they were in conflict. This is the conflict between Juror Ezell and several of the other jurors including Juror Peterson. Juror Peterson was instructed by several other jurors to—"do her homework"—meaning to find information on the internet which the jurors could use in a hope of convincing Juror Ezell to join their views.

However, during the period that the district judge was considering what to do about the conflict among the jurors, she was also informed about the juror questionnaire problem. Thus, the court was faced with two independent problems, the jury conflict issue and the juror questionnaire issue. Yet, the juror questionnaire issue *wholly consumed* the district judge's consideration of the case at that point. The district judge left unresolved her consideration of the conflict between potential "holdout" Juror Ezell and other jurors. Nowhere in the record does the district judge make a ruling as to whether a conflict existed between Juror Ezell and the other jurors to determine if the jurors had deadlocked or if Juror Ezell was indeed a holdout. Nor did the court determine the impact that dismissing Juror Ezell would have on the other jurors in light of the conflict among the jury as expressed to the court in the jurors' notes, and whether this might give an indication to other jurors that the court was siding with the views of one group of jurors over another. However, the district judge ultimately excused Juror Ezell based on the inconsistent statements Juror Ezell made on her questionnaire.

At the beginning of the trial, the district judge ordered the juror questionnaires to be redacted, yet she used the jurors' names during in-court voir dire. This allowed the

Chicago Tribune to obtain the jurors' names from the transcripts of the in-court voir dire despite the fact that the court had originally placed the jurors' names under seal. As Prosecutor Collins later noted, "a trained monkey" could have matched the information together between the publicly redacted questionnaires and in-court voir dire transcripts. Mar. 27, 2006 Tr. at pg. 24591, ln. 22. Because jurors' names were "in effect" leaked to the media during the trial, the court was unable to avoid the larger issue of a juror background investigation by the media and the impact this had on the trial.

Apart from the general admonitions made by the court it appears that there was little control of the jurors' exposure to external influences outside of the courthouse. In addition to Juror Peterson's misconduct, the jurors continued to read newspapers and were exposed to media coverage of the trial, the jurors received inquiries from friends and family about the case, and the jurors discussed the case with outsiders while the case was pending. All of these actions were taken in violation of the court's instructions, yet a reconstituted jury was allowed to deliberate and return verdicts.

There is often a lack of a record on key issues. The district judge participated in a discussion with the parties but did not state that she was providing a definite ruling. Thus, the record is at best inconclusive, and at the worst nonexistent, on the district court's decisions on many of the critical issues in this case. The most striking example is the reseating of the alternate jurors. Once the district judge decided to excuse Jurors Pavlick and Ezell, the court was required, pursuant to Rule 24, to seat alternate jurors in the order in which they were selected. However, in the reseating process the district judge skipped the next juror in line, Alternate Juror Masri. We know that he was skipped but the district judge did not say why he was passed over.

The majority deduces that Alternate Juror Masri was dismissed for his failure to disclose a prior DUI. But, there is no ruling from the district judge to support the majority's deduction. The government suggested at oral argument that Masri was excused because he received his juror certificate and was thanked for his service. But there is no record excusing him or indicating why he did not serve. Thus, the record does not demonstrate compliance with Rule 24.

At oral argument before this court, Prosecutor Collins stated that "Judge Pallmeyer is a consensus builder." Oral Arg. at 47:18. This insightful comment is the key to understanding the non-structural juror errors. Consensus building can help in finding common ground in disputes. It can also help to expose decision makers to alternative points of view. But consensus building can have negative consequences as this case demonstrates.

Consensus building by the district judge allowed a continual round robin of discussions between the attorneys and the court especially during the critical period of March 27th and 28th when the parties and the court were addressing the juror-related issues. Transcripts from this period reveal a very conscientious but irresolute judge who is willing to contribute her views and concerns to the conversation involving contested issues, but is reluctant to provide firm rulings that end the court's consideration of those issues. The record from this period is full of conversations but lacks definitive rulings. Consensus building does not always lead to the resolution of difficult issues.

A lack of definitive rulings by the trial court presents great difficulty in a review on appeal, for appellate courts review decisions, not commentary. Importantly, the lack of a firm ruling infects the consideration of excusing potential "holdout" Juror Ezell. In her post-trial ruling,

the district judge said that Juror Ezell was "removed from the jury for reasons wholly unrelated to [the] conflict [occurring between the jurors] revealed in [Juror] Losacco's note." R. 867 at pg. 75. Yet, the district judge's post-trial decision did not provide citation to the record on this point. In fact, a review of the record during the March 27th and 28th period shows there was absolutely no consideration of the conflict between Juror Ezell and other jurors. As noted earlier, this very serious issue was forgotten once the court and parties were made aware of the trouble in the jurors' questionnaire answers by the *Chicago Tribune*.

The district judge is charged with the management and control of the jury. In the deliberation phase this includes ensuring that the jurors properly conduct themselves, avoiding outside influences, conducting proper deliberations without juror-on-juror intimidation, and scheduling deliberation times, among others.

As noted, many of the problems that plagued the trial after the case was submitted to the jury could have been avoided through sequestration. While it was certainly impractical to sequester this jury during the trial phase, sequestration during deliberations was a viable option.

In a full sequestration, deliberating jurors are typically under control of Deputy United States Marshals who are responsible for ensuring that the jurors are secure during their deliberations, in movement to and from the courthouse and jury room, and while housed offsite until a verdict is reached. Partial sequestration works less of a hardship on jurors. Under this system the deliberating jurors assemble at a remote location and are picked up by Deputy United States Marshals, transported by van to the courthouse and moved in a nonpublic elevator to the jury room. At the end of a day's deliberations the process is reversed. This continues until a return of the verdict.

Despite these available options there was no apparent consideration of such sequestration even in the face of the overwhelming media presence in the courthouse, the daily media reports of courtroom activity and the jurors' continued inability during the course of the trial to avoid media reports of the trial. The relative inconvenience to the jurors weighed against a possible mistrial makes the choice of sequestration during deliberation seem clear.

Turning again to the actual deliberations, it appears that jurors were inexplicably allowed to set their own schedule for deliberations with apparently little judicial intervention. There is undisputed evidence that the jurors separated into caucuses at times during deliberations. Perhaps most striking is the example of the division between the "healthy" and the "unhealthy" jurors. The healthy jurors exercised by running up and down internal courthouse stairs while the unhealthy jurors took smoke breaks outside the courthouse. The record does not tell us if the jurors continued separate deliberations during this period outside of the presence of the other jurors.

As noted above, I recognize that individual nonstructural errors are reviewed under either harmless error or the plain error analysis as provided in Rule 52 and we afford the district judge a level of deference. However, the nonstructural errors—in their totality—were so egregious that again a mistrial was the only permissible result. The majority's failure to consider all of these errors cannot be ignored as we must recognize that these errors undermine the public's confidence in the "fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736-37 (1993).

In the final analysis, this case was inexorably driven to a defective conclusion by the natural human desire to bring an end to the massive expenditure of time and

resources occasioned by this trial—to the detriment of the defendants. Given the breadth and depth of both structural and nonstructural errors, I have no doubt that if this case had been a six-day trial, rather than a six-month trial, a mistrial would have been swiftly declared. It should have been here.

Based on either the structural errors or nonstructural errors described above concerning jury misconduct, the convictions in this case should be vacated and the case remanded for a new trial. Because the majority reaches a contrary result, I respectfully DISSENT.

A true Copy:

Teste:

Deputy Clerk

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-02-C-0072—9-6-07

No. 10-3964

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GEORGE H. RYAN SR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On appeal from the U.S. District Court for the
Northern District of Illinois, No. 10-cv-5512
Hon. Rebecca R. Pallmeyer, Judge, Presiding

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SEPARATE APPENDIX

TABLE OF CONTENTS

Document	Page
Indictment (12/17/03)	A-000063
United States' Motion for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations (8/31/05)	A-000155
Ryan's Response to United States' Motion for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations (9/15/05)	A-000168
Judgment (9/6/06)	A-000186
Final decision from Seventh Circuit on initial appeal (11/2/07)	A-000203
Petition to Supreme Court for Certiorari	A-000285
Government Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (10/7/10)	A-000322
Excerpts from Transcript of Proceedings, pp. 2562	A-000366
Excerpts from Transcript of Proceedings, pp. 2844	A-000367
Excerpts from Transcript of Proceedings, pp. 3758-59	A-000368
Excerpts from Transcript of Proceedings, pp. 6922-24	A-000369
Excerpts from Transcript of Proceedings, pp. 7316-17	A-000371
Excerpts from Transcript of Proceedings, pp. 9421-31	A-000372
Excerpts from Transcript of Proceedings, pp. 9520-21	A-000375
Excerpts from Transcript of Proceedings, pp. 9552	A-000376
Excerpts from Transcript of Proceedings, pp. 10622-23	A-000377
Excerpts from Transcript of Proceedings, pp. 10728-29	A-000378
Excerpts from Transcript of Proceedings, pp. 11773-74	A-000379
Excerpts from Transcript of Proceedings, pp. 13499-502	A-000380

Excerpts from Transcript of Proceedings, pp. 13511-15	A-000382
Excerpts from Transcript of Proceedings, pp. 15517-19	A-000384
Excerpts from Transcript of Proceedings, pp. 15735-36	A-000386
Excerpts from Transcript of Proceedings, pp. 15744-45	A-000387
Excerpts from Transcript of Proceedings, pp. 15992	A-000389
Excerpts from Transcript of Proceedings, pp. 22462-3	A-000390
Excerpts from Transcript of Proceedings, pp. 22831	A-000391
Excerpts from Transcript of Proceedings, pp. 22836	A-000392
Excerpts from Transcript of Proceedings, pp. 22843-44	A-000393
Excerpts from Transcript of Proceedings, pp. 22850-52	A-000395
Excerpts from Transcript of Proceedings, pp. 22861-63	A-000397
Excerpts from Transcript of Proceedings, pp. 22865-91	A-000398
Excerpts from Transcript of Proceedings, pp. 22914	A-000405
Excerpts from Transcript of Proceedings, pp. 22941	A-000406
Excerpts from Transcript of Proceedings, pp. 22956-59	A-000407
Excerpts from Transcript of Proceedings, pp. 22962-63	A-000409
Excerpts from Transcript of Proceedings, pp. 22968-69	A-000411
Excerpts from Transcript of Proceedings, pp. 23097	A-000412
Excerpts from Transcript of Proceedings, pp. 23149	A-000413
Excerpts from Transcript of Proceedings, pp. 23697	A-000414
Excerpts from Transcript of Proceedings, pp. 23744	A-000415
Excerpts from Transcript of Proceedings, pp. 23764	A-000416
Excerpts from Transcript of Proceedings, pp. 23771	A-000417

Excerpts from Transcript of Proceedings, pp. 23773-74	A-000418
Excerpts from Transcript of Proceedings, pp. 23902-13	A-000419
Excerpts from Transcript of Proceedings, pp. 23982	A-000423
Excerpts from Transcript of Proceedings, pp. 24022	A-000424
Excerpts from Transcript of Proceedings, pp. 24074-6	A-000425
Excerpts from Transcript of Proceedings, pp. 25422-23	A-000427
Transcript of Proceedings, Sept. 6, 2006	A-000429
United States v. Warner, 2005 U.S. Dist. LEXIS 21367 (N.D. Ill. 9/23/05)	A-000430
United States v. Warner, 2006 U.S. Dist. LEXIS 64085 (N.D. Ill. 9/7/06)	A-000445

No. _____

In the Supreme Court of the United States

LAWRENCE E. WARNER AND GEORGE H. RYAN,
PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
VOLUME I of II

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QUESTIONS PRESENTED

1. Whether a trial court violates the Fifth and Sixth Amendments when it allows the removal and substitution of a deliberating criminal juror (here, after eight days of deliberations) where there is an objective possibility that the juror's removal was prompted by the juror's view on the merits.

2. Whether a trial court commits structural error in permitting a jury verdict where more than half the jurors are interrogated in the middle of deliberations about their own misconduct in the presence of a prosecutor.

3. Whether the Fifth and Sixth Amendment rights to a fair trial before an impartial jury are violated when a reviewing court refuses to conduct a cumulative error analysis despite "a flood" or "cascade of errors" that turns "a trial into a travesty," and where the defendant has complained on appeal not only of individual errors, but also of an "avalanche of errors" that together violated his constitutional rights.

TABLE OF CONTENTS

Page

VOLUME I of II

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 10

I. This Court Should Clarify The Constitutional Limitation On A District Court's Power To Remove And Substitute Deliberating Jurors In Light Of Amended Rule 24 And Should Resolve Conflicts Over The Removal Standard 11

II. The Seventh Circuit's Holding That The Interrogation Of Deliberating Jurors About Their Own False Statements In Front Of Prosecutors Does Not Irreparably Taint The Verdict Warrants This Court's Review 16

III. The Seventh Circuit's Decision Refusing Cumulative Error Analysis Conflicts With The Law Of Other Circuits And Is Starkly Inconsistent With This Court's Precedent Concerning Fundamental Trial Rights 22

CONCLUSION 28

APPENDIX A
United States v. *Warner*,
498 F.3d 666 (7th Cir. 2007) 1a

APPENDIX B
United States v. *Warner*,
506 F.3d 517 (7th Cir. 2007) 92a

VOLUME II of II

APPENDIX C
United States v. *Warner*,
2006 WL 2583722
(N.D. Ill. 2006) (unreported) 108a

APPENDIX D
United States v. *Warner*,
2004 WL 1794476
(N.D. Ill. 2004) (unreported) 244a

APPENDIX E
U.S. District Court for the Northern District of Illinois, Judgment in a Criminal Case - George H. Ryan (Sept. 6, 2006) 317a

APPENDIX F
U.S. District Court for the Northern District of Illinois, Judgment in a Criminal Case - Lawrence E. Warner
(Sept. 6, 2006) 328a

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. *Fulminante*,
499 U.S. 279 (1991) 16

Blakely v. *Washington*,
542 U.S. 296 (2004) 27

Chambers v. *Mississippi*,
410 U.S. 284 (1973) 26

Claudio v. *Snyder*,
68 F.3d 1573 (3d Cir. 1995) 12

Duncan v. *Louisiana*,
391 U.S. 145 (1968) 27

Gentile v. *State Bar of Nevada*,
501 U.S. 1030 (1991) 27

Gomez v. *United States*,
490 U.S. 858 (1989) 16, 18

Henderson v. *Lane*,
613 F.2d 175 (7th Cir. 1980) 12

Johnson v. *Louisiana*,
406 U.S. 356 (1972) 12

Kotteakos v. *United States*,
328 U.S. 750 (1946) 25, 26

Remmer v. *United States*,
347 U.S. 227 (1954) 17, 18

Remmer v. *United States*,
350 U.S. 377 (1956) 18

Sheppard v. *Maxwell*,
384 U.S. 333 (1966) 27

Smith v. *Phillips*,
455 U.S. 209 (1982) 27

Sullivan v. *Louisiana*,
508 U.S. 275 (1993) 17

Taylor v. *Kentucky*,
436 U.S. 478 (1978) 26

Turner v. *Louisiana*,
379 U.S. 466 (1965) 27

United States v. *Abbell*,
271 F.3d 1286 (11th Cir. 2001) 15

United States v. *Allen*,
269 F.3d 842 (7th Cir. 2001) 23

United States v. *Brown*,
823 F.2d 591 (D.C. Cir. 1987) 14

United States v. *Burr*,
25 F. Cas. 49 (C.C.D. Va. 1807) 28

United States v. *Cornell*,
25 F. Cas. 650 (C.C.D.R.I. 1820) 27

United States v. *David*,
83 F.3d 638 (4th Cir. 1996) 20

United States v. *Diharce-Estrada*,
526 F.2d 637 (5th Cir. 1976) 24

United States v. *Edwards*,
303 F.3d 606 (5th Cir. 2002) 15

United States v. *Gonzalez-Lopez*,
126 S. Ct. 2557 (2006) 20

United States v. *Grunberger*,
431 F.2d 1062 (2d Cir. 1970) 22

United States v. *Josefik*,
753 F.2d 585 (7th Cir. 1985) 15

United States ex rel. McCann v. *Adams*,
126 F.2d 774 (2d Cir. 1942) 17

United States v. *Munoz*,
150 F.3d 401 (5th Cir. 1998) 22

United States v. *Necoechea*,
986 F.2d 1273 (9th Cir. 1993) 23

United States v. *Nelson*,
277 F.3d 164 (2d Cir. 2002) 20

United States v. *Olano*,
502 U.S. 725 (1993) 20

United States v. *Quiroz-Cortez*,
960 F.2d 418 (5th Cir. 1992) 12

United States v. *Recio*,
371 F.3d 1093 (9th Cir. 2004) 20

United States v. *Register*,
182 F.3d 820 (11th Cir. 1999) 15

United States v. *Rivera*,
900 F.2d 1462 (10th Cir. 1990) 23-24

United States v. *Roach*,
502 F.3d 425 (6th Cir. 2007) 22

United States v. *Sepulveda*,
15 F.3d 1161 (1st Cir. 1993) 22

United States v. *Steffen*,
641 F.2d 591 (8th Cir. 1981) 23

United States v. *Symington*,
195 F.3d 1080 (9th Cir. 1999) 14

United States v. *Thomas*,
116 F.3d 606 (2d Cir. 1997) 14, 17

United States v. *Vasquez*,
271 F.3d 93 (3rd Cir. 2001) 20

United States v. *Vasquez*,
225 F. App'x 831 (11th Cir. 2007) 23

United States v. *Virgen-Moreno*,
265 F.3d 276 (5th Cir. 2001)..... 12

United States v. *Wallace*,
848 F.2d 1464 (9th Cir. 1988)..... 23

United States v. *Warner*,
507 F.3d 508 (7th Cir. 2007)..... 10

Williams v. *Florida*,
399 U.S. 78 (1970)..... 12

Constitution and Rules

U.S. Const. amend. V..... 22

U.S. Const. amend. VI 13, 16

Fed. R. Crim. P. 23(b) 13

Fed. R. Crim. P. 24(c)(3)..... 13

INTRODUCTION

This case, which arises from one of the highest-profile public corruption prosecutions in recent memory, presents three important questions of recurring concern to courts, prosecutors and defendants throughout the Nation. The first concerns the appropriate standard for determining when a deliberating juror in a criminal trial can be removed and replaced with an alternate: May a trial court remove and replace such a juror even where there is an objective possibility that the removal was prompted by the juror's views on the merits? The second issue arises somewhat less frequently but is equally important: Does a trial court commit structural error in permitting a jury verdict where more than half the jurors are interrogated in the middle of deliberations about their own misconduct in the presence of a prosecutor? And the third issue, like the first, is one that can and does arise in a wide variety of criminal proceedings: whether a reviewing court must assess trial errors not only for their individual effects, but also for their cumulative effect on the trial proceedings. All of these issues are the subject of widespread confusion and disagreement among the lower courts, and all are worthy of this Court's review.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit are reported at 498 F.3d 666 (Wood, J., joined by Manion, J.) (Kanne, J. dissenting) (reprinted at App. 1a-91a) and 506 F.3d 517 (Posner, J., joined by Kanne and Williams, J.J., dissenting from the denial of rehearing en banc) (reprinted at App. 92a-107a). The opinions of the United States District Court for the Northern District

of Illinois (Pallmeyer, J.) can be found at 2006 WL 2583722 (reprinted at App. 108a-243a) and 2004 WL 1794476 (reprinted at App. 244a-316a).

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2007. Petitioners filed a timely petition for rehearing and rehearing en banc on August 28, 2007. These petitions were denied on October 25, 2007. App. 93a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * .

Federal Rule of Criminal Procedure 24 provides in relevant part:

> The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

STATEMENT

This case arises from the criminal prosecution of George H. Ryan, Sr., the former Governor of Illinois, and his longtime friend, Lawrence E. Warner. They were charged with "honest services" mail fraud and other federal crimes.

1. Following six months of trial testimony, the jury retired to deliberate. Eight days into deliberations, the *Chicago Tribune* revealed that certain jurors had given untruthful or inaccurate answers related to prior criminal arrests or convictions on the juror questionnaire used six months earlier in voir dire. This news broke after the district court and counsel had spent days struggling to respond to a series of notes from the jury, including questions about substantive legal instructions, requests for transcripts and, most significantly, a serious conflict that developed between a group of jurors and Juror Evelyn Ezell — a juror later revealed to be inclined to acquit. Juror Ezell had complained about verbal abuse and intimidation in the deliberations. The group of jurors responded by asking the district court to remove Juror Ezell for failing to deliberate in good faith, and requested that the court empanel an alternate.

The district court suspended deliberations in response to the information disclosed by the *Tribune* and conducted its own inquiry. The investigation initially focused on two jurors, including Juror Ezell, but soon expanded once it was learned that over half the deliberating jurors had failed to disclose arrests, convictions or other significant contact with the court system. For three days, eight jurors were questioned by the district court in the presence of federal prose-

cutors and defense counsel about their undisclosed arrests, convictions and other misstatements or omissions in voir dire. The district court and counsel discussed the necessity of advising jurors of their rights, and, upon consultation with the United States Attorney, Patrick Fitzgerald, the prosecution informed the district court that it was willing to offer immunity to jurors on a going-forward basis. App. 77a-78a.

Ultimately, the district court removed two jurors — Pavlick and Ezell — for being untruthful. The district court substituted two alternates over defense objection, reasoning that while its decision might be error, the court wanted to reach a verdict after such an "enormously burdensome and expensive" trial. 3/24/06 Tr. at 24343-46. Then, eighteen days after the conclusion of closing arguments, the court told the remaining jurors to start "all over" and to "pretend you have never had a discussion about the case at all." App. 19a; 3/28/06 Tr. at 24650, 24805. The reconstituted jury returned guilty verdicts on all counts against both Petitioners after ten days of deliberations free from conflict.

2. Following post-verdict revelations that a juror brought extrinsic legal research into the jury's deliberations, the district court held a hearing. Interviewed by phone, Juror Ezell testified that during the second week of deliberations Juror Peterson brought a piece of paper into the jury room and read from it that "a juror could be dismissed for not deliberating in good faith." App. 211a; 5/5/06 Tr. at 11-12. Juror Ezell initially believed Juror Peterson to be reading a legal instruction from the court and started searching for it in her copy of the instructions, but Peterson stopped her and said, "No, it's not in there. You need to listen." 5/5/06 Tr. at 11. According to Juror Ezell,

after Juror Peterson finished reading from the paper, Juror Losacco said, "No, read the one to her on bribery, because George Ryan was taking bribes and so are you." App. 207a; 5/5/06 Tr. at 12. According to Juror Ezell, Juror Peterson responded, "No, we don't need to" — "We've got her. We've got her right there. We've got her where we want her," and she laughed at Juror Ezell. 5/5/06 Tr. at 12. Another juror (Jesse Davis) defended Juror Ezell, and Davis told Ezell to watch her back — a warning that made her "even more afraid." App. 207a; 5/5/06 Tr. at 12. Juror Ezell testified that she was in tears, and when she tried to leave the jury room, another juror blocked the door. App. 207a; 5/5/06 Tr. at 13.

Represented by legal counsel, Juror Peterson was interviewed by the district court by telephone and confirmed the substance of Juror Ezell's account. Juror Peterson explained that after a discussion concerning Juror Ezell during the first week of deliberations, other jurors encouraged her to conduct extraneous research, telling her, "Teacher, do your homework." App. 85a; 5/5/06 Tr. at 80. Ignoring district court instructions forbidding legal research, Juror Peterson then did a Google search and found articles on dealing with difficult people. App. 10a, 217a; 5/5/06 Tr. at 68, 80. The next night, she found an American Judicature Society article on the removal and substitution of jurors. Juror Peterson is certain that she showed that article to other jurors and cut out the following paragraph:

> But other bases for substitution raise serious questions about the sanctity of the deliberative process, primarily allegations by some jurors that another juror is unwilling or unable to meaningfully

> deliberate, or is unwilling to follow the law. Such an allegation requires a hearing where the judge must decide the tricky question whether the juror is truly unfit to serve, or is merely expressing an alternative viewpoint that will likely result in a hung jury. Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss that juror and substitute an alternate juror.

App. 12a; 5/5/06 Tr. at 59-60, 76. Juror Peterson testified that the next day she read the paragraph to Juror Ezell and every other member of the jury. App. 10a; 5/5/06 Tr. at 77-78. In connection with her extrajudicial research, Juror Peterson also crafted her own instruction on good-faith deliberation and read that instruction to Juror Ezell and other jurors repeatedly during the deliberations. App. 10a, 208a-209a; 5/5/06 Tr. at 63, 79-81.

The district court made an express finding that Juror Ezell was intimidated by the use of the AJS article in deliberations. 5/5/06 Tr. at 31-32. The court concluded that Juror Peterson's external legal research was regrettable, but characterized it as "a really innocent mistake" before denying defense requests to interview other jurors. 5/5/06 Tr. at 94.

The district court concluded that "in spite of difficulties generated by this very lengthy, high-profile trial," the Petitioners received a fair trial before an impartial jury. App. 193a. Accordingly, the district court denied repeated defense motions for mistrial as well as the posttrial motion seeking a new trial, and sentenced Warner to 41 months' imprisonment and

Ryan to 78 months' imprisonment. App. 242a, 319a, 330a.

3. In their opening brief on appeal, the Petitioners argued that an "avalanche of errors" related to the jury, its deliberations and the questioning, removal and substitution of jurors midway through deliberations deprived the Petitioners of their constitutional rights to a fair trial before an impartial jury. App. 2a. The Seventh Circuit, however, issued a sharply divided opinion affirming the convictions.

The majority held that extensive juror misconduct and the district court's unprecedented decision to substitute two jurors after eight days of deliberations did not violate the Petitioners' constitutional rights to a fair trial and impartial jury because each error considered in isolation was harmless. App. 10a-33a, 36a-42a. As to removal and substitution, the majority concluded that the trial court's instructions to the reconstituted jury were sufficient to prevent the chilling of deliberations in the new jury. App. 32a. In the majority's view, the removal and substitution of two jurors did not constitute error because the district court complied with the literal requirements of Rule 24(c). App. 38a. The majority further held that the district court's interrogation of jurors during deliberations did not compromise the jury's impartiality and did not constitute a structural error because the defense had requested that at least some jurors be questioned about their misconduct. App. 66a. Finally, the majority expressly declined to consider the cumulative nature of the issues raised by the defense. App. 3a. The majority opined that "the fact that the trial may not have been picture-perfect is, in itself, nothing unusual." App. 2a.

Judge Kanne voiced strong disagreement in dissent. He concluded that "the dysfunctional jury deliberations" deprived the Petitioners of a fair trial. App. 69a. Judge Kanne summarized the remarkable developments in 18 bullet points, later quoted verbatim by Judge Posner in the dissent from the denial of rehearing en banc. App. 69a-72a, 93a-96a. A mere sampling of these points includes:

- jurors interrogated by the district court for days in the presence of federal prosecutors midway through deliberations about their own false statements in voir dire;
- an astonishing effort by jurors to force the removal of a juror with whom they disagreed, and a juror's extrinsic legal research into the basis for seeking such removal;
- the removal of two deliberating jurors in the middle of deliberations (including a defense juror) for bias;
- a raft of other juror misconduct that included among other things repeated violations of the court's instructions, *ex parte* communications, and exposure to media coverage about the trial; and
- the unprecedented substitution of two alternates and reconfiguration of the jury weeks after closing arguments.

App. 69a-72a, 93a-96a.

According to Judge Kanne, the district court's interrogation of jurors in the middle of deliberations about their own misconduct constituted a structural error because it created "irreconcilable conflicts of interest" in which the jurors themselves were poten-

tially subject to criminal prosecution. App. 72a. Further, Judge Kanne concluded that a "flood of errors" required reversal of these convictions:

> To describe the circumstances surrounding the jury . . . as "nothing unusual" is to simply turn a blind eye to the realities of what occurred – in order to save the efforts expended during a six month trial.

App. 72a. As Judge Kanne concluded, the "breadth and depth of both structural and nonstructural errors" presented are "astounding" and "egregious" such that "a mistrial was the only permissible result." App. 90a-91a.

The Seventh Circuit denied rehearing and rehearing en banc, but that decision was far from unanimous: of the nine judges who participated, three dissented in an opinion written by Judge Posner, which concluded that "a cascade of errors turn[ed] a trial into a travesty." App. 97a. Indeed, as Judge Posner observed, the government's offer to immunize deliberating jurors during interrogations related to their own false statements "suggests the proceedings were broken beyond repair." App. 99a.[1]

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[1] In a dissent from the panel majority's decision to deny continuing bail pending certiorari, Judge Kanne further noted:

> I dissent because I disagree with the in chambers opinion's characterizations of the dissent from the panel opinion and the dissent from the rehearing *en banc*; the in chambers opinion's emphasis and reliance on forfeiture; and that opinion's conclusion that the appellants have not demonstrated a reasonable probability of success on the merits. The trial was riddled with errors

REASONS FOR GRANTING THE PETITION

Public confidence in our jury system depends upon the willingness of courts to police and redress serious and pervasive errors that affect the essential fairness of a trial and jeopardize a jury's impartiality. Yet here, as we explain in more detail below, the lower courts simply refused to do that, and their refusal raises three issues warranting this Court's review.

First, the lower courts are in conflict over the standards governing the removal and substitution of deliberating jurors. The decision below effectively eliminates any constitutional limitation on a district court's ability to substitute a deliberating juror provided that the court complies with express requirements of the recently amended Rule 24(c). Review is imperative because there is genuine confusion on this recurring issue of enormous practical importance.

Second, the interrogation of deliberating jurors about their own misconduct presents the type of structural defect that defies harmless error analysis. Jurors in jeopardy themselves cannot fairly and freely determine the outcome of a case after having been questioned in the presence of federal prosecutors about their own false statements. This constitutional error is of such a magnitude that it defeats the essential feature of the jury trial — impartial jurors.

Finally, the last issue raised in this Petition goes to the heart of a reviewing court's obligation to en-

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> that ultimately rendered the proceedings manifestly unfair and unjust . . . .

United States v. *Warner*, 507 F.3d 508, 511-12 (7th Cir. 2007). Justice Stevens subsequently denied an application for continued bail.

sure that errors, individually and in combination, do not deprive a defendant of his constitutional rights to a fair trial, unanimous verdict and impartial jury. The decision below is in conflict with decisions in other Circuits in its refusal to review for cumulative error, and is inconsistent with the precedent of this Court.

I. This Court Should Clarify The Constitutional Limitation On A District Court's Power To Remove And Substitute Deliberating Jurors In Light Of Amended Rule 24 And Should Resolve Conflicts Over The Removal Standard

Here, for the first time in the history of American jurisprudence, a federal district court significantly changed the composition of a jury over defense objection eight days into deliberations at a time when the parties knew the jurors' likely views of the evidence. What made this possible was a 1999 amendment to Federal Rule of Criminal Procedure 24(c)(3), which now authorizes the substitution of deliberating jurors if the alternate does not discuss the case prior to replacing an original juror and the reconstituted jury is instructed to "begin deliberations anew." The Seventh Circuit concluded that so long as the bare requirements of the rule are satisfied, there is no limitation (constitutional or otherwise) on a district court's ability to substitute deliberating jurors. App. 35a-36a. As a legal standard, however, that effectively insulates all but express rule violations from appellate review — even in a situation where, as here, a defendant expressly argued that the substitution violated his constitutional rights to a fair trial, unanimous verdict and impartial jury. App. 33a-34a.

1. The constitutional danger inherent in substituting a deliberating juror is that it can defeat an "essential feature" of the jury trial by compromising "group deliberation." See *Williams* v. *Florida*, 399 U.S. 78, 100 (1970); *Claudio* v. *Snyder*, 68 F.3d 1573, 1575 (3d Cir. 1995); *Henderson* v. *Lane*, 613 F.2d 175, 177 (7th Cir. 1980). Further, "[u]nanimity is one of the indispensable features of the *federal* jury trial." *Johnson* v. *Louisiana*, 406 U.S. 356, 369-70 (1972) (Powell, J., concurring) (emphasis in original).

Earlier authorities recognize the inherent difficulty in asking jurors to start deliberations anew, and the significant risk of coercion to the new alternates who enter deliberations after other jurors have already formed strong conclusions about the evidence. See, *e.g.*, *United States* v. *Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992). Further, there is a risk in high-profile cases that the alternate jurors, exposed to media and other outside influences, may inject extraneous information into deliberations. All these risks increase the longer the first jury deliberates. See *United States* v. *Virgen-Moreno*, 265 F.3d 276, 289 (5th Cir. 2001). That is why no case in American jurisprudence has ever permitted the substitution of multiple jurors over a defendant's objection after eight days of deliberations. Yet after the decision below, courts, particularly those in the Seventh Circuit, will be free to do just that, and worse.

2. Nothing in the text, commentary or history of the Federal Rules of Criminal Procedure suggests that the 1999 amendment to Rule 24 altered the constitutional confines. Quite the contrary, the commentary to its counterpart, Rule 23, expressly recognizes the great potential for prejudice in substitution:

> The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations.

Fed. R. Crim. P. 23(b) advisory committee's note. As amended, Rule 24(c)(3) is best construed to permit substitution of deliberating jurors *only* if that can be accomplished without compromising a defendant's constitutional right to a unanimous verdict from an impartial jury. See Fed. R. Crim. P. 24(c)(3); U.S. Const. amend. VI. In rejecting this view, however, the Seventh Circuit essentially held that the Rule authorizes a violation of the Constitution.

This manipulation of the jury's composition deprived the Petitioners of the fundamental right to a fair trial by an impartial jury. Indeed, before the district court took the unprecedented step of substituting two alternate jurors after eight days of deliberations, it recognized the enormous potential for prejudice, calling the decision "difficult," "extraordinary,"

"tough," "an extremely close call," and one that can be "very, very, very legitimately criticized." 3/28/06 Tr. at 24725, 24803. The jurors already had spent eight tumultuous days in heated arguments about the evidence. They already had sought the court's guidance in repeated confusion about the instructions. The jurors already had deliberated to verdict on several counts. They already had witnessed an effort to purge a juror through extrinsic legal research and a request for her removal. The jurors already were questioned about falsity in their questionnaires, and heard of the tremendous media scrutiny focused exclusively upon them.

3. This Court has never addressed the constitutionality of Rule 24 or the correct standard governing the removal and substitution of deliberating jurors. There is a compelling need for guidance.

For one thing, the Circuits are in open conflict over the standard governing the removal of a holdout juror. The Second, Ninth and District of Columbia Circuits have held that it is improper and unconstitutional to remove a juror if there is an objective *possibility* that the juror's dismissal was prompted by the juror's doubts as to the defendant's guilt. See *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) ("[I]f the record evidence discloses any possibility that the request to discharge stems from the juror's views of the sufficiency of the government's evidence, the court must deny the request."); *United States* v. *Thomas*, 116 F.3d 606, 622 (2d Cir. 1997) ("adopt[ing] the *Brown* rule as an appropriate limitation on a juror's dismissal"); *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) ("[I]f the record evidence discloses any reasonable possibility that the impetus for the juror's dismissal stems from the juror's views

on the merits of the case, the court must not dismiss the juror."). The Eleventh Circuit, for its part, has held that a district court may dismiss a juror unless the record demonstrates a "substantial basis" that dismissal stemmed from the juror's view of the evidence. *United States* v. *Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001).

In this case, the Seventh Circuit has articulated a conflicting standard and held that the "defendants have the burden of demonstrating on appeal that there was no legitimate basis in the record" for the removal of the original jurors and substitution of alternates. App. 36a. The Fifth Circuit has adopted a similar view. *United States* v. *Edwards*, 303 F.3d 606, 633-34 (5th Cir. 2002). According to the Seventh Circuit, the prosecution's motivation for seeking the removal of a juror is irrelevant so long as there is a basis in the record to support the district court's action. App. 31a.

While there are few cases addressing substitution, the Circuits are in disarray on that question as well. Some older cases have held that the potential for prejudice from the substitution of an alternate must be analyzed for a *reasonable possibility of prejudice* — not actual prejudice. See, *e.g.*, *United States* v. *Register*, 182 F.3d 820, 843 (11th Cir. 1999) (the pertinent inquiry is "whether the record indicates a reasonable possibility of prejudice to the defendants"). Other courts have analyzed substitution of deliberating jurors in light of objective criteria to evaluate actual prejudice, such as the risk of external influence on alternates prior to substitution and the length and apparent extent of the original deliberations. See *United States* v. *Josefik*, 753 F.2d 585, 587 (7th Cir. 1985). But now, the Seventh Circuit has departed

from that approach by concluding that prejudice stemming from the substitution of an alternate is of no consequence absent an explicit violation of the amended Rule 24. App. 34a.

This conflict over the proper application of Rule 24 and the removal and substitution of jurors should be resolved by this Court. The conflicting appellate court opinions demonstrate real confusion, and the removal issue is one that has recurred with some frequency.

II. The Seventh Circuit's Holding That The Interrogation Of Deliberating Jurors About Their Own False Statements In Front Of Prosecutors Does Not Irreparably Taint The Verdict Warrants This Court's Review

The Seventh Circuit's holding on the second question presented — sustaining the verdict despite the interrogation of deliberating jurors about their misconduct in front of prosecutors — also merits review. The Sixth Amendment guarantees an accused the right to a trial before an impartial jury. U.S. Const. amend. VI. Certain constitutional errors, by their nature, "defy analysis by 'harmless-error' standards." *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). "Each of these constitutional deprivations is a . . . structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310.

1. As this Court has said, "[a]mong those basic fair trial rights that 'can never be treated as harmless' is a defendant's 'right to an impartial adjudicator, be it judge or jury.'" *Gomez* v. *United States*, 490 U.S. 858, 876 (1989) (citation omitted). Any attempt to apply harmless-error analysis would amount to

"pure speculation" as to what would have occurred in the absence of the error. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993).

Moreover, the hallmark of impartiality is, as Judge Learned Hand observed, that jurors "are in no wise accountable, directly or indirectly, for what they do." *United States ex rel. McCann* v. *Adams*, 126 F.2d 774, 775 (2d Cir. 1942). Indeed, the practice of punishing jurors related to their service was abandoned more than three centuries ago: since "the famous opinion in *Bushnell's Case*, 124 Eng. Rep. 1006 (C.P. 1680) . . . jurors have been protected from being called to account for their verdicts." *United States* v. *Thomas*, 116 F.3d 606, 615 (2d Cir. 1997).

By contrast, where jurors fear repercussions from their deliberations — not to mention possible prosecution — they cannot fairly determine the outcome of the case. The threat of punishment works a coercive influence on the jury's independence, and jurors fearing possible prosecution for their own misdeeds during the trial cannot be impartial jurors. That is because of the significant risk that jurors who are the subject of law enforcement scrutiny during deliberations in a criminal case will seek to please the prosecution and vote to convict.

That was the essence of this Court's holding in *Remmer* v. *United States*, 347 U.S. 227 (1954) ("*Remmer I*"), which questioned a juror's ability to deliberate freely when questioned by law enforcement during a trial:

> The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A

> juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder.

Id. at 229. *Remmer I* was decided before "structural error" came into this Court's lexicon. But significantly, while *Remmer I* ordered a remand for the purpose of establishing prejudice, this Court in subsequent proceedings ("*Remmer II*") ordered a new trial even over the lower court's finding of no prejudice. 350 U.S. 377, 381-82 (1956).

This is consistent with the Court's subsequent decisions related to the fundamental right to trial before unbiased jurors. *Gomez*, 490 U.S. at 876. Errors that implicate such a basic trial right — the right to an impartial jury — are structural defects that render a criminal trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence.

2. Here, the Seventh Circuit adopted an unduly restrictive legal standard in failing to consider the government's offer of immunity during juror interrogations as error — structural or otherwise. App. 64a-68a. Indeed, the Seventh Circuit dismissed the issue raised in the Petitioners' opening brief on appeal as a "modest point" even as it struggled to distinguish *Remmer I*. App. 67a-68a. But *over half* the deliberating jurors had made misstatements in voir dire about prior arrests and convictions, and were questioned about those misstatements by the district court in the presence of federal prosecutors. App. 71a. At the time of those interrogations, local media in Chicago advocated perjury prosecutions of the jurors, and at least three jurors retained legal counsel in connection with their jury service. The district court's questioning of jurors in the presence of federal prosecutors

raised the specter of perjury prosecutions such that the court and counsel considered whether the jurors should be advised of their rights. App. 76a. Indeed, the United States Attorney on his own accord offered a grant of immunity to jurors "going forward."[2] App. 77a-78a.

There can be no confidence in a jury's verdict where the verdict was "delivered by a jury whose number included some who themselves faced potential criminal prosecution for their actions that occurred during this trial." App. 74a. As Judge Posner concluded, not only did the jurors' misrepresentations "cast doubt on the jurors' ability to serve, but the court's grilling of the jurors on this topic may have prevented them from performing their duty conscientiously and undistractedly":

> They faced potential prosecution by a *party* to the case — the federal government. They may have feared perjury charges, having seen first-hand in the trial that the government prosecutes people for making false statements. Had the government fully immunized the jurors from prosecution, and had the jurors known this, there is the considerable risk that they would have been biased in favor of the government. But even if the jurors did not know that any

[2] Despite the prosecution's decision to grant blanket immunity, the offer was conveyed to only one juror. This selective disclosure of immunity is itself problematic, with the other jurors inevitably wondering why they were not afforded immunity when one of their peers was specifically guaranteed that "nothing that you say here is going to be used against you in any way." 3/27/06 Tr. at 24502.

> offer of immunity had been made, they may have decided to convict the defendants in order to avoid provoking the government's ire and inviting a retaliatory prosecution of them (the jurors). The government's attempt to immunize jurors itself suggests the proceedings were broken beyond repair.

App. 98a-99a (emphasis in original). Indeed, the entire process of removing and replacing deliberating jurors was so fundamentally flawed as to undermine the basic fairness of the proceedings. The inherently prejudicial interrogation of deliberating jurors, the extraordinary confusion over the standard for removing jurors and the notes revealing an apparent split on the jury made it impossible to fairly reconfigure the jury eight days into deliberations.

The dissenting judges below concluded that structural error treatment was particularly appropriate — and that the majority's opinion to the contrary[3] squarely conflicted with this Court's precedent — because of the inability to quantitatively assess or discern actual prejudice. *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 n.4 (2006) (resting "con-

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[3] The majority's suggestion of waiver is questionable in itself. This Court expressly left open whether reversal is required when an error is structural but unpreserved. *United States* v. *Olano*, 502 U.S. 725, 735 (1993). Subsequent to *Olano*, some Circuits have suggested that certain structural errors may be unwaivable. See, *e.g.*, *United States* v. *Nelson*, 277 F.3d 164, 205 (2d Cir. 2002) (Calabresi, J.) ("[T]he right to an impartial fact finder might be inherently unwaivable."); *United States* v. *Vasquez*, 271 F.3d 93, 100 (3rd Cir. 2001). Other Circuits have taken a contrary view. See, *e.g.*, *United States* v. *Recio*, 371 F.3d 1093, 1100 n.4, 1101, 1103 n.7 (9th Cir. 2004); *United States* v. *David*, 83 F.3d 638, 647 (4th Cir. 1996).

clusion of structural error upon the difficulty of assessing the effect of the error"). Indeed, that was patently apparent in the district court's response to defense counsel's repeated objections on this very issue[4]: "The . . . argument you are making is that we now have a bunch of fearful jurors. I just don't know how to address that." 3/28/06 Tr. at 24699.

But the answer is simple. In a case such as this, in which jurors are questioned in the presence of prosecutors about the jurors' own conduct, the risk is simply too great that they will not be fair to the defendant. The Seventh Circuit's refusal to recognize

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[4] Before the district court reconstituted deliberations, the defense argued that the jurors "may well be terrified that the U.S. government is looking at them":

> DEFENSE COUNSEL: [T]hese jurors now are under investigation . . . . And there is not a chance in the world that they are going to vote for defendant when they think that the federal government is looking at them the way that they looked at these others.
>
> They have sat there for six months and watched a defendant be prosecuted and going to be sent to jail, in the government's view, because he did exactly what they might have done, and they know they did. And they are not going to put themselves in that position by going against the government, even if they feel in their heart that they should. That's the realistic outcome.
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> ****
>
> And these jurors were visibly frightened. And if you think for one minute that that fear is going to help the defense, I beg to differ with you.
>
> When a jury is afraid, they vote with the prosecution . . . .

3/28/06 Tr. at 24692, 24698.

that reality, and the risk that it will escape recognition by that and other courts throughout the Seventh Circuit, warrants this Court's review.

III. The Seventh Circuit's Decision Refusing Cumulative Error Analysis Conflicts With The Law Of Other Circuits And Is Starkly Inconsistent With This Court's Precedent Concerning Fundamental Trial Rights

The Seventh Circuit's refusal to engage in cumulative error analysis likewise warrants this Court's review. Due process guarantees a criminal defendant a fair trial free from prejudicial error, U.S. Const. amend. V, and this necessarily extends to a trial free from *cumulative* error.

1. The Seventh Circuit, however, has adopted a minority view in refusing to consider the permeating effect of jury and other trial errors. With the decision below, the Seventh Circuit has now joined the Sixth Circuit in refusing cumulative error review. App. 3a; *United States* v. *Roach*, 502 F.3d 425, 443 (6th Cir. 2007).

In direct conflict, the First, Second, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits hold that a cumulative error analysis is an implicit and indispensable step in determining whether a defendant's trial was rendered fundamentally unfair. See *United States* v. *Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) ("A reviewing tribunal must consider each such claim against the background of the case as a whole . . . ."); *United States* v. *Grunberger*, 431 F.2d 1062, 1064 (2d Cir. 1970) (holding that the cumulative effect of errors "when viewed in the light of the trial posture of the case as a whole requires a reversal . . . ."); *United States* v. *Munoz*, 150 F.3d 401, 418 (5th

Cir. 1998) ("[A]n aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal."); *United States* v. *Steffen*, 641 F.2d 591, 598 (8th Cir. 1981) (explaining that the court will reverse where "the case as a whole presents an image of unfairness" even though none of the claimed errors alone is sufficient to require reversal); *United States* v. *Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988) (finding that a "balkanized, issue-by-issue harmless error review" would not be "very enlightening in determining whether the appellants were prejudiced by the errors" because "[a]lthough each of the . . . errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted"); *United States* v. *Rivera*, 900 F.2d 1462, 1470, 1477 (10th Cir. 1990) (en banc) ("Unless an aggregate harmlessness determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless."); *United States* v. *Vasquez*, 225 F. App'x 831, 836 (11th Cir. 2007) (unpublished decision) ("In addressing a claim of cumulative error, we must examine the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial.") (citation omitted).[5]

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[5] The Circuits are divided as to whether a finding of a "single" error precludes cumulative error analysis, but even a single error can violate a defendant's right to a fair trial. Indeed, in contrast with the Seventh Circuit, other Circuits have considered whether prejudicial circumstances — in addition to errors — imperiled the fundamental fairness of the trial. Compare *United States* v. *Allen*, 269 F.3d 842, 847 (7th Cir. 2001) ("[E]ven if we found it to be error, it would amount to the only error in

2. Nor can there be any doubt that this case provides a good vehicle for resolving the disagreement and confusion on the necessity of cumulative error review. In its desire to secure verdicts after such a lengthy trial, the district court here committed what the Petitioners in their brief on appeal termed "an avalanche of errors" that individually and collectively deprived the Petitioners of their constitutional rights to a fair trial before an impartial jury. And a litany of jury-related problems undoubtedly infected this trial: a group of jurors sought to remove a defense holdout; at the urging of others, a juror conducted legal research on the removal of jurors and used it in deliberations to threaten the holdout; the juror who brought extrinsic research into the jury room, and those who encouraged her to commit that misconduct, remained on the jury and deliberated until verdict; half of the jurors failed to disclose prior arrests and convictions on their questionnaires; for days, deliberations were halted and jurors questioned about their false answers in the presence of federal prosecutors; two jurors who had participated in eight days of deliberation were removed; and two alternate jurors

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this case, completely precluding a finding of cumulative error."), with *United States* v. *Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) ("Even if a particular error is cured by an instruction, the court should consider any 'traces' which may remain" when reviewing for cumulative error."); *Rivera*, 900 F.2d at 1471 n.8, 1477 (noting that courts have found fundamental unfairness when error is considered in conjunction with other prejudicial circumstances, but declining to explore the outer parameters of when prejudicial circumstances are included in a cumulative impact analysis); and *United States* v. *Diharce-Estrada*, 526 F.2d 637, 642 (5th Cir. 1976) ("Based upon the combination of errors and prejudicial circumstances recited, this court is left with the definite and firm conviction that [defendant] did not receive a fair trial.").

were substituted after a two-and-a-half-week absence from the courthouse (including one who had been questioned about his failure to disclose a criminal conviction).

In discarding a cumulative error analysis, the Seventh Circuit has impermissibly narrowed the scope of appellate review by considering each error in isolation and declining to consider their aggregate effect. App. 3a. The decision eviscerates a criminal defendant's basic rights to a fair trial and impartial jury by improperly circumscribing the scope of appellate review. As Judge Posner noted in dissent, "harmlessness" of an individual trial error viewed in isolation "is not the test of reversible error when a cascade of errors turns a trial into a travesty." App. 97a. Further, Judge Posner concluded, "the panel majority opinion, unless set aside, will be read as an endorsement of laissez-faire appellate review" and "will have the force of precedent in future cases." App. 83a.

3. The minority view adopted by the Seventh and Sixth Circuits is also in open tension with this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946), which described a reviewing court's obligation to consider claims of error "not singled out and standing alone, but in relation to all else that happened":

> But if one cannot say, with fair assurance, after *pondering all that happened without stripping the erroneous action from the whole*, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there*

> *was enough to support the result, apart from the phase affected by the error.* It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 765 (emphases added). The Seventh Circuit's decision to limit its "review of the trial proceedings" to "particular" errors considered in isolation is incompatible with the clear and unambiguous statement of controlling law from *Kotteakos* and other decisions from this Court.

Indeed, this Court has since reaffirmed the principle that the right of an accused in a criminal trial to due process requires a cumulative error analysis. In *Chambers* v. *Mississippi*, the Court held that a trial was rendered fundamentally unfair as a result of the cumulative effect of several evidentiary rulings. 410 U.S. 284, 302-03 (1973). Similarly, the Court held in *Taylor* v. *Kentucky* that cumulative error could render a trial fundamentally unfair: "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness." 436 U.S. 478, 488 n.15 (1978). This precedent is predicated on the sound recognition that errors, while individually harmless when viewed in isolation, can nonetheless in the aggregate violate a defendant's due process rights just as much as a single reversible error. Due process requires a reviewing court to assess the harm done by the errors considered in the aggregate. As Judge Posner noted in his dissent, "harmlessness is not the test of reversible error when a cascade of errors turns a trial into a travesty." App. 97a.

4. The significance of the Seventh Circuit's failure to conduct a cumulative error analysis is particularly acute here because the errors in question directly related to the jury, the integrity of its deliberations and the impartiality of its members. There is, as Judge Posner described, "an independent judicial interest in the proper functioning of the adjudicative process" which is "at its zenith in a criminal jury trial." App. 97a. Indeed, two hundred years of precedent from this Court has assiduously guarded an accused's right to a fair trial and impartial jury. See, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 305-06 (2004) ("[T]he right of jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."); *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors . . . ."); *Smith* v. *Phillips*, 455 U.S. 209, 231 (1982) (Marshall, J., dissenting) ("The right to a trial by an impartial jury is too important, and the threat to that right too great, to justify rigid insistence on actual proof of bias. Such a requirement blinks reality."); *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice . . . ."); *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences."); *Turner* v. *Louisiana*, 379 U.S. 466, 471-72 (1965) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."); *United States* v. *Cornell*, 25 F. Cas. 650, 655-56, No.14,868 (C.C.D.R.I. 1820) ("To insist on a ju-

ror's sitting in a cause when he acknowledges himself to be under influences . . . would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice."); *United States* v. *Burr*, 25 F. Cas. 49, 50, No. 14,692g (C.C.D. Va. 1807) ("The great value of the trial by jury certainly consists in its fairness and impartiality.").

This clear and express conflict in the law of the Circuits on a question as fundamental as the role of cumulative error analysis warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	Case No. 10 CV 5512
v.	)	
	)	Judge Rebecca R. Pallmeyer
GEORGE H. RYAN, SR.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this response in opposition to defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255.

INTRODUCTION

Defendant George Ryan challenges his convictions on one count of racketeering and seven counts of mail fraud based on the Supreme Court's recent decision in *Skilling v. United States*, 561 U.S. __, 130 S.Ct. 2896 (2010). Contrary to Ryan's contentions, nothing in *Skilling* undermines Ryan's convictions. The instructions in this case permitted the jury to convict Ryan of honest services fraud only if the jury concluded that Ryan took bribes and kickbacks, the very conduct *Skilling* held is prohibited under the honest services statute. Because there was no instructional error, there was no error at all.

Even if the Court were to conclude that the instructions permitted the jury to convict Ryan for conduct that fell short of taking bribes and kickbacks, any error would be harmless for three reasons. First, even if a jury could have convicted Ryan without finding that he took bribes and kickbacks, no reasonable jury actually would have. Any jury that was properly instructed on honest services fraud would have convicted Ryan of taking bribes and kickbacks because the evidence that

he did so was overwhelming. The evidence showed that over the course of many years, Ryan accepted a stream of benefits from benefactors, and that Ryan awarded state contracts and leases to those benefactors in return. In other words, Ryan took bribes and kickbacks, and any properly instructed jury would have reached that finding.

Second, even if the jury could have convicted Ryan of honest services fraud for conduct that fell short of taking bribes and kickbacks, any reasonable jury that would have convicted Ryan of honest services fraud also would have convicted him of money-property fraud, which the government properly charged. The government alleged a single fraud scheme in which Ryan not only deprived the state of its right to his honest services, but also obtained state money under false pretenses, by steering state money to his benefactors through lucrative state contracts and leases, while actively concealing and lying about the substantial personal and financial benefits his benefactors were giving him in return. In many cases, Ryan's awarding of state money through fraud resulted in a significant loss to the state. This is money-property fraud, and it was so inseparable from Ryan's honest services fraud that no reasonable jury would have convicted on the latter ground without convicting on the former, making any error in the honest services instructions harmless.

Finally, any reasonable jury that was properly instructed only on the money-property fraud theory would have convicted Ryan. The evidence that Ryan committed money-property fraud was overwhelming, and so any error in the honest services instructions could not have prejudiced Ryan.

Because there was no error, and any potential errors were harmless, this Court should deny Ryan's § 2255 motion.

BACKGROUND

I. Second Superseding Indictment

In December 2003, a federal grand jury returned a 22-count second superseding indictment ("indictment") against defendant George Ryan and his co-schemer, Larry Warner. The indictment alleged that over the course of many years as Secretary of State (SOS), and then as Governor of Illinois, Ryan awarded to Warner and others lucrative state property in the form of state contracts and leases in exchange for substantial personal and financial benefits, and that he and his co-schemers concealed these exchanges from the people of Illinois.

Count One of the indictment charged Ryan and Warner with racketeering conspiracy in violation of 18 U.S.C. § 1962(d), alleging that Ryan and Warner conspired to conduct the affairs of the State of Illinois through a pattern of racketeering activity involving multiple acts of mail fraud, money laundering, extortion, obstruction of justice, state-law bribery, and related offenses. R110:1-16.[1] Counts Two through Ten charged that Ryan, in violation of 18 U.S.C. § 1341 and 1346, devised and carried out a scheme to defraud the State of Illinois of money, property, and the right to the honest services of Ryan and other state officials and employees, and used the United States mails and other interstate carriers in furtherance of the scheme. R110:17-67.[2] Counts Eleven through Thirteen charged Ryan with making false statements to the FBI, in violation of 18 U.S.C. § 1001(a)(2). R110:68-71. Counts Eighteen through Twenty-Two charged Ryan with tax crimes. R110:76-88.

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[1] Citations to Ryan's § 2255 motion are to "Mot__." Citations to record documents and trial transcripts are to "R__" and "Tr__," respectively. Citations to the government's trial exhibits are to "Gx__."

[2] Warner was also charged in Counts Two through Five, and Seven through Ten. R110.

II. The Evidence Presented at Trial

The evidence established that, throughout Ryan's tenure in statewide public office, Ryan, his friends, and his family received financial benefits from benefactors, including Larry Warner and other key figures, Harry Klein, Arthur ("Ron") Swanson, and Donald Udstuen, in exchange for state contracts and leases worth millions of dollars, and that Ryan concealed the benefits he received.

A. Official Actions Taken by Ryan in Return for Personal Benefits Provided by Warner and Udstuen

1. The ADM Contract (Count Two)

Shortly after Ryan was elected SOS, Warner told Udstuen, another Ryan friend and political supporter, that Warner was going to capitalize on his relationship with Ryan by entering the lobbying business. Tr11620. Warner said Udstuen "should be part of it" because no one had done more for Ryan than Udstuen, and Udstuen, therefore, "deserved some of this." *Id.*[3] Warner explained that he had talked to Ryan about this plan, and Ryan was "fine" with it. Tr11620-21. Warner added, "I will take care of George." Tr11622.

One of Warner's first clients was ADM, a manufacturer of validation stickers for license plates. Tr11637. Before Ryan became SOS, ADM had won the annual stickers contract, which had specifications calling for a "metallic security mark," which only ADM could provide. Tr8032-33,8064,8067-68,8112-13. From 1991 through 1998, to keep the contract, ADM paid Warner a monthly fee ranging from $2,000 to $5,000. Gx02-004,02-005,02-015,02-500,02-501.

[3] In addition to giving political support to Ryan and assisting on Ryan's political campaigns as a part of a group of supporters providing advice on such things as strategy and fundraising, Tr.11604-10, Udstuen also provided a valuable personal benefit to Ryan in the mid-1980s when, at Ryan's request, he gave a job to Ryan's daughter, who was recuperating from a very serious car accident. The daughter's employment at the Illinois State Medical Society, where Udstuen worked as a lobbyist and administrator for many years, continued through the period in which Ryan was SOS and governor. Tr11593,11600-01,11612-13.

In early 1993, an official in the SOS office decided to change the contract's specifications by eliminating the metallic security mark. Tr8120-26,8135-36. An upset Warner told the SOS official that Warner would "take care of it," and a day or two later, Ryan sternly told the official to quietly retract the revised specifications. Tr8140-45. The official did so, even though he believed the new specifications were in the State's best interests. Tr8146. As a result, ADM continued to be awarded the contract, and from 1991 to 1999, ADM paid Warner $399,000. Tr2801,8146-47. Warner funneled $122,000 of this money to Udstuen, who did nothing to assist ADM. Tr16905,16916;Gx02-500,02-501. Neither Warner nor Udstuen were ever registered as lobbyists for ADM. Tr13755-56;Gx02-093.

2. The IBM Mainframe Computer Contract (Counts Four and Five)

Ryan chose Warner and Udstuen to search for a director of the SOS department that dealt with mainframe computer issues, and then hired Warner and Udstuen's hand-picked candidate for the job. Tr12526. Warner and Udstuen chose the candidate because he said he would support a transition to IBM, one of Warner's clients. Tr12528-29. In 1996, as planned, the SOS office awarded IBM a $26 million mainframe computer contract. Tr3125,12541;Gx04–043. Warner received lobbying fees calculated as 3.5 percent of SOS revenues received by IBM. Tr12931. In total, Warner received almost $1 million from IBM, most of which came as a result of the award of the mainframe contract. Tr12981-87; GX04-014,04-021. Warner funneled $298,371 of this money to Udstuen, although Udstuen's interest was never disclosed to IBM or to the public through lobbyist disclosure documents. Tr16918,16923;Gx04-500,04-501.

3. The Viisage Digital Licensing Contract (Count Seven)

In July 1996, when the SOS office was considering switching to digital driver's licenses,

several companies, including a company called Viisage, made presentations to Ryan. Tr3091-94. Shortly after the presentations, Warner entered into an arrangement with Viisage which provided that he would receive 5 percent of Viisage's revenues on the licensing contract in return for his help in landing it. Gx03-015,03-016. A businessman named Irwin Jann served as a front man in this arrangement. Jann's name was on the original lobbying agreement with Viisage, and Jann was registered as Viisage's lobbyist, even though Jann did no actual work for Viisage. Tr13178,13188-206;Gx03-020, 03-023, 04-045.

In December 1996, months before the bidding process for the contract began, Ryan directed Warner to cut another Ryan friend and supporter, Swanson, in on the Viisage deal, and Warner did so, guaranteeing Swanson $36,000 for his non-existent "lobbying efforts." Tr3102-04;Gx03-009. After the State awarded the $20 million contract to Viisage in June 1997, Tr13195, Warner removed Jann as the front man and had the Viisage lobbying arrangement transferred to Warner's company. Tr13202-05; Gx03-028. Warner never registered as Viisage's lobbyist, and only in 2001 did Viisage file a record showing that the lobbying arrangement had been transferred to Warner's company in 1997. Tr13756-63. Warner received fees totaling $834,000 on the Viisage contract, of which he provided Swanson $36,000, as Ryan had directed, even though Swanson did no work for Viisage, and Swanson never registered as Viisage's lobbyist. Tr3103-04,16923-25;Gx03-023,03-500,03-501. Five days after landing the Viisage contract, Warner wrote Ryan a blank check, which Ryan used to pay over $3,000 to a band for playing at his daughter's wedding. Gx23-003.

4. The Bellwood and Joliet Leases (Counts Three and Eight)

Ryan steered two SOS leases to Warner, costing the state hundreds of thousands of dollars. In 1992, Warner told Ryan that Warner had found a building in Bellwood to house the SOS Police.

Tr2771-73. When Ryan's chief of staff, Scott Fawell, expressed concern that the press might discover Warner's involvement, Warner told Ryan and Fawell not to worry because Warner's ownership interest in the building was "buried in the paperwork." Tr2774. Indeed, before the lease was signed, Warner's interest in the property was hidden behind front men, whose names were put on the real estate trust documents. Tr16939-40; Gx07-500. Ryan approved the Bellwood lease, and after the lease was signed, Warner's ownership interest in the property surfaced through a series of transactions, and Warner went on to receive about $171,000 in profits. Tr16950-51, 16954;Gx07–011,07-501,07-502. The state overpaid on the Bellwood property by about $246,583 for the first five years. Tr11045,11399.

In about 1994, Warner told Ryan that Warner was looking for property in Joliet for the SOS Office to lease, and Ryan directed an SOS official to deal with Warner on the lease. Tr. 7822-24, 2804-05,10463. Warner bought property in Joliet for $200,000, but as with the Bellwood lease, Warner used front men to hide his ownership interest. Tr16954-58; Gx06-500. Warner again told Fawell that Warner's ownership in the property was buried in paperwork. Tr2812,3005. After Ryan personally signed a four-year SOS lease, Warner's 90% ownership interest in the property emerged through various transactions, and Warner ultimately received about $854,258 in rental payments. Tr16959-62; Gx06-016,06-028,06-501,06-502.[4] The state overpaid for the lease by $296,485. Tr11021. When Warner's role in the lease came to light publicly, Warner told Udstuen that he never should have done the Joliet lease because it was "too good a deal." Tr11727.

5. Financial Benefits Provided by Udstuen and Warner

In return for the state contracts and leases Ryan steered to Warner, Warner gave Ryan a

[4] It was unusual for Ryan to personally sign a lease. The evidence showed he signed only two as SOS: the Joliet lease (for Warner) and the South Holland lease (for Klein). Tr6289-91.

stream of benefits to Ryan and to Ryan's family members and associates. Warner provided over $400,000 in payments to Udstuen relating to the ADM and IBM contracts; $145,000 in loans and financial support to Comguard, a financially distressed company partly owned by Ryan's brother, Gx09-001,09-002,09-020,09-500; $36,000 to Swanson relating to the Viisage contract; and provided Ryan and Ryan's family members with approximately $25,000 in loans, gifts, insurance services, investments and payments. *E.g.*,Gx08-087,08-088,08-089,22-004. Udstuen, in addition to getting Ryan's daughter a job at the Illinois State Medical Society, also arranged, at Ryan's request, for Ryan's son-in-law to work for the Medical Society beginning in 1994. Tr11678-83. When, in early 1997, Udstuen told Ryan's son-in-law that the Medical Society was contemplating terminating his services, Ryan called Udstuen and insisted that the Medical Society retain the son-in-law and also give him a raise. Tr11690-91. Ryan told Udstuen, "John needs the help, and you should continue to help. And he could use a little more help." T11691. Ryan added, "Look, this is important." *Id.* Udstuen gave in to Ryan, and the Medical Society not only did not terminate Ryan's son-in-law, but also gave him a raise, as Ryan had asked. Tr11691-96.

B. Official Actions Taken by Ryan in Return for Personal Benefits Provided by Harry Klein (Count Six)

Beginning in the 1990s, Ryan and Fawell made trips to a Jamaican villa owned by Harry Klein, an Illinois currency exchange owner. Tr2832-34,9421-23;Gx01-044. On Fawell's first trip, Ryan said that because Klein's business was regulated by SOS, they should each give Klein a check for the $1,000 lodging fee, and have Klein return to them the same amount in cash. Tr2838-42. In this way, they would create a false paper trail giving the appearance that Ryan and Fawell were paying for their lodging, whereas, in truth, the transaction was actually a "wash"; in other words, Klein was actually providing free lodging. *See id.* This is what happened every year from 1993 to

2001. Tr2844,9432-33;Gx10-001-10-009. Ryan later falsely represented to FBI agents that he paid his own way at Klein's villa, and went so far as to produce negotiated checks reflecting annual lodging payments, while concealing the cash-back arrangement. Tr18143-49;Gx10-013.

Throughout Ryan's first SOS term, currency exchanges repeatedly requested a fee increase, but Ryan opposed it. Tr. 2843-44. In January 1995, however, during one of Ryan's and Fawell's complimentary stays at Klein's villa in Jamaica, Klein asked Ryan to approve a fee increase. Tr2851. Having been treated to lodging at Klein's Jamaica for several years, Ryan subsequently agreed, and the increase was implemented. Tr. 2852-53.

In late 1996 or early 1997, while Ryan, Fawell and Klein were relaxing around a picnic table during another free stay at Klein's Jamaican villa, Klein said that he wanted to lease his building in South Holland to the SOS. Tr2858-59. Upon returning from his free Jamaican vacation, Ryan ordered an SOS director to work out a lease for the Klein property. Tr6552. Without reviewing other sites, the director cancelled a less-expensive lease in order to move an SOS office to Klein's property, even though, according to the head of SOS's property management division, the building was not in an ideal location. Tr3010-11, 6263, 6266-67, 6557-6560;Gx01-062. When the SOS director asked Ryan's view about certain disputed lease terms, Ryan responded, "What does Harry want?" and then approved Klein's terms, telling Fawell he wanted "Harry to be happy." Tr 2870, 6578-80;Gx01-006. In June 1997, Ryan personally signed the South Holland lease, authorizing $600,000 in payments to Klein over five years. Tr6289-91; Gx11-001. Over a two-and-a-half year period, the state paid significantly more for the South Holland lease than it had for the previous lease, for a total difference of over $170,000. Tr11036.

C. Official Actions Taken by Ryan In Return for Personal Benefits Provided by Arthur Swanson

Swanson gave many benefits to Ryan and his family, including a trip to Cancun and a trip to Lake Tahoe in 1995, Tr15262-77,15333, as well as a figurine worth over $1200, which he gave the Ryans for their anniversary in 1996. Tr15275-77;Gx16-045. In early 1995, around the time Swanson gave Ryan a free vacation at a timeshare in Mexico, Ryan steered an SOS lease to Swanson (the Lincoln Towers lease). Tr15261-71, 2910-20;Gx34-004. Ryan told Fawell to work out the Lincoln Towers lease, even after Swanson proposed a rental figure well above market rate. Tr2914-16. By including non-useable space in the cost figures, Fawell manipulated the cost per square foot to make it appear lower than it actually was. Tr2919;Gx01-036. The Lincoln Towers lease cost $97,000 more than the SOS office paid at its former location, and Swanson made over $21,000 on the deal. Tr15345;Gx15-027, 15-029, 16-002,01-036.

In about August 1999, Swanson paid $2,200 for Ryan's daughter to take a family trip to Disney World. Tr1665-66, 16880-81;Gx28-009. Shortly thereafter, Ryan told Fawell to hire Swanson as a lobbyist for the Metropolitan Pier & Exposition Authority (MPEA). Tr2929-30(JA791). When, after several weeks, Fawell had not yet hired Swanson, an agitated Ryan repeated his directive, adding that Swanson should receive $5,000 per month. Tr2934. Fawell then hired Swanson on Ryan's terms. Tr2937-38. As a result, Swanson's firm was paid $180,000 in state money over three years, even though it did virtually no meaningful work. Tr17238;Gx16-503.

D. False Statements of Economic Interest

Every year from 1991 to 2002, Ryan, as SOS and then governor, filed statement of economic interest forms, as state law required. Gx28-012. The forms required Ryan to list the source of all gifts over $500 that he received during the previous calendar year. *Id.* Ryan's forms for 1991

through 2002 listed none of the payments or other benefits he and his family received from Warner, Klein, or Swanson. *Id.* Ryan signed each form, declaring it to be "a true, correct, and complete statement of my economic interests," and filed or caused the forms to be filed with the SOS. *Id.*

III. Conviction, Sentencing, and Appeal

After a seven-month trial, on April 17, 2006, the jury convicted Ryan and Warner on all counts. R770,771. This Court granted Ryan's motions for acquittal on Counts Nine and Ten (mail fraud counts relating to one of Warner's leases and one of Swanson's lobbying deals). R867:20-23. The Court otherwise denied Ryan's motions for acquittal and a new trial. R867.

On September 6, 2006, this Court sentenced Ryan to the low end of the guideline range, 78 months' imprisonment on Count One, the racketeering conspiracy. The Court ordered this sentence to be served concurrently with sentences of 60 months on each mail fraud and false statement count, and 36 months on each of the tax counts. R888. Ryan appealed, and the Seventh Circuit affirmed his conviction and sentence on direct appeal. *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007).

IV. Section 2255 Motion

On August 31, 2010, Ryan filed the instant motion pursuant to 28 U.S.C. § 2255, arguing that the Supreme Court's decision in *Skilling* invalidated his convictions and sentences on Counts One through Eight, the racketeering and mail fraud counts.[5] Ryan does not challenge his convictions and sentences on the remaining counts, but asks the Court to re-sentence him on those counts if the Court vacates his racketeering and mail fraud convictions.[6]

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[5] *Skilling* applies retroactively because it "narrow[s] the scope of a criminal statute by interpreting its terms," and therefore announces a new substantive rule of criminal law. *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

[6] The government disagrees with Ryan's analysis of this Court's reasoning in imposing sentence on the false statement and tax counts. Since the Court will not need to reach the issue if

ARGUMENT

THE SUPREME COURT'S DECISION IN *SKILLING* DOES NOT UNDERMINE THE VALIDITY OF RYAN'S CONVICTIONS ON COUNTS ONE THROUGH EIGHT.

As the Seventh Circuit stated in the direct appeal of this case, "[a]lthough the intangible rights theory of federal mail fraud may have its problems when applied to other fact settings, it is not unconstitutionally vague as applied here," and "the evidence supporting the jury's verdict was overwhelming." *Warner*, 498 F.3d at 698-99, 675. Nothing in the Supreme Court's decision in *Skilling* changes that analysis. The mail fraud offenses of which Ryan was convicted involved bribes and kickbacks, and therefore fell squarely within the definition of "core" honest services fraud under the Supreme Court's decision in *Skilling*. Even before *Skilling*, the Seventh Circuit described Ryan's convictions as arising from his "channel[ing of] state contracts and leases to a friend *in return for* paid vacations." *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (emphasis added).

Moreover, the jury's verdict may be supported by the alternative valid theory of guilt—money-property fraud—which was properly presented to the jury and is unaffected by *Skilling*. For both of these reasons, the *Skilling* decision does not undermine the validity of Ryan's convictions on Counts One through Eight, and Ryan's motion should be denied.

I. Standard of Review

A prisoner is entitled to relief pursuant to 28 U.S.C. § 2255 only if his "sentence was imposed in violation of the Constitution or laws of the United States," the Court lacked jurisdiction, the sentence exceeded the maximum authorized by law, or the sentence is otherwise subject to

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it denies Ryan's motion, the government has deferred any discussion of re-sentencing at this time.

collateral attack. 28 U.S.C. § 2255(a). In considering a motion under § 2255, the Court must "review evidence and draw all reasonable inferences from it in a light most favorable to the government." *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir.1992). This standard requires that the Court uphold the jury's verdict unless "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Blanchard*, 542 F.3d 1133, 1154 (7th Cir. 2008) (quotations omitted).

This Court reviews *de novo* the legal correctness of the instructions provided to the jury. *United States v. Cote*, 504 F.3d 682, 687 (7th Cir. 2007). The Court reviews the instructions as a whole, and finds error "only if the instructions, viewed as a whole, misguide the jury to the litigant's prejudice . . . ." *Id.* (quoting *United States v. Palivos*, 486 F.3d 250, 257 (7th Cir. 2007).

Where an instructional error has occurred, this Court reviews for harmless error. *Neder v. United States*, 527 U.S. 1, 19 (1999). As the Supreme Court made clear in *Skilling*, harmless error review applies where, although the jury has rendered a general verdict after having been instructed on a legally invalid theory of guilt, the verdict may be supported by an alternative, valid legal theory. *Skilling*, 130 S. Ct. at 2934 (citing *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (*per curiam*) (citing *Neder*, 527 U.S. at 19)). On collateral review, an instructional error will result in reversal only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S.750, 776 (1946)); *Carter v. DeTella*, 36 F.3d 1385, 1392 n.14 (7th Cir. 1994).[7]

[7] Ryan argues that *Brecht* may not apply because it was decided in the context of a post-conviction challenge to a state conviction under 28 U.S.C. § 2254. Mot26-27. Most Circuits have held that the *Brecht* standard applies to a post-conviction challenge to a federal conviction under 28 U.S.C. § 2255. *See, e.g., United States v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006); *United States v. Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003); *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000).

The *Brecht* standard requires more than "a reasonable possibility" that the error contributed to the verdict. *Brecht*, 507 U.S. at 637; *Carter*, 36 F.3d at 1392 (quotations omitted). Instead, on habeas review, a court may reverse a conviction only if after looking at the record as a whole, the court concludes—or has a "grave doubt" about whether—the error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637-38; *O'Neal v. McAninich*, 513 U.S. 432, 435 (1995); *Carter*, 36 F.3d at 1392.

II. The Supreme Court's Decision in *Skilling*

In *Skilling v. United States*, the Supreme Court held that the honest services statute, 18 U.S.C. § 1346, is constitutional when limited to mail fraud schemes involving bribes and kickbacks. *Skilling*, 130 S. Ct. at 2905. *Skilling* noted that after the Supreme Court invalidated the honest services theory in *McNally v. United States*, 483 U.S. 550 (1987), Congress passed § 1346 "to reinstate the body of pre-*McNally* honest-services law," which "dominantly and consistently applied the fraud statute to bribery and kickback schemes." *Skilling*, 130 S. Ct. at 2929. In light of this history, the Court in *Skilling* held that schemes involving bribes and kickbacks form the "core" of honest services fraud, and that "[a] criminal defendant who participated in a bribery or kickback scheme . . . cannot tenably complain about prosecution under § 1346 on vagueness grounds." *Id.* at 2929-31. The Court went on to conclude that cases involving convictions for mere undisclosed conflicts of interest are both rarer and less clear than cases involving bribe and kickback schemes,

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The Seventh Circuit has not specifically addressed the issue. In *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000), the Seventh Circuit applied a more stringent standard on collateral review, requiring the government to show the error was harmless beyond a reasonable doubt. *Lanier* applied the heightened standard without analysis, however, and the issue does not appear to have been raised by the parties. Accordingly, *Lanier* is not controlling. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952). No Circuit that has specifically considered the issue has concluded that the heightened standard applies to § 2255 motions.

and the Court declined to extend the reach of the honest services statute to schemes involving "undisclosed self-dealing" in the absence of a bribe or kickback, that is, to the mere "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 2932 (quotations omitted).

Although the Court in *Skilling* confined honest services fraud to bribes and kickbacks, it did nothing to change the elements of proof required to establish a mail fraud violation based on money-property fraud. *Id.* at 2933-34.

III. Because the Jury Instructions on Honest Services Fraud Required the Jury to Find that Ryan Took Bribes or Kickbacks, There Was No Instructional Error.

A. Bribes and Kickbacks as Described in *Skilling*

Skilling did not redefine bribes and kickbacks, but rather explained that those terms draw content from pre-*McNally* case law involving bribe and kickback schemes, as well as from federal statutes prohibiting bribes and kickbacks. *Skilling*, 130 S. Ct. 2933-34.[8] Cases cited as examples in *Skilling* , as well as recent federal bribery and kickback cases, reveal three essential points. First, to take a bribe, a public official must receive a benefit and perform or promise to perform official acts in return. *See United States v. Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009), *cert. denied*, ___ S. Ct. ___ (Oct. 4, 2010); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir. 2009); *United States v. Ganim*, 510 F.3d 134, 141 (2d Cir. 2007) (Sotomayor, J.); *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007); *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001); *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998). This requirement ensures that the bribe

[8] *Skilling* cited two federal bribery statutes, 18 U.S.C. § 201(b) and 666(a)(2), and one kickback statute, 41 U.S.C. § 52(2). *Skilling* also singled out three post-*McNally* decisions about bribes and kickbacks. *United States v. Ganim*, 519 F.3d 134 (2d Cir. 2007), *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009), *cert. denied*, ___ S. Ct. ___ (Oct. 4, 2010), and *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007). *See Skilling*, 130 S. Ct. at 2934.

payer must get more for his money than mere access or general goodwill; he must get the promise of an official act or acts. *See Kemp*, 500 F.3d at 281.

Second, it is not necessary that the bribe payer and the official express their agreement to exchange benefits for official acts in so many words. "The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." *United States v. Evans*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring); *accord Giles*, 246 F.3d at 972; *Kemp*, 500 F.3d at 284. Instead, an agreement may be "implied from [the official's] words and actions." *Evans*, 504 U.S. at 274; *Giles*, 246 F.3d at 972.

Third, one form of bribery occurs when an official accepts a benefit and agrees in exchange to take official actions to benefit the bribe payer in the future, and in such cases the official does not need to specify those future acts at the time he takes the bribe. *See, e.g., Whitfield*, 590 F.3d at 349-50; *Ganim*, 510 F.3d at 147; *Kemp*, 500 F.3d at 281. In other words, there is bribery as long as there is "a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor." *Jennings*, 160 F.3d at 1014 (quotations omitted); *accord Whitfield*, 590 F.3d at 352-53; *Ganim*, 510 F.3d 147, 149; *Kincaid-Chauncey*, 556 F.3d at 943; *Kemp*, 500 F.3d at 282.[9] Indeed, such schemes have been described as "some of the most pervasive and entrenched corruption in existence." *See, e.g., Ganim*, 510 F.3d at 147. This "stream of benefits" theory is what the government charged and proved in Ryan's case.

Ryan's motion devotes much attention to the argument that bribery requires a "*quid pro quo*." The case law on this issue depends on how courts define that term. In *United States v. McNair*, 605 F.3d 1152, 1187-88 (11th Cir. 2010), for instance, the Eleventh Circuit defined "*quid*

[9] *Skilling* cites *Whitfield*, *Ganim* and *Kemp* approvingly, including the specific portions of those decisions cited here. *Skilling*, 130 S. Ct. at 2934.

pro quo" narrowly to mean "a specific payment given . . . in exchange for a specific official act," *id.* at 1187, and held that because bribery does not require that each specific payment be linked to a specific official act, it does not require a "*quid pro quo*." *See also United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005) (bribery under § 666 does not require a specific *"quid pro quo"*); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997) (same). Similarly in *Ganim*, the Second Circuit held that each specific payment need not be linked to a specific official act, so long as there is an exchange of benefits for official action. *Ganim*, 510 F.3d at 147. However, because *Ganim* defined "*quid pro quo*" more broadly to include "an ongoing course of conduct" where "favors and gifts flow[ ] to a public official . . . *in exchange* for a pattern of official actions . . . ," *id.* at 149, the court said that bribery requires a "*quid pro quo*." The point is that, regardless of the label, bribery simply requires an exchange of benefits for official action.

In the present case, the evidence showed that Ryan agreed to exchange benefits for official action, and such conduct clearly constitutes bribery, as that term is used in *Skilling*.[10]

B. The Jury Instructions on Honest Services Fraud Required That the Jury Find Bribes or Kickbacks.

In the context of this case, the instructions provided to the jury permitted a conviction of honest services fraud *only* if the jury found that Ryan took bribes or kickbacks. The first relevant

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[10] Ryan's motion says little about kickbacks, but the Supreme Court used the term broadly in *Skilling*, citing a federal statute that defines a kickback as "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances]." *Skilling*, 130 S. Ct. at 2933-34 (quoting 41 U.S.C. § 52(2)). This definition—focusing on payments made to get favorable treatment from a person who controls a source of income—is consistent with the way the Seventh Circuit has defined kickbacks. *See United States v. Hickok*, 77 F.3d 992, 1005 n.12 (7th Cir. 1996); *United States v. Hancock*, 604 F.2d 999, 1002 (7th Cir. 1979). If anything, the definition of kickbacks is broader than that of bribes.

instruction stated:

> A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest (also known as a conflict of interest) in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services, if the other elements of the mail fraud offense are met.

Tr23905.

On the facts of this case, this instruction is consistent with *Skilling* because it permitted the jury to convict Ryan for failing to disclose a conflict of interest *only* if the conflict took the form of a "material personal or financial interest . . . in a matter over which [the official] has decision-making power"—which in this case, included only a bribe or kickback. For purposes of the mail fraud counts of which Ryan was convicted, the matters over which Ryan had decision-making power were the state contracts and leases he awarded to Warner, Klein, and Swanson. And the only "material personal or financial interest" the jury heard that Ryan had in those matters was the stream of benefits he received in return for awarding Warner, Klein, and Swanson those contracts and leases. Ryan did not own or have any other interest in buildings leased by the state or the companies that received state contracts, nor did he steer state business directly to himself or his own family. Instead, the only conflict of interest a reasonable jury could have found that Ryan failed to disclose was his agreement to receive personal and financial benefits in exchange for official action—in other words, his receipt of bribes and kickbacks—and not the type of conflicts of interest that *Skilling* excluded from the ambit of the honest services fraud statute.

Just as importantly, the Court's instructions to the jury required that to convict Ryan for undisclosed conflicts of interest, the jury had to find that all of the other elements of the mail fraud statute were met. The Seventh Circuit emphasized this point on direct appeal when it rejected

Ryan's attack on the portion of the instructions that related to conflicts of interest, explaining that:

> The portion of the jury instructions quoted by the defendants about "conflict of interest" is taken out of context, as the jury instructions explicitly stated that a conflict of interest violated the statute only "if the other elements of the mail fraud statute are met." The district court explained that the government must also show that the public official allowed or accepted the conflict of interest with the understanding or intent that she would perform acts within her official capacity in return.

Warner, 498 F.3d at 698.

Accepting a conflict of interest or benefit with the understanding or intent to perform official acts in return constitutes taking a bribe. *See supra* at 15-17. Thus, in context, the conflict of interest instruction permitted the jury to find honest services fraud only if it found that Ryan took a bribe or kickback. There was no error under *Skilling*.

The three instructions that followed[11] properly defined bribes and kickbacks and, as the Seventh Circuit made clear on direct review, correctly informed the jury about the "exchange" element at the heart of a bribe and kickback scheme. Ryan waived or forfeited his right to challenge any of these instructions,[12] however, even if he had not, there would be no error because individually and collectively they correctly emphasized the need to find that the scheme involved the performance of official acts in return for personal benefits. First, in an instruction that Ryan proposed, the Court instructed the jury:

The law does not require that the government identify a specific official act given in

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[11] There was a fourth instruction that addressed bribery in the context of campaign contributions, but it is not relevant to this discussion. Tr23907-08.

[12] Of the three instructions discussed below, Ryan proposed the first and third instructions, them.R703:6; R703:5 (modified in court), and thus waived any challenge to them. *E.g., United States v. Yu Tian Li*, 615 F.3d 752 (7th Cir. 2010). Ryan failed to challenge the second instruction on direct appeal, and so any challenge is procedurally defaulted. *E.g., United States v.* Podhorn, 549 F.3d 552, 558 (7th Cir. 2008).

> exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the public official accepted the personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return.

Tr23905-06 (quoted in part by the Seventh Circuit, *Warner*, 498 F.3d at 698.). This instruction was accurate, and numerous courts, including three cited in *Skilling*, have approved similar language. *See, e.g., Whitfield*, 590 F.3d at 353; *Ganim*, 510 F.3d at 144; *Kemp*, 500 F.3d at 281-82. Ryan's only quibble with the instruction is that it focuses on the understanding of the public official, not on "whether two parties had agreed to an exchange." Mot23. But his § 2255 motion omits the second half of the instruction, which requires the same understanding on the part of the bribe-payer. *See* Tr23906.[13] More importantly, the law is clear that a public official's "intent to perform an act in exchange for a benefit" is sufficient to show the official took a bribe. *Ganim*, 510 F.3d at 147. For example, the solicitation of a bribe from an unwilling payer or from an undercover agent, neither of whom "agreed" to the exchange, would constitute a bribery scheme.

The next instruction stated:

> A benefit or benefits received by a defendant or given by a defendant with the intent that such benefit or benefits would ensure favorable official action when necessary can be sufficient to establish the defendant's intent to defraud the public of its right to honest services. You need not find that such a benefit was conferred or received in exchange for a specific official action.

Tr23906. This instruction also accurately states the law—before and after *Skilling*. Ryan asserts, without authority, that "[a]n intent to ensure favorable action when necessary is not enough." Mot24n.15. For decades, courts, including courts cited as paradigmatic bribery and kickback cases

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[13] The second half of the instruction provided: "Likewise, the law does not require that the government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the personal and financial benefits were given with the understanding that the public official would perform or not perform acts in his official capacity in return."

in *Skilling*, have held otherwise. *See United States v. Isaacs*, 493 F.2d 1124, 1145 (7th Cir. 1974) ("There is bribery if the offer is made with intent that the offeree act favorably to the offeror when necessary."); *accord United States v. Abbey*, 560 F.3d 513, 518 (6th Cir. 2009); *Kinkaid-Chauncey*, 556 F.3d at 943 & n.943; *Kemp*, 500 F.3d at 282; *Jennings*, 160 F.3d at 1014; *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976).

The third instruction—another of Ryan's proposals—stated that to prove a mail fraud violation, it is not enough that a public official received benefits from a person who has business with the state and that, instead, "that receipt violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making." Tr23906-07. Ryan does not explain why this instruction is incorrect, especially when read in light of the instruction cited above requiring that the "public official accepted the personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." Tr23906. Contrary to Ryan's contentions, this instruction passes muster under *Skilling*.

Finally, the Court instructed the jury about certain provisions of Illinois law. Tr23908-11. Ryan claims a violation of state law can never form the basis for an honest services fraud conviction, Mot25, but *Skilling* did not so hold. *Skilling* acknowledged a circuit conflict on the issue, and did not resolve the conflict. 130 S. Ct. at 2928 n.37. In any event, this is a non-issue for several reasons. First, as the Seventh Circuit noted on direct appeal, the instructions made clear that "[n]ot every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation," Tr23908, 23911, and that, to the contrary, an official or employee defrauds the public of his honest services only "[w]here a public official or employee misuses his

official position . . . *for private gain for himself or another*," "*and* the other elements of the mail fraud offense have been met," Tr23911 (emphasis added). And, in discussing the conflict-of-interest provision, the Seventh Circuit explained, the required showing that "the other elements of the mail fraud statute have been met" meant that the official must accept a benefit for private gain "with the understanding or intent that [he will] perform acts within [his] official capacity in return." *Warner*, 498 F.3d at 698. In other words, the instructions required a bribe, particularly in the context of the evidence, which established that the private gain at issue was limited to benefits given to Ryan in exchange for Ryan's steering of valuable contracts and leases. Moreover, as the Seventh Circuit noted:

> [m]any of the state law provisions in the instructions explained what kinds of financial transactions are not prohibited for state officials. This explanation was more likely to undermine than to assist the prosecution in showing the defendants' intent to deprive Illinois citizens of Ryan's honest services.

Warner, 498 F.3d at 698. Thus, the instructions emphatically did not permit the jury to convict based on something other than a bribe or kickback scheme.

Accordingly, in order to find that Ryan committed honest services fraud in this case, the instructions, read as a whole and in the context of the evidence, required the jury to find that Ryan took bribes and kickbacks. There is no instructional error here, and therefore no error at all.

IV. Even if There Were Instructional Error Here, a Properly Instructed Jury Would Have Reached the Same Result, In Light of the Overwhelming Evidence Showing that Ryan Took Bribes and Kickbacks.

Even if this Court were to conclude that the honest services instructions permitted the jury to convict Ryan for actions that did not involve the taking of bribes and kickbacks, the instructional error would be harmless. In light of the evidence, a properly instructed jury would have found that Ryan took bribes and kickbacks because the evidence that he did so was overwhelming. Thus, Ryan

suffered no actual prejudice. *See Brecht*, 507 U.S. at 637-38.

A. The Evidence Established Bribes and Kickbacks.

The indictment charged, and the evidence proved, that Ryan took bribes in the form of a stream of benefits from Warner, Klein and Swanson with respect to each count of honest services mail fraud of which Ryan was convicted. In the face of this evidence, Ryan attempts to define bribes and kickbacks so narrowly that little more than an express agreement to trade a particular sum of cash for a particular official action would ever qualify. The law provides no support for Ryan's cramped definition of bribery.

1. The Currency Exchange and South Holland Bribes

For years, Ryan enjoyed free lodging at Klein's Jamaican villa, gifts Ryan lied about on his disclosure forms and actively concealed through the secret cash-back arrangement. In 1995, while Klein and Ryan were relaxing at Klein's villa in Jamaica, Klein asked Ryan for favorable official action in the form of a fee increase for currency exchanges. Ryan later agreed, even though he had opposed a fee increase for years. As the government reminded the jury in its rebuttal argument, Ryan's change of heart occurred "right after a trip to Jamaica." Tr23714.

During a later vacation at Klein's villa in Jamaica, Klein told Ryan that Klein wanted to lease his building in South Holland to the SOS, and when Ryan returned from the trip, he made that happen. Ryan caused the SOS to cancel a less-expensive lease and move to Klein's ill-suited property without considering other locations, directed his subordinate to agree to Klein's lease terms, and told his chief of staff he wanted to make Klein "happy." Ryan personally signed the lease, giving Klein $600,000 in lease payments over five years. As the government argued to the jury, the $13,000 in cash-back that Klein paid Ryan in Jamaica over the years was a striking example

of the "corrupt payments" that Ryan took in return for state action. Tr23085; *see also* Tr23708.

Ryan's motion argues there was no bribe because four years passed between Ryan's first vacation in Jamaica and the lease signing, Mot18, but Klein's benefits to Ryan were ongoing—Ryan vacationed in Jamaica for free every year, including the year he awarded Klein the lease. And contrary to Ryan's assertion, there is nothing "extraordinary" about years passing between a bribe and the payoff. In *Whitfield*, a case the Supreme Court cited favorably in *Skilling*, an attorney secured a state court judge a favorable loan, which the judge did not list on his disclosure forms. *Whitfield*, 590 F.3d at 336. After the attorney arranged the loan, he filed a personal injury lawsuit, and over a year later, the judge assigned the case to himself. *Id.* Nearly a year and a half after that, the judge ruled for the lawyer's client, awarding him millions of dollars in damages. *Id.* The Fifth Circuit affirmed the honest-services bribery convictions of both defendants without hesitation, despite the passage of time, and even though the lawyer and the judge never expressly agreed to trade the loan for the legal ruling at the time the loan was made. *Id.* at 373. *See also Abbey*, 560 F.3d at 515-16 (affirming bribery conviction of developer who gave city administrator a free subdivision lot in exchange for favorable consideration in the future; one year later the administrator pushed for developer to receive funding through municipal bonds, resulting in hundreds of thousands of dollars in payments).

2. The Warner Bribes and Kickbacks

Ryan awarded Warner contracts and leases in return for the many times Warner "took care" of Ryan through financial favors to Ryan, his family, and friends. Warner's relationship with Ryan epitomizes a stream of benefits given in exchange for a serious of favorable official acts. Warner usually was not buying any one specific action; the benefits Warner gave Ryan, his family, and

friends, served to keep Ryan on "retainer," so that when opportunities arose, Ryan used his influence to favor Warner. *See Kincaid-Chauncey*, 556 F.3d at 943& n.15; *Abbey*, 560 F.3d at 518.

In this respect, Ryan's relationship with Warner was similar to that between the defendants in *Kemp*, a case *Skilling* cited with approval. In *Kemp*, the Third Circuit affirmed the defendants' convictions of honest services fraud based on bribery, concluding that bank executives gave a city treasurer benefits such as loans to the treasurer's friends and family members who had "shaky credit." *Kemp*, 500 F.3d at 284-85. This was similar to the way Warner, among other benefits, loaned $145,000 to Ryan's brother's financially unstable company, Comguard, and invested $6,000 to Ryan's son's company. Gx08-087-89,09-001,09-002,09-020,09-500. In *Kemp*, the city treasurer, in exchange for the loans, rigged bids to ensure that the executives' bank got a lucrative government contract, *Kemp*, 500 F.3d at 269, much as Ryan overruled his subordinate to make sure Warner's client ADM kept the lucrative sticker contract, Tr8140-46, steered a state contract to Viisage because Warner was its lobbyist (though Warner concealed that fact), Tr13206, Tr3102-04; Gx03-020, 03-023, 03-009, and caused the SOS to relocate to buildings Warner owned in order to benefit Warner. Tr16954, 7822-24, 2804-05, 10463; Gx07-011, 07-500, 07-501, 07-502.

The court in *Kemp* had no difficulty finding that the city treasurer took bribes, relying on the same stream of benefits theory the government pursued at Ryan's trial. 500 F.3d at 281-82. Among other things, the court noted that on one occasion when a bank executive agreed to waive an appraisal fee for a loan the treasurer wanted approved, the treasurer told the executive, "you are my f–king guy.... So you get special treatment." *Id.* at 286. Similarly, when Warner recruited Ryan's friend Udstuen to join Warner's effort to make money from their relationship with Ryan by entering the lobbying business, Warner told Udstuen that no one had done more for Ryan than Udstuen, and

that Warner would "take care of George," Tr11620-22, thereby drawing a direct link between the benefits Warner and Udstuen gave Ryan, and the money Warner and Udstuen would make after Ryan steered them state business.[14] The court in *Kemp* emphasized that the bank executives, like Warner, did in fact get special treatment, with the treasurer rigging bids for a city contract to ensure the bank got it. *Id.* at 286. From this "course of conduct," the court held, the jury could conclude that the treasurer, like Ryan, agreed to take official action in exchange for the benefits he received. *Id.*

In addition to bribes, Warner's Viisage contract also involved at least two instances of kickbacks. Months before the bidding process began, Ryan told Warner to cut Ryan's friend Swanson in on the deal, and Warner eventually paid Swanson $36,000 for no work. The government highlighted this as another example of Ryan's "corrupt payments," telling the jury, "When George Ryan directed Warner to give a piece of the Viisage lobbying fee to [Ryan's] good friend Ron Swanson, that was the equivalent of him claiming a piece of those fees for himself." Tr23085.

In addition, five days after landing the Viisage contract, which earned him over $800,000, Warner wrote Ryan a blank check, which Ryan used to pay the band at his daughter's wedding. The proximity between the award of the contract and Warner's payment to Ryan is evidence the two were linked, *see Giles*, 246 F.3d at 973; *Jennings*, 160 F.3d at 1018, as is Warner's use of a front man to conceal that he was the one getting paid as Viisage's lobbyist. *See Jennings*, 160 F.3d at 1018.

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[14] To take another example, when Ryan was asked about disputed terms in the lease with Klein, he replied, "What does Harry want?" and told Fawell he wanted "Harry to be happy." Tr2870,6578-80.

The ADM and IBM contracts also involved kickbacks—this time to Ryan's friend Udstuen. With Ryan's approval, Warner gave Udsteun a cut of Warner's fees on the contracts, totaling about a third of the money Warner made, even though Udsteun did little or no work. These kickbacks to Ryan's friend are no different than kickbacks to Ryan himself. *Cf. Ganim*, 510 F.3d at 138-39 (affirming honest services conviction of mayor who agreed to kickback of one-third of fees earned on city contracts he awarded).

3. The Swanson Bribes

Swanson's bribes were similar—Ryan awarded Swanson lucrative leases and contracts soon after Swanson paid for vacations for Ryan and his daughter. The $2,200 Swanson paid so Ryan's daughter could go to Disney World netted Swanson a lobbying contract worth $180,000 for no work, showing, as the government explained to the jury, that "Ryan is willing to sell his office in order to give a government benefit to the friend who buys that vacation." Tr23805, 23807-08. After Swanson paid for Ryan's vacation in Cancun, Ryan ordered his subordinates to give Swanson the Lincoln Towers lease for which the state paid well above market rate. As the government told the jury, the state paid Swanson "for one reason: Because Ron Swanson got in George Ryan's office, and George Ryan just got back from Cancun with Ron Swanson." Tr23783.

Ryan does not dispute that over the course of many years, his benefactors gave him a stream of benefits, or that Ryan gave a stream of state business to his benefactors. Nevertheless, Ryan argues he did not take bribes and kickbacks because, he claims, he and his benefactors never agreed that the benefits were *in exchange for* state business. The jury heard ample evidence permitting it to reject this claim. Viewing the evidence in a light most favorable to the government, as is required, the evidence clearly showed that Ryan's relationship with Warner, Klein, and Swanson was a classic

arrangement of "I'll scratch your back if you scratch mine," *see Jennings*, 160 F.3d at 1014, in which people "with continuing and long-term interests" in matters under Ryan's control, gave Ryan numerous benefits "to coax ongoing favorable official action." *United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996). *See also United States v. Woodward*, 149 F.3d 46, 55 (1st Cir. 1998) (affirming honest services bribery conviction of state representative who took years worth of undisclosed free meals, rounds of golf, and other payments from a lobbyist and friend, and in return repeatedly ruled in the lobbyists's favor).

The Seventh Circuit has joined many others in calling conduct like Ryan's bribery. In *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999), for example, a contractor, mimicking the actions of Warner, Klein, and Swanson, "showered" a state official with gifts worth thousands of dollars, including upgraded airline tickets, trips, and money to spend at casinos. *Id.* at 964-65. The official, like Ryan, failed to disclose any of the gifts, as he was required to do by department regulations. *Id.* What the official did do was make recommendations and prepare misleading cost estimates that allowed the contractor to be awarded a lucrative contract on favorable terms, costing the state money and lining the contractor's pockets. *Id.* at 964-65. The Seventh Circuit held that the official's "guilt of receiving bribes is not open to serious doubt," and that he accepted the gifts intending to be influenced in connection with his official acts, in violation of 18 U.S.C. § 666—one of the statutes *Skilling* cites as helpful in defining bribery in the honest services context. *See Martin*, 195 F.3d at 965.

In *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984), a pre-*McNally* bribery case, the Seventh Circuit affirmed the mail fraud conviction of a deputy commissioner on the Cook County board of tax appeals who took cash payments from lawyers who appeared before him, and failed to

disclose those payments on his statements of economic interest. *Gorny*, 732 F.2d at 599-600. Even though none of the cash payments were "linked directly to any action on a particular real estate assessment file," the people who paid bribes "enjoyed an unusually high rate of success in their practice before the Board." *Id.* at 600. In light of this circumstantial evidence of a stream-of-benefits agreement, and the testimony of several bribe payers who said they paid the money intending to receive some favorable treatment in exchange, the Court concluded that sufficient evidence had been presented to establish that the defendant accepted the payments intending to be influenced by them. *Id.* at 601. Just so here.

B. The Government Argued to the Jury that Ryan Took Bribes and Kickbacks.

As outlined above, the government argued that Ryan exchanged official action for the benefits he received from Warner, Klein, and Swanson—in the government's words, that Ryan "sold his office" in return for "corrupt payments." Tr23084-85, 23817-18, 23809, 23826. The government explained Ryan's bribes and kickbacks using the stream-of-benefits theory courts repeatedly have approved. As the government argued, "the flow of benefits, when Ryan received, referred, and advocated for these financial benefits and then took some action to benefit those who had provided the benefits to him or his family, he was, in essence, selling his office brick by brick." Tr22971; *see also* Tr22836.

The government told the jury:

- "George Ryan actively perverted the decision-making process to tilt the gain in favor of his friends who were taking care of him and his family. And that is not politics, ladies and gentlemen. That's a crime." Tr23100.
- Ryan "decided that the benefits of his public office were his to give out like candy to Larry Warner and to other friends of his who at the same time were giving him and his family financial benefits and gifts." Tr23140.

- "Warner hit the jackpot during George Ryan's terms as secretary of state and as governor . . . $3 million in total benefits," and Warner, in turn, "did a very nice job of taking care of George Ryan." Tr22835.

Ryan's motion notes correctly that more than once, the government told the jury it did not have to find a "*quid pro quo*." Tr22956-58, 23083-84, 23763-64, 23817-18. But, as is clear from the context of those statements, the government was simply arguing, correctly, that in order to convict Ryan, the jury did not have to find that Ryan had a conversation in which he expressly agreed to accept a specific benefit in exchange for a specific official act. Instead, the government emphasized that Ryan received benefits from Warner, Klein, and Swanson over many years, and in return, Ryan took official action for these benefactors as opportunities arose. The government made this point several times, perhaps most clearly in its initial closing argument:

> [Ryan] did not make announcements or press releases when Warner, Swanson, or Klein gave him or his family something in order to influence his decision-making. The loans, the vacations, the other benefits did not come in packages with bright red lettering that said, "This is to influence you." Most importantly, keep in mind that this is not a case in which a public official had a specific price for each official act that he did, like a menu in a restaurant where you pick an item and it has a particular price. The type of corruption here—that type of corruption where you give me this, I will give you that, is often referred to as a *quid pro quo*. The corruption here was more like a meal plan in which you don't pay for each item on the menu. Rather, there is a cost that you pay, an ongoing cost, and you get your meals.

Tr22852-53.

This, in a nutshell, is the stream of benefits theory of bribes and kickbacks, one that courts—including courts cited favorably in *Skilling*—repeatedly have approved. *See supra* at 16-17.

C. In Light of the Evidence and the Government's Arguments, a Reasonable Jury, Properly Instructed, Would Have Found that Ryan Took Bribes and Kickbacks.

Three features of Ryan's scheme, as alleged in the indictment and proved by the evidence, make it particularly clear that a properly instructed jury would have convicted Ryan of taking bribes.

First, Ryan, Warner, Swanson, and Klein carefully concealed what they were doing. These "elaborate efforts at concealment provide powerful evidence" of Ryan's consciousness of guilt, *see United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985), and powerful evidence that Ryan hid his transactions precisely because he was awarding friends in exchange for the benefits they gave him. Second, as the government emphasized to the jury during rebuttal, Ryan was not the type of friend who did favors for Warner, Klein, and Swanson other than giving them state business. Ryan did not pay for Warner, Klein, and Swanson to go on vacations, invest in their relatives' companies, or write checks to their families. Tr23763-64. These men did not do favors for Ryan because he reciprocated in kind; they did favors for him because Ryan awarded them state contracts and leases worth millions of dollars. *See Woodward*, 149 F.3d at 58. Finally, Warner, Klein, and Swanson did not seek mere general goodwill, they sought specific official actions—leases, contracts, currency exchange rates—and it was in exchange for these things that they "took care" of Ryan.

In light of the evidence presented by the government at trial, there is no basis for "grave doubt" concerning whether the jury convicted Ryan only of conduct that does not constitute a crime after *Skilling*. *See O'Neal*, 513 U.S. at 435. If properly instructed, any reasonable jury would have convicted Ryan of taking bribes and kickbacks.

V. The Jury Necessarily Concluded that Ryan Committed Money-Property Fraud.

The Court should deny Ryan's motion for a third reason. Even if the jury convicted Ryan of honest services fraud based on undisclosed conflicts of interest that did not involve taking bribes and kickbacks, the jury must have also concluded that Ryan committed money-property fraud, and so any error resulting from the honest services instructions is harmless.[15]

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[13] On direct appeal, Ryan raised no claims relating to money-property fraud, and any such claims are procedurally defaulted. Ryan's § 2255 motion likewise fails to raise such a claim.

A. Post-*McNally* Money-Property Cases

After the Supreme Court invalidated the honest services theory in *McNally*, numerous appellate court decisions affirmed mail fraud convictions and found that erroneous jury instructions on the honest services theory were harmless because the government proved a valid money-property theory. *See, e.g.*, *Moore v. United States*, 865 F.2d 149, 153-54 (7th Cir. 1989); *United States v. Asher*, 854 F.2d 1483, 1496 (3d Cir. 1988); *United States v. Perholtz*, 836 F.2d 554, 558-59 (D.C. Cir. 1987). While courts generally overturned convictions that were "based entirely on the intangible rights theory," courts affirmed convictions, such as Ryan's, where the "bottom line of the scheme or artifice to defraud had the inevitable result of effecting monetary or property losses to the . . . state." *Asher*, 854 F.2d at 1490, 1494; *see also Messinger v. United States*, 872 F.2d 217, 222 (7th Cir. 1989); *United States v. Saks*, 964 F.2d 1514, 1521 (5th Cir. 1992). In judging whether an error was harmless, courts looked to the trial as a whole, including the indictment, the evidence, the arguments, and the jury instructions. *See Messinger*, 872 F.2d at 221; *Perholtz*, 836 F.2d at 559. The same harmless error analysis applies here.

B. The Indictment Charged a Single Scheme that Included Money-Property Fraud.

The indictment alleged that Ryan devised and participated in one scheme "to defraud the people of the State of Illinois, and the State of Illinois, of money, property, and the intangible right to honest services. . . ." R110:19. Counts Two through Eight alleged specific mailings of state money, or money derived from state contracts, in furtherance of the single scheme. *Id.* at 59-65. That the scheme involved money and property is central to the indictment's allegations: the indictment describes numerous state contracts and leases that were the objects of the fraud. *See, e.g.*, R110:19-21 (referring to "contracts" and "real property lease[s]").

C. The Evidence Established a Single Scheme that Included Money-Property Fraud.

The elements of mail fraud are a scheme to defraud, intent to defraud, and use of the mail. *United States v. Sorich*, 523 F.3d 702, 708 (7th Cir. 2008). "A scheme to defraud requires the making of a false statement or material misrepresentation, or the concealment of [a] material fact." *United States v. Powell*, 576 F.3d 482, 490 (7th Cir. 2009) (quotations omitted). "A failure to disclose information may constitute fraud if the omission [is] accompanied by acts of concealment." *Id.* at 491. For money-property fraud, the scheme must also have "a substantial potential" to deprive someone of money or property, which includes state contract and leases. *United States v. Barber*, 881 F.2d 345, 349 (7th Cir. 1989); *Sorich*, 523 F.3d at 713; *United States v. Leahy*, 464 F.3d 773, 788 (7th Cir. 2006). At trial, the same evidence that supported the honest services fraud theory based on undisclosed conflicts of interest also established the elements of money-property fraud.

1. South Holland Lease Steered to Klein

The South Holland lease resulted in $600,000 of state money going into Klein's pockets over five years. Tr.6289-91; Gx11-001. At the same time Ryan obtained state money for Klein, Ryan used the false paper trail from the cash-back arrangement to hide the free lodging Klein gave him. In its closing argument, the government correctly called this a "sham transaction." Tr22906. As the government also pointed out during closing, during this same period, Ryan lied on his annual statements of economic interest by failing to disclose these gifts from Klein, as Illinois law required. Gx28-012; Tr22918-20. Later, Ryan lied to the FBI, claiming he paid his own way in Jamaica, and producing the bogus checks as proof. Tr18143-49; Gx10-013.

Ryan did not just obtain state money for Klein through fraud, he caused actual loss to the state. Ryan let Klein decide disputed lease terms, telling Fawell he wanted "Harry to be happy."

Tr2870, 6578-80; Gx01-006. Making Harry happy meant the state lost money, paying $173,000 more for Klein's lease than it had for the previous lease. Tr.6289-9111036; Gx11-001.

2. Contracts and Leases Steered to Warner

a. Bellwood and Joliet Leases

Warner pocketed hundreds of thousands of dollars of state money on the Bellwood and Joliet leases, and both leases were accompanied by acts of concealment and misrepresentations. On the Bellwood lease, Warner assured Ryan and Fawell that the press would never find out about Warner's interest, because Warner's name was "buried in paperwork." Tr2772-73, 2774. Warner concealed his interest in the property until after Ryan signed the lease in the spring of 1993, and then allowed his interest to surface through various transactions. Tr16950-51, 16954; Gx07-011, 07-501, 07-502. Warner did the same for the Joliet lease, again telling Fawell that his interest was buried in paperwork, and again hiding his interest until after Ryan awarded the lease. Tr2812, 3005, Gx06-500. In its closing argument, the government told the jury these leases were filled with "concealment and deceit." Tr22922.

Both leases resulted in a loss to the state. The state paid above market rate for the Bellwood property, for a total of about $246,583 for the first five years. Tr11045,11399 For the Joliet property, the state overpaid by about $296,485. Tr11021. When Warner's role in the Joliet lease ultimately became public, Warner told Udstuen he never should have done the lease because it was "too good a deal." Tr11727.

b. Viisage Contract

In 1996, Ryan awarded Viisage, one of Warner's clients, a contract for $20 million in state money, again using concealment and misrepresentations. As the government's closing argument

pointed out to the jury, Warner actively concealed his role as a lobbyist for Viisage by failing to register as a lobbyist, and by using a front man whose name went on the paperwork. Tr23009, 13206; Gx03-015, 03-016, 03-020, 03-023, 04-045. It was only after Viisage won the contract that Warner removed the front man and had the lobbying arrangement transferred to his company, raking in $834,000 in fees. Tr3103-04, 16923-25; Gx03-500, 03-501. Ryan knew Warner had an interest in the contract from the start. Indeed, before the bidding process even began, Ryan told Warner to cut Swanson in on the Viisage deal, and Warner promised Swanson $36,000 on a contract Viisage hadn't been awarded yet. Tr3102-04; Gx03-009. Five days after Ryan steered the contract to Warner, Warner wrote Ryan a blank check, which Ryan made out for over $3,000 to pay the band at his daughter's wedding. Gx23-003. Ryan lied on his statements of economic interest by not disclosing this benefit, as well as other benefits Warner gave to Ryan and his family. Gx28-012.

c. ADM and IBM Contracts

In 1991, Warner leveraged his access to Ryan and convinced ADM to hire him as a lobbyist to ensure that ADM would keep a lucrative contract for license plate stickers. Tr8032-33, 8064, 8067-68, 8112-13, 11637. ADM paid Warner between $2,000 and $5,000 every month to keep the contract. Gx02-004, 02-005, 02-015, 02-500, 02-501. In 1993, an official at SOS decided it was in the state's best interest to eliminate ADM's security mark, which may have cost ADM the contract, but an angry Warner told the official Warner would "take care of it." Tr8140-44. A few days later, Ryan told the official to quietly retract his proposal, and asserted—falsely—that the security mark was necessary for public safety. Tr8140-44, 9143-46. The official retracted his proposal, even though he believed doing so was against the state's best interests, and in this way, ADM continued to receive state money from 1991 to 1999, and Warner continued to be enriched

as ADM's lobbyist. Tr8143-47, 2801.

In 1996, Ryan allowed Warner and Udstuen to rig the bidding on a computer mainframe contract by allowing them to choose the director of the SOS department who dealt with mainframe issues. Tr12526. Warner and Udstuen specifically picked a director who had expressed support for giving the contract to IBM, a Warner client. Tr12528-29 The official did, in fact, award IBM the $26 million mainframe contract, and Warner received $1 million in fees from IBM, most of which was contingent on IBM landing the contract. Tr3125,12541,12931,12981-87;Gx04-043,04-014,04-021. Warner gave about one-third of these fees to Udstuen, who never registered as IBM's lobbyist and was, in fact, unknown to IBM.

During the same time period the state paid money to ADM and IBM on these contracts, Warner gave a number of financial benefits to Ryan and Ryan's family. In 1994 and again in 1997, Warner loaned a total of $145,000 to Comguard, Ryan's brother's financially unstable company. Tr10677, 17243-49; Gx09-020, 09-008, 09-500, 09-501. Also in 1997, Warner provided a slew of benefits, including waiving a $1,000 insurance adjustment fee Ryan owed, waiving an insurance adjustment fee for Ryan's son-in-law, giving the same son-in-law a $5000 loan, and making a $6,000 investment in Ryan's son's company. Tr15515-19,17092-118,15157-63, 17088-91; Gx32-001,32-004,22-004,22-005,08-087-89. Ryan reported none of these benefits on his disclosure statements. Gx28-012.

The actions of Ryan and his co-schemers, summarized above, were part of a scheme to defraud the state of money and property. The government proved that Ryan and his co-schemers did not merely fail to disclose a conflict, they actively concealed and misrepresented material facts about the benefits he received and the benefits he provided. Each misrepresentation arose in a single

context: Ryan awarding a state contract or lease to one of his benefactors. In that context, Ryan "directly targeted [the state's] coffers and its position as a contracting party." *Leahy*, 464 F3d at 788. Ryan and his co-schemers obtained this state money under false pretenses, by lying or concealing material information. In some cases, such as the Bellwood and Joliet leases and the Viisage contract, Ryan or his co-schemer Warner took active steps to conceal that Warner was the person receiving state money, by "burying Warner's name in paperwork" and using front men to appear on documents—the type of "acts of concealment" that constitute fraud. *See Powell*, 576 F.3d at 491 (involving failure to disclose information plus active concealment in the form of forged signatures).

In other cases, such as the ADM contract, Ryan made misrepresentations by lying to state officials about why he was acting to preserve ADM's contract, claiming that it was for security reasons, when in fact it was to ensure that Warner could keep getting rich on a state contract. For the South Holland lease and the Viisage deal, Ryan lied on his disclosure statements by failing to report Klein's free Jamaican vacations and Warner's blank check for the wedding band. And for all of Warner's contracts and leases, Ryan lied on his disclosure statements by failing to report any of the benefits Warner gave Ryan and his family, benefits the government argued, and the jury was entitled to conclude, were in fact benefits to Ryan himself. Tr22967-69.

The acts of concealment and misrepresentations by Ryan, Warner, and Klein were material because the state would have wanted to know, and was entitled to know, who was receiving state money, why they were receiving it, and whether the recipient had showered Ryan with personal and financial benefits. *See United States v. Bush*, 522 F.2d 641, 647 (7th Cir. 1975). If Ryan had truthfully disclosed this information, it would have been capable of influencing the state when the

state decided whether to award the contracts and leases to Warner and Klein in the first place, and whether to continue the contracts and leases over the course of several years. Indeed, it is precisely because such information is capable of influencing the state that Illinois requires its public officials to file annual statements of economic interests. *See Bush*, 522 F.2d at 645, 647-48 (false statements of economic interests are material misrepresentations). The state might have decided it did not want to award a contract or lease to someone who had benefitted Ryan, or that the state wanted different terms for the contracts and leases than the terms Ryan permitted. By depriving the state of this information, Ryan obtained state money "through false pretenses," that is, active concealment and material misrepresentations, and engaged in a scheme to defraud the state of money. *See Leahy*, 464 F.3d at 788; *United States v. Lack*, 129 F.3d 403, 406 (7th Cir. 1997).

Ryan's fraud cost the state hundreds of thousands of dollars on the South Holland, Bellwood, and Joliet leases. On the ADM stickers contract, Ryan caused the state to continue to pay ADM for a contract based on specifications that the relevant state official no longer believed were in the state's best interest. The Viisage and IBM contracts were essentially no-bid contracts in which Ryan picked, or allowed Warner to pick, one of Warner's clients to receive the contract. Whether or not Ryan caused the state actual loss on these contracts, he exposed the state to a substantial risk of loss, which is all the mail fraud statute requires. *Barber*, 881 F.2d at 349; *see also United States v. Riley*, No. 08-3758, 08-3759, 2010 WL 3584066, at *10 (3d Cir. Sept. 16, 2010); *United States v. Welch*, 327 F.3d. 1081, 1108 (10th Cir. 2003). Here, the risk of loss was inherent in the scheme. Ryan awarded the contracts to Warner's clients because they were Warner's clients—as the ADM example makes clear, Ryan was less interested in whether the deal was in the state's best interests. Even if by chance the contracts were favorable to Illinois, Ryan deprived the state of the chance to

make a better deal, or the best deal possible, because he awarded state business based on what was best for Warner and himself, by making misrepresentations and actively concealing information. *See Bush*, 522 F.2d at 648; *see also Riley*, 2010 WL 3584066, at *10.

D. The Government Argued, and the Court Properly Instructed the Jury, Concerning Money-Property Fraud.

The government argued the money-property fraud scheme to the jury, explaining, "When you are given – when you are stealing from the state, people's resources, that's property. That's money. You can't do that and lie about it, and there is a mailing in furtherance of it. That's money or property." Tr23771. The prosecution used various formulations, but the argument was the same: Ryan and his co-schemers obtained state money by awarding contracts and leases, while concealing or misrepresenting various facts about the transactions. The government marshaled the same evidence to argue that Ryan both failed to disclose conflicts of interest, and defrauded the state of money and property. For example, the government's initial closing argument described "the core of the case" as Ryan violating his duty to provide honest services by "giving state benefits, like contracts and leases to his friends . . . while at the same time they were providing various undisclosed financial benefits to him. . . ." Tr22836. Later, the government explained that Ryan's friends gave him things of value "at the same time that Ryan was giving them government money in the form of leases." Tr22851-52. And whether discussing Ryan's failure to disclose conflicts of interest or Ryan's fraud involving state money, the prosecutors zeroed in on the concealment and misrepresentations of Ryan, Warner, and Klein, arguing that Ryan concealed benefits on his disclosure forms, Tr22958, 22967, and that "concealing is fraud." Tr 23757.

The government also made clear the scheme was not just about an intangible right to honest services, but that the state was defrauded of "tangible things," such as the South Holland, Joliet, and

Bellwood leases, and the ADM sticker contract for which there was no competition. Tr23099. The government emphasized the loss to the state, explaining that the state was"ripped off" for $173,000 for the South Holland lease, Tr22914, and that "Warner, Swanson, Klein take in thousands and thousands of dollars on these leases. The state was a loser . . . where the state moved out of one location, where they were paying less, moved into another Ryan-picked location, where they end up paying more, costing the taxpayers money." Tr22892-93.

Finally, unlike in some cases where courts have found harmless error even when the judge gave no instruction on money-property fraud, *see Moore*, 865 F.2d at 153-54; *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989) (Breyer, J.), this Court properly instructed the jury on the money-property theory. Tr23902-03. The Court also informed the jury that the money-property fraud was part of "a single scheme to defraud." Tr23903.

E. The Jury Must Have Convicted Ryan of Money-Property Fraud.

This case was not "based entirely on the intangible rights theory," but is one where the "bottom line of the scheme or artifice to defraud had the inevitable result of effecting monetary or property losses to the . . . state." *Asher*, 854 F.2d at 1490, 1494. As described above, the evidence and arguments that Ryan failed to disclose conflicts of interest and that Ryan and his co-schemers defrauded the state of money were identical. Any reasonable jury that convicted on the former basis must also have convicted on the latter.

The Seventh Circuit has found harmless error in similar cases where money-property fraud was inherent in the scheme, even where the jury was only instructed on an intangible rights theory. In *Moore*, for example, the Seventh Circuit found the failure to give a money-property instruction was harmless, concluding that, as here, the government "plainly lost money or property as a result

of the proven bid-rigging scheme," and the jury "could not have found a scheme to defraud [the government] of its intangible rights separate from a criminal scheme to obtain money or property by the bid rigging charged and shown." 865 F.2d at 153-54. *See also Asher*, 854 F.2d at 1495-96 (finding harmless error where scheme involved award of no-bid contract in exchange for a bribe, resulting in "a substantially greater cost to the Commonwealth than a contract obtained through traditional competitive bidding."); *Perholz*, 836 F.2d at 558 (finding harmless error where kickback scheme caused the government to overpay for a subcontract). Since, on the facts presented, if the jury found Ryan guilty of honest services fraud they necessarily found him guilty of money-property fraud, Ryan suffered no prejudice.

VI. A Properly Instructed Jury Would Have Convicted Ryan of Money-Property Fraud.

Even if the Court finds that the honest services and money-property frauds were not so closely intertwined, there is a final basis to deny Ryan's motion. Any jury that was instructed solely on the valid theory of money-property fraud would have convicted Ryan of that crime because the evidence that Ryan committed money-property fraud was overwhelming. Therefore, any errors in the honest services instructions could not possibly have prejudiced Ryan

The South Holland lease provides the clearest example. There is no question that Ryan obtained state money through false pretenses, by awarding the lease to Klein, actively concealing the free vacations Klein had given Ryan through the cash-back arrangement, and lying on his disclosure forms by not listing those free vacations, resulting in a state lease for a property with serious drawbacks that cost the state $173,000 more than the previous location. These actions deprived the state of money through fraud.

Because of this evidence, and the evidence related to the other contracts and leases, any

reasonable jury properly instructed solely on money-property fraud would have convicted Ryan. Therefore, the honest services instructions did not affect the verdict, and Ryan's convictions and sentence should stand.

VII. Skilling Provides No Basis for Finding Prejudice Based on the Evidence Admitted at Trial.

Finally, Ryan complains about several pieces of evidence he claims are inadmissible in light of *Skilling*. Mot15-16. Because all of the evidence was admissible even without a mail fraud theory based on undisclosed conflicts of interest, *Skilling* has no effect on the admissibility of this evidence. *See Riley*, 2010 WL 3584066, at *7; *United States v. Prosperi*, 201 F.3d 1335, 1345 (11th Cir. 2000). For example, the following evidence was admissible both before and after *Skilling*.

- That Ryan accepted gifts in excess of the $50 limit imposed by SOS regulations and Ryan's personal policy was admissible to show Ryan's intent to defraud and his credibility, the latter of which was at issue because of the false statements counts.
- The consulting fee Ryan took from the Gramm campaign was specifically charged in the tax counts. *See* R110:80-81.
- The evidence of Ryan's dismantling of the SOS Inspector General's Office was admissible to show Ryan's intent to protect the ability of Citizens for Ryan to make money. Ryan used this money for personal use, but, as charged in the tax counts, did not pay taxes on it. *See* R110:76-84.
- Warner's access to low-digit plates was admissible to show how Ryan gave Warner complete access to SOS operations, which was relevant to the government's mail fraud theories based on both money-property and bribes and kickbacks. As the government argued to the jury, that Ryan's secretary kept a kitty at her desk so Warner could order low-digit plates for his friends showed the types of governmental favors Ryan did for Warner, and made it more believable that SOS employees recognized Warner's clout and acceded to his demands about state contracts and leases. Tr22975; *see also* Tr23047.
- The evidence that Ryan told Swanson the location of the Grayville prison was admissible to show how Ryan showered Swanson with government benefits, including confidential information. Although the Court later vacated Ryan's conviction on Count Ten related to this episode, the evidence was admissible to

prove the flow of benefits between Ryan and Swanson. In any event, Ryan waived his right to challenge this evidence by failing to do so on direct appeal.

- Ryan's conversion of state property, such as using state employees and state resources on his campaigns, was admissible as evidence of how Ryan used false pretenses, including false time sheets, to obtain state money and property.

Even if the Court were to conclude that some of this evidence was inadmissible, any error was harmless because its admission did not affect Ryan's "substantial rights." *See United States v. Jones*, 389 F.3d 753, 758 (7th Cir. 2004). In light of what the Seventh Circuit called the "overwhelming" evidence of Ryan's guilt, *Warner*, 498 F.3d at 675, a reasonable juror's view of the case would not have changed had this evidence been excluded. *See United States v. Owens*, 424 F.3d 649, 656 (7th Cir.2005).

CONCLUSION

For the reasons set forth above, the Court should deny Ryan's motion.

Dated: October 7, 2010

Respectfully submitted,

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2561

reason you need to keep an open mind is because of these legal principles that our system of justice is based on.

Yes, I represent this man, George Ryan, and I'm going to say again, as others have told you, that there's a lot at stake in this case. His future is in your hands and, yes, the Government has to prove these charges beyond a reasonable doubt. Every day you walk into this courtroom, if there's any day when you say you can't give him the presumption of innocence, then you're not doing your sworn duty as jurors, and we picked you because I know you can do that.

And, quite frankly, I'm not worried about that, but it's important because the Government, for example, today did what I call cherry picking. "Cherry picking" means that they selected certain facts and evidence that they want to talk to you about, because there's a lot of events and transactions that make up this case. They told you at a very high level that this happened or that happened, and they picked facts to support their theories of the case.

I want to tell you right now that I'm going to spend some time, I'm going to spend some time this afternoon going through what I believe to be some facts and issues that they've ignored, and I tried to put it on one piece of paper, one chart, one chart alone which I think contains significant evidence and issues that the Government has ignored in this

2562

case. And when you look at this, what I put up on this one chart on one piece of paper is why the Government cannot prove its case beyond a reasonable doubt.

I'd like to just spend a little time going through it. There's not a lot of points there. I have five, five points that I'd like to make to you as I start this afternoon, and the first one is probably the most profound.

I don't know whether you realized this or not when Mr. Fardon was talking to you today, as to whether or not you actually realized as jurors that you're going to sit here for four months as jurors listening to the evidence in this case, and as far as I know today, there's not going to be a single witness that's going to testify that they gave any corrupt payments of money to George Ryan, not a single solitary witness. No one is going to go on that witness stand and tell you that they gave George Ryan any money to influence his judgments as secretary of state or governor, not one single witness.

The Government has spent an investigation that's lasted seven years; they've interviewed virtually anyone that ever had any contact with this man, George Ryan; they have gone through thousands and tens of thousands of documents related to when he was in government; they've actually done tape recordings of George Ryan, trying to see if they could nail him on doing something wrong; and there's not going to

2563

be any witness that's going to testify that they gave any corrupt payments of money to George Ryan.

In fact, I was glad Mr. Fardon had used this chart during his opening statement because this is their conspiracy (indicating). So this is not very complicated. These are the people that the Government says George Ryan was involved with in corrupt activity.

I think Mr. Fardon told you this morning George Ryan is corrupt and he's greedy. That's what he told you. That's what this case is about: His corruption and his greed. I want you to look at that chart and remember it as we go through this trial because these people, Warner, Klein, Swanson, Udstuen, yes, those people did earn money and fees on various leases, contracts, and transactions, and the Government is going to prove that up. They earned money, and they made some money.

You're not going to hear any evidence from any one of those people, Warner, Udstuen, Swanson, or Klein. You can sit here until the end of the case, and I'm going to get up in closing argument and I'm going to tell you that you're not going to have heard a piece of testimony from any of those witnesses that they ever gave any corrupt money to George Ryan, that they ever gave any money to influence his judgments as the secretary of state or governor. Not one of them will testify to it, and as far as I know there will be

2564

no other witness. There'll be no other witness beyond those that will tell you that they have any evidence that Warner, Udstuen, Swanson, or Klein gave money to George Ryan, money that they earned on these contracts, leases, and transactions, not a one.

So this corruption case that Mr. Fardon waxed on about for an hour and a half this morning, that simple fact, no witness, no tape recording, no document will ever establish that that happened, and yet this is a corruption trial, according to Mr. Fardon, that is about George Ryan and his acts of corruption. The enormous resources that they have at this table, and after all of these years, they have not developed any evidence to support that first point. No one is going to testify to that.

Number two, by the way, let me just say the first witness, the first witness is Mr. Fawell. He was Mr. Ryan's chief of staff who worked with George Ryan every day in those years in the secretary of state's office, the number 2 person. The Government says he's going to be on the stand for days, weeks. I don't know how long he's going to be on the stand.

It is my belief that Mr. Fawell will tell you that he also, no matter how close he was to George Ryan, no matter how much he knew about all these events and transactions, that he is not aware of any evidence that George Ryan took

A. Georgia Marsh more than anything because she dealt with the currency exchanges.
Q. Who was Ms. Marsh? What was her position?
A. She was the director of accounting revenue.
Q. As of early 1994 when you went to Jamaica, was there any desire, agreement on behalf of the secretary of state's office to go along with the rate increase proposals that the Currency Exchange Association had made?
A. No, not at that time, no.
Q. Now, with regard to this check, you gave a $1,000 check that you handwrote. You get $1,000 back in cash. What's the point of that, sir?
A. So nobody would question -- so there is no question of -- certainly for my check, a regulatory function that we were being compromised, I guess would be a good term.
Q. So there is a paper trail for the check -- with the check?
A. Yes.
Q. But the transaction, just so we are clear, it's a wash. You are giving a check and you are getting money back. So for you, it's a wash?
A. Correct.
Q. Sir, after you got back from this first Jamaica trip, I want to direct your attention to November of 1994. That was, of course, an election year; is that right?

A. Correct.
Q. You were a major campaign participant for Mr. Ryan for his reelection; is that right?
A. Yes.
Q. Shortly after the election, within days of the election, what did you do?
A. We went to Harry's place. Harry had a place in Palm Springs. We went there for a little R and R.
Q. When you say "R and R," rest and relaxation?
A. Correct.
Q. Who went on this trip to Harry's place in Palm Springs?
A. The same contestants -- me, my wife at the time, George, Lura Lynn -- again, I don't know whether Harry and Lonnie were there already -- but Harry and Lonnie and Manny and Judy Hoffman.
Q. This was a second home Mr. Klein owned; is that correct?
A. Yes.
Q. Can you generally describe for the jurors the layout of this property in Palm Springs, California?
A. I don't remember it that well certainly internally. It was like any golf course development out in the desert. It was, you know, homes next to each other. I don't know if you call them town houses or condos, but it was nice. It was a nice roomy Palm Springs kind of place.
Q. Laid out on a golf course, sir?

A. Yes, on the golf course.
Q. How many bedrooms did Mr. Klein's property have?
A. I think only three.
Q. When you went on this trip in November 1994 did everyone stay at Mr. Klein's location?
A. No. I think there was only three. I stayed next door at a friend of Harry's, I guess.
Q. At any time were you asked to pay anything for the rental of the home next door, if there was rental?
A. No.
Q. Sir, when you were in Palm Springs how long did you stay with this group of eight people?
A. I think a week. It might have been eight, nine days, but I think a week.
Q. What were the general activities while this group was in Palm Springs, particularly the men?
A. We played some golf. Not as much as I would like to play, but it's never that amount. We went to dinners. We went to a show one night. I don't know. Just the same kind of activity, lounging around doing nothing.
Q. Where did you golf when you were in Palm Springs, sir?
A. Harry lives on a golf development, so we golfed at Harry's place.
Q. Was it a private club, sir?
A. Yes.

Q. Did you pay for golf?
A. No.
Q. Could a public person pay cash for golf?
A. I don't think so. Most country clubs you can't. You just have to sign and play.
Q. Were you ever asked to reimburse Mr. Klein for any of the golf?
A. No. I was his guest.
Q. How many times did you play golf that week, sir?
A. I am guessing only a couple. I always try to get everybody out a little more. I was for every day.
Q. On every occasion you went did Mr. Ryan go as well?
A. Pardon me?
Q. On every occasion you went to golf did Mr. Ryan go as well?
A. I think so. Usually it would be the four us. The four guys would play.
Q. Sir, during the course of this visit for a week to Mr. Klein's place in Palm Springs, did the group make a decision to go elsewhere?
A. Yes.
Q. What decision was made, sir?
A. We did a little banzai trip to Las Vegas for a day.
Q. When you say "banzai trip," what do you mean by "banzai"?

3756

A. I think it's fair to say, yes.
Q. Let's go through it. I mean I think you covered this on direct-examination, but when George Ryan would be in Chicago working as secretary of state out of the secretary of state's
03:51PM office in Chicago, you would probably be with him almost every day when you were together in the office. Is that fair to say?
A. I would say that's fair to say, yes.
Q. And if you weren't physically together in meetings,
03:51PM you'd be on the telephone with him throughout the day. I think you testified to that, is that correct?
A. Correct.
Q. When you -- when George Ryan would be in Springfield at the secretary of state's office there, normally when George
03:52PM Ryan was in Springfield, that's where you were. Is that fair to say?
A. Correct.
Q. And when you were with George Ryan in Springfield, you would spend a good part of each day with him in meetings,
03:52PM discussions, events, et cetera. Is that correct?
A. Yes.
Q. If you weren't physically together, you'd be on the telephone with each other, is that correct?
A. That would be correct.
03:52PM Q. If you weren't in Springfield or you weren't in Chicago

3757

but you were on the road somewhere at some meeting, some other city in Illinois, normally you'd be with George Ryan, is that correct?
A. Probably not as much as -- probably I wasn't on the road
03:52PM maybe as much, but I certainly was in contact with him at all times.
Q. And even if you weren't working, if you were just, like, socializing with a lunch or a dinner with mutual friends, if I understand your testimony, when George Ryan would go out
03:52PM with friends just to have a social lunch or dinner, you frequently would be there, is that correct?
A. Correct.
Q. And so you got to know George Ryan pretty well during those years that he was secretary of state and the events
03:53PM that you've testified about. Is that fair to say?
A. Yes, that's a fair assessment, yes.
Q. All right. I've listened to you testify for several days. I don't know how many days, five or six days you've been on the stand so far?
03:53PM A. A while. Yes, something like that. Five, six. Four, five, six. I don't know. Over a long period of time, yes.
Q. It will be two weeks this Thursday that you started on the witness stand. Is that correct? You started on a Thursday, September 29th?
03:53PM A. Yeah, I think so. I mean it's been a while.

3758

Q. I listened to all the questions that the prosecutor asked you. Let me ask you the fundamental question that I don't think they asked you during those five or six days.
During the years that you and George Ryan worked
03:53PM together in the secretary of state's office, were you ever aware of anyone ever giving any money to George Ryan to affect his decisions as secretary of state?
A. No.
Q. That never happen -- you have no knowledge of that ever
03:54PM happening, is that correct?
A. Correct.
Q. And am I correct, sir, let me -- I'll take it one step further. During the years that you worked with George Ryan and all these events took place that you told the jury about,
03:54PM did George Ryan ever do anything that indicated to you that he had received any money or any benefits from anybody to affect or influence his judgments as secretary of state?
MR. COLLINS: Judge, objection. It calls for him to surmise, speculate, to render a legal opinion.
03:54PM MR. WEBB: There's no legal --
MR. COLLINS: Judge, he can ask what he observed, but in terms of what he thought, what was in Mr. Ryan's head, I would object.
MR. WEBB: I'll rephrase the question.
03:54PM THE COURT: Thank you.

3759

BY MR. WEBB:
Q. I'll ask the question to make sure -- by the way, if I ask you a question and you don't understand, just tell me. I'm going to repeat it. You don't need to answer questions
03:55PM you don't understand, Mr. Fawell.
A. I understand.
Q. In all these meetings, at all these events that you've testified about, did you ever observe or see George Ryan do anything that indicated to you that he had received any money
03:55PM or benefit from anyone to influence or affect his judgments as secretary of state?
A. No.
Q. Never once, is that correct?
A. Correct.
03:55PM Q. In all those years as those events took place, did anyone ever tell you that they had ever given any money or benefits to George Ryan in order to affect or influence his decisions as secretary of state?
A. No.
03:55PM Q. No one ever told you that, did they?
A. No.
Q. Not once.
A. No.
MR. COLLINS: Judge, objection. Asked and answered
03:55PM now three times.

6919

plates; is that right?
A. No. The way that would work is, I would say, "I have a porter and he has been with me many years, and his initials are RS. Could you kindly give me a plate for him?"
Q. Okay.
Do you recall ever sending Kathy Spainhour a check as a thank you?
A. It was either her birthday or something. She was so nice to me, and I had never met her before, that I think I sent her a check for $100, and she returned it. She would not accept it.
Q. Now, let me direct your attention to late December of 1998.
Did you get a telephone call about a low-digit plate? I think you referred to plate 217. Did you get a call regarding plate 217?
A. I got a call three, four days prior to the end of that year and said they had another plate they could give me.
Q. Who called you, just to your knowledge?
A. Someone from his office. I never talked to George Ryan directly. It was always someone from his office.
Q. Did this -- this call came in late December of '98; is that what you said?
A. It was three, four, or five days prior to the end of the year. And he said that I would have to have a title to a

6920

car, so I called a car dealer and bought an old junk, and we put the license plate on that particular car. And then eventually we transferred it to someone in the family or whatever.
Q. Do you remember signing some paperwork for that license plate?
A. I may have. I don't recall.
(Document tendered.)
BY MS. BARSELLA:
Q. Mr. DeSantis, I have handed you what's been marked as Government's Exhibit 19-011, and I ask you to take a look at the second page of that.
A. That 19-011?
Q. Right. What I -- I just handed you that exhibit.
A. That is not my signature.
Q. Okay.
Now, if you could turn to the second page. Is that your signature?
A. That's closer to my signature, but I don't think it's mine.
Q. Does the name Drury Lane Productions appear on that?
A. Oh, yes.
I have five grandchildren and one daughter. I have cars for all of them, and they are all in the name of Drury Lane Productions. And I buy the cars for them.

6921

MS. BARSELLA: I believe that's -- that's all the questions I have. Thank you.
THE COURT: Let's take a recess and we will take up cross-examination.
(Jury out.)
(Brief recess at 10:27 a.m.)F.
(Jury in.)
THE COURT: You may be seated.
Cross-examination, Mr. Lerman?
MR. LERMAN: Thank you, your Honor.
CROSS-EXAMINATION ON BEHALF OF THE DEFENDANT RYAN
BY MR. LERMAN:
Q. Mr. DeSantis, my name is Brad Lerman, and I represent George Ryan.
I am going to try and keep my voice up and make sure that you and I hear each other. I am going to ask you some questions about your testimony, okay?
A. Okay.
Q. If at any time you don't understand my question or I am not speaking loud enough, let me know.
A. I will let you know.
Q. Okay. Good. Thank you, sir.
Mr. DeSantis, how many years young are you?
A. Ninety-one.
Q. Ninety-one and more hair than I have, sir. I am very,

6922

very impressed.
(Laughter.)
BY THE WITNESS:
A. Thank you.
BY MR. LERMAN:
Q. Let me ask you this, and let me be absolutely clear in my question. At no time, sir, at no time did you ever give George Ryan a gift or contribute to his campaign fund for the purpose of bribing him; is that right?
A. That's correct.
Q. At no time, sir, no time did you ever give George Ryan a gift or make a campaign contribution for the purpose of influencing his decision-making as secretary of state; is that right?
A. Correct.
Q. At no time, ever, did you give him a gift or give him a campaign contribution for the purpose of buying influence, did you?
A. Correct.
Q. At no time did you give George Ryan anything, whether it was tickets to your theater -- which I want to talk to you about -- or a campaign contribution or a gift or any other thing for the purpose of obtaining a low-digit license plate, did you?
A. I believe that's correct.

6923

Q. In fact, Mr. DeSantis, Ms. Barsella showed you a number of checks that went up on that screen there (indicating). Do you remember those?
A. Correct.
Q. Not one of those checks, not one of those checks, sir, was intended to be a bribe paid by you to George Ryan; is that correct?
A. Correct.
Q. Not one of those checks was intended to buy his influence, George Ryan's influence, or to corrupt George Ryan as secretary of state, was it?
A. Correct.
Q. That was not your intention, was it, sir?
A. Absolutely not.
Q. Mr. DeSantis, tell the ladies and gentlemen of the jury, if you would, in all the years that you have known George Ryan -- and I want to talk to you about how long you have known him -- and in the conversations that you have had with him, has he ever, ever, at any time, even once, asked you for money?
A. No, never.
Q. Has he ever, even once, asked you for a gift?
A. No, not once.
Q. Has he ever, George Ryan, the man who's on trial here, Mr. DeSantis, has he ever, even once, asked you for a

6924

campaign contribution?
A. No, I don't think so. He didn't ask me. I may have received something in the mail, and then I contributed.
Q. That was in 1994, and we saw that check. I am going to talk to you about that in a second.
But George Ryan personally has never asked you, "Tony, can you give me a campaign contribution?" That's never happened?
A. Never asked, correct.
Q. And George Ryan has never, not once, not a single time, said to you, "Mr. DeSantis, if you will give me a gift or if you will give me a campaign contribution, I will give you a low-digit license plate." He has never said that to you?
A. Never has.
Q. Sir, have you ever, at any time, given George Ryan or any member of his family any cash?
A. No, sir.
Q. Not once, correct?
A. Not once.
Q. Because everything that you have been shown and talked to Ms. Barsella about was by check, written out, negotiated through the banks; is that right?
A. True.
Q. No cash payments, no envelopes, no payoffs, correct?
A. Correct.

6925

Q. And that's because, Mr. DeSantis, these checks that Ms. Barsella showed you, these were legitimate checks and you wanted to keep records of them; is that right?
MS. BARSELLA: Objection, Judge, to "legitimate."
THE COURT: Objection to the form is sustained.
BY MR. LERMAN:
Q. Well, you wanted to keep records of these payments; is that correct? You did this by check so that you could have a record of the contributions or gifts that you gave; is that right?
A. I do everything by a personal check. And by having a personal check, I always have a paper trail. I do not give cash to anybody.
Q. Okay. Sir, in all the times -- and you have met with Ms. Barsella and my colleagues here at the government's table. You have met with them a number of times; is that right?
A. Correct.
Q. And you have met with FBI agents, and I want to talk to you about that in a second.
But you have met with people from the government on a number of occasions; is that right?
A. Right.
Q. At any time in those meetings with the government, when you have discussed these checks that were just put up for the

6926

jury earlier this morning, at any time did anyone from the government ever suggest to you that you were going to be charged with a crime for writing these checks?
A. No, I don't think anyone ever said that to me.
Q. As you sit here today, Mr. DeSantis, you have done nothing wrong, as far as you are concerned, with respect to the checks that were shown here to George Ryan and his family; is that right?
A. That's correct.
Q. Now, actually, Mr. DeSantis, you were interviewed in connection with this case by the FBI on a couple of occasions; is that right?
A. Correct.
Q. Then you gave some testimony to the grand jury investigating this case on one occasion. Do you remember that?
A. I do.
Q. Sir, do you remember FBI Special Agents Ron Rickard and Gary Sebo? Do you remember those two gentlemen?
A. I don't recall the names, but I did meet with two of them, correct.
Q. That was sometime -- that was on -- you met with them twice, once on October 16th and once on October 17th of 2000, the year 2000. Do you remember that?
A. I remember meeting in 2000, correct.

7314

Ryan." You didn't hear those words at all?
A. That's correct.
MR. COLLINS: Your Honor, I object to this. This is not a change. This is something he didn't hear, Judge. It's not a change from the question he heard. I object to this whole line of questioning.
THE COURT: I think the jurors heard the testimony as it was given. We can move on.
BY MR. WEBB:
Q. As far as your cooperation with the government in this case, sir, am I correct that -- how many days have you had meetings with government prosecutors or FBI agents to discuss the subject matters that you've been talking about in your direct-examination?
A. By my estimation, all or part of about 35 or so different days, ranging from brief, half-hour conversations all the way up to longer ones.
Q. Now, does that 35 different days, does that include your meetings recently with the prosecutors to actually prepare for your direct-examination that you gave to the jury here on Thursday and today?
A. I believe so, yes.
Q. So on those 35 different days -- strike the question.
Am I correct you had no meetings with any lawyer that represents George Ryan to talk about your testimony; is

7315

that correct?
A. That's correct.
Q. And you've -- have you had any meetings with lawyers that represent Mr. Warner?
A. No.
Q. Let me go to a different subject matter, Mr. Juliano.
You testified on Thursday of last week and today about a lot of interactions and contact that you had with my client, George Ryan, during the years 1991 to 1999 when he was secretary of state; is that correct?
A. Yes.
Q. Let me ask you some very basic questions.
Mr. Juliano, am I correct during the years that you worked in the secretary of state's office and George Ryan was secretary of state, am I correct you were never aware of anyone giving any money or financial benefits to George Ryan to affect his decisions as secretary of state; is that correct?
A. Not that I can recall, no.
Q. And at any time while you were working at the secretary of state's office, am I correct no one ever told you that they had ever given any money or benefits to George Ryan in order to influence his decisions as secretary of state; is that correct?
A. That's correct.

7316

Q. And am I correct that -- well, let's take Scott Fawell specifically.
You've told the jury how frequently you interacted with Scott Fawell, virtually every day during those years; is that correct?
A. Yes.
Q. And am I correct at no time did Scott Fawell ever tell you that he had any thoughts or beliefs that George Ryan was taking money or financial benefits to affect his decisions. He never told you that, did he?
A. Not that I can recall, no.
Q. You would remember that, wouldn't you, sir?
A. Most likely, I would, yes.
Q. You've remembered a lot of things here. If somebody told you -- Scott Fawell told you George Ryan was taking bribes, you would not forget that coming into this courtroom, would you?
A. No.
Q. He never told you that, did he?
A. No.
Q. Now, at any time while you worked in the secretary of state's office and George Ryan was secretary of state, did you ever see any documents or records that you in any way believed indicated that George Ryan had received money or financial benefits from anyone to influence his decisions as

7317

secretary of state?
A. No.
Q. You mentioned Larry Warner several times during the course of Mr. Collins's questioning, so let me be specific as to Larry Warner.
Am I correct during the years that you worked in the secretary of state's office and George Ryan was secretary of state, you were never aware of Larry Warner ever giving any money or financial benefits to George Ryan to affect his official decisions; is that correct?
A. Yes.
Q. Let me go to another subject matter.
During your direct-examination, you gave a lot of testimony about the use of secretary of state employees to work on CFR, Citizens For Ryan, political activities.
Do you recall that that's a subject matter you testified about quite a bit when Mr. Collins was asking you questions.
A. Yes.
Q. And in particular you provided quite a bit of testimony about the use of secretary of state employees on Citizens For Ryan political matters during the 1998 gubernatorial campaign. Do you recall that?
A. Yes.
Q. Sir, am I correct -- in fact, let me show you a document

9421

business or not?
A. No, sir.
Q. So the net effect was $1,000 in income to Seven Seas Villa, and you were out of pocket $1,000 cash --
10:20AM A. Yes, sir.
Q. -- is that correct?
A. Yes, sir.
Q. Sir, prior to the time that you did this transaction with Mr. Ryan, this transaction that you have just testified
10:21AM to, had you ever done that with anyone else who visited you in Jamaica?
A. No, sir.
Q. You testified that when Mr. Ryan came to vacation with you in Jamaica in 1993, you did not know him at that point;
10:21AM is that right?
A. Correct.
Q. After you spent the week with Mr. Ryan in Jamaica, did you thereafter develop any sort of relationship with him?
A. Yes, sir.
10:21AM Q. When you got back to the Chicago area, in the next year, say, did you see Mr. Ryan during that year?
A. Yes, sir.
Q. Do you recall about how many times you saw him in the next year?
10:21AM A. Four or five times.

9422

Q. Where would you see him? What sorts of events or activities?
A. Social events, maybe political gatherings, dinner.
Q. Were these -- just so that we have an understanding of
10:22AM what the relationship was, were these events where it was just you and him? Were there other people involved? Were these public events? Tell us what kind of events these were.
A. Say that again. I am sorry.
Q. What kind of events were these where you would see
10:22AM Mr. Ryan? Were they just private events with you and Mr. Ryan, or were they public events with other people?
A. Mostly private -- with other people.
Q. How big a group or what sort of gatherings were they?
A. I can't recall, sir.
10:22AM Q. Sir, would you characterize your relationship with Mr. Ryan as it developed in that year, did you become a close friend of his? An acquaintance? How would you describe it?
A. A friend.
Q. A friend.
10:22AM Now, sir, moving on -- moving forward, then, to the next year, did you go to Jamaica the same week every single year?
A. Not the same week, sir.
Q. But the same general time?
10:23AM A. Approximate. Yes, sir.

9423

Q. Early in the year; is that right?
A. Yes, sir.
Q. Did you go again in early 1994?
A. Yes, sir.
10:23AM Q. Who else went with you in early 1994 when you went to Jamaica?
A. Mr. Ryan and his wife, Lura Lynn; Manny Hoffman and his wife; Scott Fawell and his wife; and myself and my wife.
Q. Did you know Mr. Fawell before he came to Jamaica in
10:23AM early 1994?
A. I don't think so, sir.
Q. Pardon me?
A. I do not think so.
Q. How was it that Mr. Fawell was there then?
10:23AM A. He was asked to come.
Q. By whom?
MR. WEBB: Objection, unless I have a foundation as to who was present. I don't object to the subject matter.
THE COURT: Fair enough.
10:23AM MR. LEVIN: That's fine.
BY MR. LEVIN:
Q. You testified Mr. Fawell was down there with the rest of you in early 1994, right? Is that right?
A. Yes, sir.
10:24AM Q. Did you have a conversation with Mr. Fawell -- did you

9424

invite him to come down there?
A. Personally, no. I don't -- I can't recall.
Q. Were you aware that he was going to come?
A. Yes, sir.
10:24AM Q. How did you learn that he was going to come?
A. From Mr. Hoffman, Mr. Ryan. They had asked if he could come.
Q. Do you remember, sir, or not?
A. Who?
10:24AM Q. Right.
A. No, I don't remember who.
Q. So someone asked you if he could come?
A. Yes, sir.
Q. Is that right?
10:24AM A. Yes, sir.
Q. You said yes?
A. Yes, sir.
Q. So if I have this right, there were four couples down there in this trip; is that right?
10:24AM A. Yes, sir.
Q. That was Mr. Ryan and his wife, Mr. Fawell and his wife, Manny Hoffman and his wife, and you and your wife?
A. Yes, sir.
Q. During the course of this week, can you tell us what
10:25AM sorts of activities you engaged in down there?

A. We ate, we swam, maybe we golfed, went into the mountains, went into the city -- into the town.
Q. Same sorts of things you had done the previous year?
A. Yes, sir.
10:25AM Q. The same sorts of things you do every year when you go down there?
A. Yes, sir.
Q. Now, the golfing, is that something you have to pay some sort of fee for?
10:25AM A. Yes, sir.
Q. Do you recall who paid the fee when you went golfing?
A. I cannot recall that, sir.
Q. Now, sir, this second year, 1994, when you were down there with Mr. Ryan, did you have any conversation with him
10:25AM about payment for that year?
A. I cannot recall that.
Q. Did you receive any payment from him that year?
A. Yes, sir.
Q. In what form did you receive the payment from him?
10:25AM A. A check, sir.
Q. Sir, I am showing you what I have marked as Government Exhibit 10-002.
(Document tendered.)
BY MR. LEVIN:
10:26AM Q. Do you recognize that, sir?

A. A check for $1,000 from Mr. Ryan.
Q. Is that the check that you received in payment for the second year?
A. Yes, sir.
10:26AM MR. LEVIN: Your Honor, we offer in evidence Government Exhibit 10-002.
MR. WEBB: I have no objection. I don't have any objection to the rest of the checks.
MR. LEVIN: That's fine.
10:26AM THE COURT: That will be admitted.
(Said exhibit was received in evidence.)
BY MR. LEVIN:
Q. We have got it up on the screen now, Mr. Klein. This check was dated January 12th, 1994; is that correct, sir?
10:26AM A. Yes, sir.
Q. Made out to Seven Seas Villa?
A. Yes, sir.
MR. LEVIN: Agent Ruebenson, if we can look at the reverse side of the check.
10:26AM BY MR. LEVIN:
Q. Did you also deposit this check into your account at Seven Seas Villa?
A. Yes, sir.
Q. The second year when Mr. Fawell was there, did he also
10:26AM give you a check for $1,000?

A. Yes, sir.
Q. I am showing you what I have marked as Government Exhibit 01-007.
(Document tendered.)
10:26AM BY MR. LEVIN:
Q. Do you recognize that to be a check from Mr. Fawell?
A. Yes, sir.
MR. LEVIN: Your Honor, we offer in evidence Government Exhibit 01-007.
10:27AM THE COURT: That will also be admitted.
(Said exhibit was received in evidence.)
MR. LEVIN: Oh, I'm sorry. It's already in evidence.
BY MR. LEVIN:
10:27AM Q. This check from Mr. Fawell, then -- we can see it on the screen, sir. And you have got a copy of it, right? Was it deposited then into the Seven Seas account?
A. Yes, sir.
MR. LEVIN: Agent Ruebenson, if we can just put on
10:27AM the screen that section from the check ledger, Government Exhibit 11-010.
BY MR. LEVIN:
Q. Sir, do you see the entries for the checks that you received from Mr. Ryan and Mr. Fawell?
10:27AM A. Yes, sir.

Q. Can you just read for the jury what you have written there on those.
A. G. Ryan, $1,000 deposit. S. Fawell, $1,000 deposit.
Q. Did you also put the dates in parentheses there?
10:28AM A. Yes, sir.
Q. What dates did you write down there?
A. 1-8-94 and 1-15-94.
Q. For both of them, right?
A. Yes, sir.
10:28AM Q. Was that the week that you all were down there?
A. Yes, sir.
Q. Sir, going back to Jamaica, then, when you were down there in early 1994, after you received the check from Mr. Ryan, did you give him an equivalent amount of cash?
10:28AM A. Yes, sir.
Q. Do you recall, was there anyone else present when you did that?
A. There was no other present.
Q. Do you recall where you did it?
10:28AM A. No, sir.
Q. Why did you do it?
A. Pardon?
Q. Why did you give him the cash?
A. Because I didn't want to charge for being down there.
10:29AM Same reason as the first year.

9429

Q. Did he take the cash?
A. Yes, sir. Say that again.
Q. Did he take the cash?
A. Yes, sir.
10:29AM Q. Now, with Mr. Fawell, after you got the check from him, did you give him some payment back?
A. Yes, sir.
Q. What did you give him?
A. $1,000.
10:29AM Q. What form was that in?
A. Cash.
Q. Was anyone else present when you gave him the money?
A. No, sir.
Q. Now, sir, for this second year, then, you got a total of
10:29AM $2,000 from Mr. Ryan and Mr. Fawell; is that right?
A. Yes, sir.
Q. And the $2,000 in cash that you gave them, where did that cash come from?
A. My personal money.
10:29AM Q. So what was the net financial effect, then, to you of these transactions?
A. I was – I was $2,000 out of my pocket.
Q. And the $2,000, was that treated as income to Seven Seas Villa?
10:29AM A. Excuse me. The one that I am looking at on the screen?

9430

Q. Yes.
A. Yes, that was income.
Q. To Seven Seas Villa?
A. Yeah. The checks.
10:30AM Q. Right.
Now, sir, moving forward from 1994, did Mr. Ryan continue to join you in Jamaica for vacations for a number of years after 1994?
A. Yes, sir.
10:30AM Q. When Mr. Ryan was down there, were you always there at the same time?
A. Yes, sir.
Q. Did you spend more time in Jamaica than he did?
A. Yes, sir.
10:30AM Q. But whenever he was there, were you also there at the same time?
A. Yes, sir.
Q. Were you there with other people, other than him and you?
10:30AM A. Yes, sir.
Q. Did your wives always join you?
A. Yes, sir.
Q. Typically Mr. Hoffman and his wife joined you?
A. Repeat that again. What years?
10:30AM Q. Did Mr. Hoffman and his wife join you and your wife and

9431

Mr. Ryan and his wife when you were down in Jamaica?
A. Yes, sir.
Q. Did that happen for a number of years?
A. Yes, sir.
10:30AM Q. Did Mr. Fawell and his wife also come down there for a couple of years?
A. For a couple of years, yes, sir.
Q. Each year when you did this, who was it who coordinated the trip down there?
10:31AM A. All of us individually.
Q. Did you talk amongst the group to set a week when you would be going?
A. I can't recall that.
Repeat that again, please.
10:31AM Q. Well, you knew they were coming down there ahead of time, right, sir?
A. Yes, sir.
Q. So it was arranged beforehand; is that right?
A. Yes, sir.
10:31AM Q. In terms of your relationship with Mr. Ryan, '94, '95, you have testified that he became a friend of yours; is that right?
A. Yes, sir.
Q. Did the relationship change at all, or did it
10:31AM continue –

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A. It was just a nice friend.
Q. About how many times a year would you see him?
A. What year, sir?
Q. '94, '95, that time frame.
10:31AM A. Five, six times a year.
Q. Were they the same sorts of events or affairs that you described?
A. Yes, sir.
Q. In general, did you ever get together just you and your
10:31AM wife and him and his wife? Did that ever happen?
A. In that period of years?
Q. Right.
A. Yes, sir.
Q. Was that a frequent occurrence or infrequent?
10:32AM A. Unfrequent.
Q. Sir, in terms of these transactions that you had with Mr. Ryan in Jamaica, the exchange of the cash for the check, did that continue then in these subsequent trips?
A. With Mr. Ryan?
10:32AM Q. Yes.
A. Yes, sir.
Q. Did he continue to give you a check each time he was down there?
A. Yes, sir.
10:32AM Q. Did you continue to give him the equivalent amount of

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A. Yes, sir.
Q. As you sit here now in front of this jury, do you know of anything that you've done wrong because you've been a friend of George Ryan's?
A. No, sir.
Q. Do you know of anything George Ryan has done wrong because he's been your friend?
MR. LEVIN: Objection, your Honor, foundation. It's beyond the scope of this witness's knowledge, your Honor.
THE COURT: I'll allow it.
BY MR. WEBB:
Q. I said do you know of anything George Ryan has done wrong because he's your friend?
A. No, sir.
Q. Did you ever try to bribe George Ryan?
A. No, sir.
Q. Now, you did get to do some things that were kind of interesting because -- strike the question.
By becoming George Ryan's friend, when he became governor, you got to do some interesting things that probably ordinary people, a lot of us haven't had a chance to do; is that correct?
A. Yes, sir.
Q. You had dinner at Charlie Trotter's, I understand it.

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A. Yes, sir.
Q. I suspect that was an interesting evening.
A. Yes, sir.
Q. That was at the mansion.
A. Yes, sir.
Q. And you got to sleep -- slept at the mansion; is that correct?
A. Yes, sir.
Q. You were aware that there were other friends sleeping at the mansion; is that correct?
A. Yes, sir.
Q. And you're aware that governors do that over the years; is that correct?
A. Yes, sir.
Q. Let me ask you this, you -- I'm just curious. The bed you slept in, was that the same bed Lincoln -- you had to sleep in the same bed Lincoln slept in.
A. I think that was a myth because I just made it.
Q. In any event, the point is -- and by the way, he appointed you to a position with Governors State University; is that correct?
A. Yes, sir.
Q. Do you think because you were his friend that that played some role in his decision to appoint you to that job probably?

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A. Yes, sir.
Q. And do you see anything wrong with that?
A. No, sir.
Q. Do you get paid a dime for that?
A. No, sir.
Q. Do you work real hard in that public service job?
A. Yes, sir.
Q. I want to get another thing out of the way right off the bat.
Well, you have done one thing wrong, as I understand your direct-examination, because you told the prosecutor that there was an occasion that you were not completely honest; that is, you told a lie when you met with an FBI agent; is that correct?
A. Yes, sir.
Q. And you do know that's wrong, do you not?
A. Yes, sir.
Q. So I want to get one thing out of the way right off the bat.
Whatever you did that day with the FBI agent, George Ryan had nothing to do with that; is that correct?
A. Yes, sir.
Q. Did George Ryan have anything to do with the fact that you made a decision to lie to the FBI?
A. No, sir.

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Q. You made -- I'm not going to go into it in any detail. I take it you made a serious mistake in judgment, and you know that; is that correct?
A. Yes, sir.
Q. And, by the way, at that time that you did that, you did not have a lawyer; is that correct?
A. Correct, sir.
Q. Now, this man here, his name is Joe Duffy, as I understand it. He's your lawyer; is that correct?
A. Yes, sir.
Q. You understand him to be a reputable lawyer, and you went out and hired him after that first interview with the FBI; is that correct?
A. You bet.
Q. And since that day, Mr. Klein, since you hired that man, Joe Duffy, if there's anything clear in your mind you've been clear that whenever you meet with the folks at this table, you are obligated to tell the truth; is that correct?
A. Yes, sir.
Q. In fact -- in fact, to the best of your knowledge, have you always told the truth when you've had an opportunity to meet with the folks at this table?
A. Outside of that one time.
Q. I understand the one -- after you got over that first time.

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Mr. Ryan staying at your Jamaican home as your guest, did you allow Mr. Ryan and his wife to stay as guests in your Jamaican home because you wanted to affect or influence any decision George Ryan ever made as secretary of state?
A. No, sir.
Q. Did that thought even enter your mind?
A. No, sir.
Q. Ever once?
A. No, sir.
Q. Did you ever have any conversations with George Ryan at any time in which you indicated or told him that you wanted or expected anything from him as secretary of state as a result of the fact that he was a guest in your Jamaican home?
A. No, sir.
Q. Did that ever happen at any time ever?
A. No, sir.
Q. At the time that George Ryan began, at the time he began to vacation as your guest in your Jamaican home, were you aware of any issues or matters pending before the secretary of state's office that could have any impact or effect on you that you knew of?
A. No, sir.
Q. Now, you told the jury this morning that you are in the currency exchange business; is that correct?
A. Yes, sir.

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Q. And just so the jury understands, is there an agency of Illinois government that is responsible for actually regulating and controlling the conduct of currency exchanges in the State of Illinois?
A. Yes, sir.
Q. Tell the jury what is the name of that agency?
A. DFI, the Department of Financial Institution.
Q. That's an agency of state government that has the legal responsibility of being the regulator and controlling the conduct of currency exchanges as they operate within the State of Illinois; is that correct?
A. Excuse me. Yes, sir.
Q. The secretary of state's office is not the regulator of the currency exchange industry in Illinois, is it?
A. No, sir.
Q. And because the Department of Financial Institutions regulates currency exchanges, you sometimes interact with them, is that correct, with the agency?
A. Yes, sir.
Q. Okay. Because as a businessman, when you're regulated by a certain government agency, just in the normal course of business, you'll have reason to interact and deal with them sometimes; is that right?
A. Yes, sir.
Q. And by the way, if you ever got in trouble, did

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something wrong, if you did -- I didn't say you did, okay, but if you did, it's the Department of Financial Institutions, DFI, that would have the responsibility of doing something about that if you did something wrong as a currency exchange; is that correct?
A. Yes, sir.
Q. Let me talk about the South Holland property that you talked about this morning.
If I understand it, you purchased -- you purchased this South Holland commercial property in 1992 for $300,000.
A. Yes.
Q. Do I have that right?
A. Yes, sir.
Q. Am I correct you actually -- when you bought it, you paid $200,000 for the property and you had to pay $100,000 for a sign.
A. Yes, sir.
Q. That sign becomes important because later, you give that sign -- that sign becomes part of the drivers license facility; is that correct?
A. Right.
Q. We'll come to that in a minute.
But you had to actually pay a hundred thousand dollars for that sign?
A. That's the way the price was broken up.

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Q. That's the way they did it.
A. Yes.
Q. Okay. In any event, the building was in a good location right off the interstate; is that correct?
A. Yes, sir.
Q. The public would have easy access to get to that location?
A. Yes, sir.
Q. It's right off the -- it's right off of -- well, it's near several interstates, right? It's near 294. That's called the Tri-State, right?
A. Right.
Q. It's also near, I think, I-94?
A. Yes, sir.
Q. Okay. So it's near some major expressways in the Chicago area.
A. Yes, sir.
Q. And it's -- how -- was it a pretty -- when you bought it, was it a pretty decent building, pretty good shape?
A. I thought so, yes, sir.
Q. Okay. And I think you said it has, what did you say, 4800 square feet?
A. Yes, sir.
Q. And you used half the space -- well, in the early years, you were using 60 or 70 percent of the space yourself to

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Q. And you would occasionally drive him in the van occasionally; am I right?
A. When he was with Mr. Ryan, yes, sir.
Q. When he was with Mr. Ryan. Obviously when he was with Mr. Ryan, sometimes he would be a guest in the van, right?
A. Yes, sir.
Q. And sometimes he would accompany Mr. Ryan into restaurants, and you would be around at the time, right?
A. Yes, sir.
Q. And so you accepted the $50 as a Christmas gift, didn't you?
A. Yes, sir.
Q. You didn't find anything inappropriate with a holiday remembrance like that from Larry Warner, did you?
A. No, sir. No, sir.
Q. Sir, Larry Warner never asked you for any favor in exchange for those Christmas gifts, did he?
A. No, sir, he didn't ask that, is the only way I can put it.
Q. I didn't mean to ask you a trick question.
He never asked you for any favors, did he?
A. No, sir, he did not.
Q. And you told the government that when you told them about the Christmas gifts, didn't you?
A. Yes, sir, I did.

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Q. He never asked you for a single thing in exchange for that, did he?
MR. LEVIN: Objection. Asked and answered.
THE COURT: Sustained.
BY MR. ROONEY:
Q. Regarding the conversation with Tom Ryan and Comguard, I think you testified that you recall -- you sort of vaguely recall a conversation, but you don't remember what was talked about; am I right?
A. No, I don't remember the content of the occasion -- or the discussion.
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Q. Fair enough then. You recall -- whatever conversation it was was in the van?
A. Yes.
Q. Am I right?
A. Yes, sir.
Q. And you don't commonly overhear conversations that Mr. Ryan has in the back of the van; is that right?
A. Once again, that wasn't my job.
Q. Can you tell me why -- why that is you wouldn't overhear his conversations in the back of the van?
A. Well, for a couple reasons, actually sir. We had a television in the van which was usually on. Mr. Ryan sat probably six feet behind -- the way the van was set up, six foot behind where the driver and the other person sat.
The TV was between that area, and then generally the two people in the front of the van, we were usually discussing, if we weren't talking about something at work, we were just carrying on a conversation amongst ourselves.
Q. Okay. And when Mr. Ryan would have that TV on, he'd have it on kind of loud, right?
A. Sometimes.
Q. So he could hear it in the back, right?
A. Yeah.
Q. And it's right here back behind your head, isn't it?
A. That's correct.

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Q. And so that would be -- I don't want to say an annoyance, but it would certainly be noticeable. You could hear that TV in your ear, am I right?
A. Yes, sir.
Q. And so conversation in the back of the van is not something that you would commonly hear as a detail guy, am I right?
A. That's correct, sir.
Q. My last -- my last question, Mr. Levin asked you about where George Ryan got his cash, and you said you never saw anybody hand George Ryan cash. Am I right?
A. That's correct.
Q. You never saw any -- anybody at all hand George Ryan cash that he put in his pocket, did you?
A. No, sir.
Q. Never saw a donor do it, am I right?
A. A donor, sir?
Q. A campaign donor.
A. There was a couple instances at fund-raisers he would be given an envelope, but he would turn around and give it to one of his staff people.
Q. Immediately give it to a staff person, right?
A. That's correct.
Q. So you never saw him put a campaign donor's envelope or check or cash right into his pocket, did you?

MS. BARSELLA: Objection, Judge, in terms of -- we need foundation. Right now the evidence is that this witness just typed up correspondence. So in terms of -- I mean, we need some foundation before we can ask these questions.

THE COURT: Sustained.

BY MS. GURLAND:

Q. Do you have any knowledge of Mr. Warner's efforts on behalf of American Decal to assist them in developing new business?

A. I can't say that I recall any -- I'm thinking maybe there was a letter that said, "I have some different ideas. Let's get together."

Q. Okay. So your recollection --

A. But I don't know what they were.

Q. You mean you don't know what the specific ideas were?

A. Correct.

Q. But you do remember that there was a letter at some point that -- in which Mr. Warner made some new business suggestions to that company?

A. Yes.

Q. What you do know for a fact, for American Decal Company, is that over this period from 1991 to 1998, that Mr. Warner was providing consulting services to this company; is that right?

MS. BARSELLA: Judge, asked and answered.

THE COURT: Sustained.

BY MS. GURLAND:

Q. You know that during this time period that we have discussed, that the problem was that Mr. Warner wasn't getting paid; is that right?

A. Yes.

MS. GURLAND: If I can have a moment.

(Brief pause.)

MS. GURLAND: That's all I have for now. Thank you.

THE COURT: Mr. Ryan's attorneys cross-examining this witness?

MR. MIARECKI: Yes, your Honor.

THE COURT: Okay.

CROSS-EXAMINATION ON BEHALF OF THE DEFENDANT RYAN

BY MR. MIARECKI:

Q. Good morning, Ms. Cernuska.

A. Good morning.

Q. My name is Greg Miarecki. I am one of the attorneys representing George Ryan here today. And I just have a few additional questions for you. We will try to get you out of here as soon as we can so you can go back to some warmer weather. All right?

I believe you testified that you started working at Lash Warner in 1987, correct?

A. Yes.

Q. You are aware that during 1987 George Ryan was not yet secretary of state. He was lieutenant governor, correct?

A. That's correct.

Q. You are aware that George Ryan became secretary of state in or about 1991?

A. Yes.

Q. You were at Lash Warner until approximately 2004, true?

A. Correct.

Q. You were aware that's well after Mr. Ryan stopped being secretary of state?

A. Yes.

Q. In fact, it's after he left the governor's office?

A. Correct.

Q. I want to focus on that. I think, if my math is right, it's 17 years you were at Lash Warner, correct?

A. Yes.

Q. During your 17 years at Lash Warner, did you ever see Larry Warner provide George Ryan with any cash?

A. Never.

Q. Not once?

A. Never.

Q. During that 17-year time frame, did you become aware of any evidence that suggested to you that Larry Warner was providing George Ryan with any cash?

MS. BARSELLA: Objection, Judge, in terms of evidence.

THE COURT: I will allow it.

You may answer.

BY THE WITNESS:

A. Never.

BY MR. MIARECKI:

Q. Not once?

A. Not once.

Q. During that 17-year time frame, did you ever at any time become aware of any evidence that suggested to you that Larry Warner was bribing George Ryan?

A. Never.

MR. MIARECKI: Thank you, ma'am. That's all I have.

THE COURT: Redirect, Ms. Barsella?

MS. BARSELLA: Judge, we actually need to boot up our computer. Maybe we can take just a short break.

THE COURT: Sure. We will take a short recess. The jurors are excused.

(Jury out at 10:42 a.m.)

(Brief recess.)F.

MS. BARSELLA: Judge, before the jury comes out, can we have a sidebar?

THE COURT: Sure.

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A. Correct.
Q. You help him run against Jerry Cosentino; is that -- is that correct?,
A. That's correct.
Q. And he won that race, as the jury knows, and you went on his transition team and were co-chairman of his transition team.
A. Yes, I was.
Q. And he ran again in 1994 for reelection --
A. Correct.
Q. -- which you called an easy election.
A. Yes.
Q. And then he ran for governor in 1998; is that correct?
A. That's correct.
Q. And I'm not going to belabor it, during all these years you're spending a lot of time with George Ryan in a variety of circumstances. Is that fair to say?
A. Yes.
Q. You told the jury that you became a member of this kitchen cabinet, as you called it; is that correct?
A. That's correct.
Q. Those are the -- that's -- you're actually using that term to describe your role as kind of an outside advisor during the time he was secretary of state; is that correct?
A. That's correct.

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Q. And I think you described that kitchen cabinet with several people, Zale Glauberman, Scott Fawell, Larry Warner, Pete Peters --
A. Right.
Q. -- Art Tessler?
A. Right.
Q. And 12 or 14 other people at various times.
A. Right.
Q. And you, again, during these years, you're simply spending a lot of time with George Ryan. Is that fair to say?
A. Yes.
Q. You got to know him very well; is that correct?
A. Yes.
Q. In all those hundreds of times that you were in the presence of George Ryan over those 30 years while he was an elected public official, did you ever, ever once, see anyone ever give any bribe money to George Ryan?
A. No.
Q. Did you -- when I say bribe money, I mean -- I'm asking you, Mr. Udstuen, as someone who knew him well, did you ever see anybody give George Ryan any money under any circumstance where you thought they were giving him money to affect his official judgment as a public official?
A. No.

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Q. Not once, did you?
A. No, I didn't.
Q. In those 30 years, when George Ryan was in public office, did George Ryan ever once say anything to you that indicated to you that he was receiving bribe money from anybody?
A. No, he didn't.
Q. And at no time -- when I say bribe money, again, did he ever say anything to you at any time that hinted or suggested he thought he was getting money from someone to affect his judgment as a public official?
A. No.
Q. Not once; is that correct?
A. Not once.
Q. And I'm talking about phone calls, meetings, alone, with other people, never once; is that correct?
A. Never once.
Q. Let me ask it this way: When you were him, either with other people or by himself, did he ever do anything -- forget what he said. Did he ever do anything in your presence that indicated to you that he was receiving bribe money from anyone?
A. No, he didn't.
Q. And let me get more specific. You talked about Larry Warner quite a bit in your testimony; is that correct?

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A. That's correct.
Q. Have you ever seen Larry Warner ever give any bribe money to George Ryan?
A. No, I have not.
Q. And by that, again, I mean am I correct on no occasion did you ever see -- am I correct on -- did you ever see Larry Warner ever give any money to George Ryan under any circumstance?
A. No. I never saw him give any money to George Ryan.
Q. And you certainly never saw him give any money to George Ryan that you believed was done to affect George Ryan's decisions as a public official; is that correct?
A. That is correct. I never saw that happen.
Q. In all those hundreds of meetings that you had with George Ryan, either in a meeting, by himself, with others, privately with you, on a phone call, did George Ryan ever say anything to you that indicated he was receiving any bribe money from Larry Warner?
A. No, he didn't.
Q. Did you ever see in your presence George Ryan even do anything that indicated to you that he was receiving bribe money from Larry Warner?
A. No, he didn't.
Q. Now, you testified about one conversation that you told the jury this morning that you had with Larry Warner in 1990,

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the reelect.
Q. And were each of those individuals that Mr. Fawell indicated, the 40 or 50 folks, given an increase in salary December 1998 after the George Ryan's election for governor?
A. Yes.
MR. COLLINS: May I have one moment, your Honor?
THE COURT: Sure.
(Pause.)
MR. COLLINS: I have nothing further, your Honor.
THE COURT: Let's take a short recess and then proceed with cross-examination.
(Recess from 2:45 to 3:03 p.m.)
MR. COLLINS: Judge, just one scheduling issue that I've talked to both counsel about.
Mr. Wright has some board meetings and commitments tomorrow morning. I don't expect we're going to finish with him today. He has a window from 11:00 to 1:00, and I realize there's a luncheon scheduled and perhaps we can address it after court's over, but there is some issue and it sounds like defense counsel can be flexible about delaying cross, but I just wanted the Court to know there's an issue we have to deal with.
MR. GENSON: Are you saying I was a nice guy again?
THE COURT: That's what he said, and as usual, everyone agreed.

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MR. GENSON: Thank you.
THE COURT: I think we probably can work that out. I would expect that we'd go to lunch at 12:30 anyway, but we could make it 12:45 if that helps.
MR. MARTIN: Judge, in light of what your Honor had said last week, I made a commitment where I'm away for an hour and a half tomorrow at lunch starting at 12:30.
THE COURT: 12:30? Okay. Well, you know, we'll talk fast between 11:00 and 12:30 assuming that that's necessary.
MR. MARTIN: My cross will not be as long as others'.
MR. COLLINS: Judge, the only other is Brad.
THE COURT: Well, there's Mr. Genson, but he's a nice guy.
All right. We can get our jurors.
(Jury enters courtroom.)
THE COURT: You may be seated, and we'll proceed with cross-examination.
Mr. Lerman.
MR. LERMAN: Thank you, your Honor.
CROSS-EXAMINATION
BY MR. LERMAN:
Q. Good afternoon, ladies and gentlemen. Good afternoon, Mr. Wright. My name is Brad Lerman. I represent George

13498

Ryan.
Mr. Wright, Mr. Collins just asked you a number of questions regarding various conversations that you had at different points in time between 1991 and about 2001 or 2002; is that right?
A. Yes.
Q. Did he ask you a single question on direct-examination regarding a conversation that you might have had with George Ryan?
A. No.
Q. Did you testify, have you testified to this jury this afternoon about any conversation that you ever had with George Ryan?
A. No.
Q. Okay. I want to talk to you about George Ryan and conversations with George Ryan.
Over the years that you worked for George Ryan's administration -- director of legislative affairs, deputy chief of staff at the secretary of state's office, deputy chief of staff at the governor's office -- did you have multiple occasions over that period of time to have conversations with George Ryan?
A. Yes.
Q. Okay. And I'm not going to ask you to estimate how many conversations you had with George Ryan, but we're talking

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about a 12-year period of time in which you occupied positions of importance and responsibility in his administrations; is that right?
A. Yes.
Q. And you were part of many high-level meetings, many strategy meetings, many substantive meetings over that period of time both at the secretary of state's office and in the governor's office; is that right?
A. Yes.
Q. You had the opportunity to speak with him, to watch him at his job, to see him on a regular sometimes daily basis; is that correct?
A. Yes.
Q. Mr. Wright, in all of those conversations, in all of those meetings, in all of the times that you were with him during that 12-year period of time, did George Ryan ever say or do anything in your presence that led you to believe that he sold his office?
A. No.
MR. COLLINS: Objection to the term "sold his office."
THE COURT: Sustained.
BY MR. LERMAN:
Q. Well, let me ask the question again. Did you ever see him -- did you ever hear him say or see him do anything in

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your presence that led you to believe that he took bribes?
A. No.
Q. Did he say or do anything in your observation that indicated to you that he was living beyond his means as a public official?
A. No.
Q. Or that he had some unexplained source of wealth. Did that observation ever come to you?
A. No.
Q. In your conversations and your observations, in your work with George Ryan, did you come to believe that he was a man who cared about doing a good job in the office that he held?
A. Yes.
Q. And is that one of the reasons, Mr. Wright, that you worked with him not only for eight years in the secretary of state's office but chose to follow him to the governor's office as well?
A. Yes.
Q. In your experience, and I don't want to get into issues of actual legislation or what was on the agenda. The jury has heard about some of the agenda items and legislative issues that occurred over the 12 years, but in your experience, was he somebody who wanted to see a positive enactment of legislation and work with you to get that done?

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A. Yes.
Q. Okay. In fact, you talked on direct-examination about a meeting in Lake Shelbyville after the reelection of secretary of state in 1995, and you talked about continuing to build on his legacy; is that right?
A. Yes.
Q. And what did you mean by that, Mr. Wright? What legacy were you talking about?
A. His record of accomplishment from '91 to '94, which was quite outstanding, and continuing to build on that record of accomplishment.
Q. And did you view it as part of your job and part of the job of the senior team in the secretary of state's office to make that happen, to continue to build?
A. Yes.
Q. Did you believe during the years that you worked for George Ryan that you were working for a decent, principled and effective leader?
MR. COLLINS: Judge, again, if we're going to have a character witness here, Judge, I assume that we will be allowed --
THE COURT: The objection to this --
MR. COLLINS: -- extensive length on cross-examination.
THE COURT: The objection to this question is

13502

sustained.
MR. LERMAN: All right.
BY MR. LERMAN:
Q. Did you ever see any time anyone, you talked about -- and I want to talk to you about each of the conversations, and I want to talk to you about currency exchanges and Grayville prison and walking-around rights, and we're going to get into that.
But speaking of walking-around rights or people in his office, did you ever see anyone, did you ever see Mr. Warner, did you ever see Mr. Swanson, hand George Ryan cash?
A. No.
Q. Or hand him an envelope that contained cash?
A. No.
Q. Did you ever hear anybody say that they were bribing George Ryan?
A. No.
Q. In your presence, did you ever hear or see him do anything that led you to believe that he was making a governmental decision because he had been corrupted by a payment of money?
A. No.
Q. Now, prior to working for George Ryan, you got a degree at the Kennedy School of Government in Harvard; is that

13503

right?
A. Yes.
Q. Okay. And you worked for a number of years for Governor James Thompson; is that right?
A. Yes.
Q. And you held a high position in Thompson's administration dealing with legislative affairs; is that right?
A. Yes.
Q. In fact, towards the end of his administration, you were his principal liaison to the Illinois Senate; is that right?
A. Yes.
Q. And then he appointed you in 1990 to be head of the Department of Professional Regulation; is that right?
A. Yes.
Q. And in that position, the Department of Professional Regulation, which does not regulate lawyers, you regulate professionals like doctors, accountants, even barbers; is that right?
A. Yes.
Q. There's one that I want to talk to you about, but the point I'm making is in that job, you were making sure that people live up to certain ethical standards, certain regulatory standards; is that right?
A. Yes.

13508

Q. Mr. Wright, again, this is a -- I'm not going to show the whole document. It's a document from Georgia Marsh to Zale Glauberman dated January 8, 1991, which is right as George Ryan is coming into office at the secretary of state's office; is that right?
A. Yes.
Q. And just reading it, it says, "Increase in fees financial institutions may charge for over-the-counter sales program. Over 2,000 banks, savings and loan, credit unions and currency exchanges offer a convenient service to the public through the sale of passenger renewal stickers, motorcycles and small truck and trailer stickers at their respective locations. The fee they can charge over and above the service is set by the secretary through an administrative review process."
That's the process, by the way, Mr. Wright, that you were talking about; is that right?
A. Yes.
Q. "The rates have not been increased since 1984 and based on need, an increase is warranted. Secretary Edgar promised the financial institutions a raise prior to his leaving office. With only three days left, however, it appears this won't materialize and will be left to the new secretary. While a raise based on need is unquestionably deserved, there are political considerations."

13509

Do you see that in the document?
A. Yes.
Q. And Mr. Wright, what are the political considerations that need to be taken into account?
MR. COLLINS: Judge, object. This is not his document. We don't even know whether this statement about Edgar is true. It's a hearsay statement, Judge. I object.
MR. LERMAN: Well, your Honor, we do because we've had evidence already about when Jim Edgar --
MR. COLLINS: Not what he promised, Judge. There's absolutely no evidence of that.
THE COURT: Objection is sustained.
BY MR. LERMAN:
Q. Mr. Wright, do you have any understanding of what Georgia Marsh is referring to when she says there are political considerations?
MR. COLLINS: Same objection, your Honor.
THE COURT: You may answer.
BY THE WITNESS:
A. Yes.
BY MR. LERMAN:
Q. What are those -- what is your understanding of those political considerations?
A. Political backlash from the customers that are charged these fees and legislative backlash from increase in fees which are akin to tax increases.
Q. Okay. And this is -- you used the analogy of a tax increase. There's a political problem with raising user fees; is that right?
A. Yes.
MR. LERMAN: You can take that down, Courtney.
BY MR. LERMAN:
Q. And that's an issue that whenever the issue of raising currency exchange rates is addressed, the issue of political impact or political backlash has to be considered; is that right?
A. Yes.
Q. Okay. Let me show you another document again from Georgia Marsh to George Ryan dated January 6th, 1992. And this is Defendant's Exhibit Ryan 1553, which is already in evidence.
MR. LERMAN: And Courtney, can we call up the document. Let's look at the top portion of the document.
BY MR. LERMAN:
Q. It's from Georgia Marsh who's the director of the department of accounting revenue to George Ryan dated January 6th, 1992.
So it's a year after the document we were just looking at; is that right?
A. Yes.

13510

13511

Q. Okay. If we look at the first paragraph, it says, "Shortly after you took office, both the Illinois Currency Exchange Association and the Illinois Bankers Associations formally requested increases in rates they charge for over-the-counter stickers. During the final year of then-Secretary Edgar's administration, increases had been approved but never enacted."
Did you see that?
A. Yes.
Q. And then it says, "The last time an increase was granted was in March of 1985." And Georgia Marsh says, "I was present at the public hearing connected with this increase in my capacity as supervisor of the currency exchange division, Department of Financial Institutions." Do you see that?
A. Yes.
Q. Let me take you to the last page of the document.
MR. LERMAN: Courtney, if we can go to the paragraph that begins, "It has been seven years."
BY MR. LERMAN:
Q. Georgia Marsh writes, "It has been seven years since the last raise, and certainly a good case has been made that the increased cost of doing business warrants this additional 50 cents per transaction. Conversely, the current economic climate makes it difficult to approve anything that will further dip into the consumer's pocket. Also, there are

13512

political considerations on both sides. I have discussed this issue with Fawell and Bickel, and they are opposed to an increase because they believe it may come back to haunt us. They may well be right."

Do you see that?

A. Yes.

Q. And is that your understanding back in the 1992 time period of part of the reason why the Ryan administration did not propose a rate increase for currency exchange over-the-counter program?

A. Yes.

Q. Now, in 1994, then-Secretary of State Ryan ran for reelection; is that right?

A. Yes.

Q. And who was his opponent in that election?

A. The treasurer, Pat Quinn.

Q. And at that time, did Mr. Quinn, if you recall, make as one of issues to the voters, did he raise the issue of currency exchange fees in that election?

A. Yes.

Q. And was his position that not only should those currency exchange fees not be raised, but they should actually be reduced?

A. Yes.

Q. Okay. And in light of that political positioning by

13513

Mr. Quinn as the opponent to Mr. Ryan in 1994, did Mr. Ryan choose to raise currency exchange fees?

A. No.

Q. And would any politician in your experience, 20-plus years, would any politician propose a fee increase as he was facing reelection?

MR. COLLINS: Judge, objection.

THE COURT: I'll allow it. You may answer.

BY THE WITNESS:

A. No.

BY MR. LERMAN:

Q. Now, in 1995, in the spring of 1995 -- do you recall whether it was April, May, June?

A. I don't recall specifically.

Q. Okay. But in the spring of 1995 when Mr. Fawell came to you and said that Secretary Ryan had decided to go forward because the election is now past, did you understand that the political considerations now allowed a rate increase to go forward?

MR. COLLINS: Judge, objection to his understanding of what Fawell meant.

THE COURT: Objection sustained.

BY MR. LERMAN:

Q. Well, in your view, Mr. Wright, did you believe that the political climate allowed for a rate increase without damage

13514

to George Ryan politically?

A. Yes.

Q. Now, there is a procedure that you talked about. George Ryan on his own cannot order the rates to be increased; is that right?

A. Yes.

Q. What does he -- what needs to happen? Tell the jury what needs to happen in order for the currency exchanges to get a rate increase through?

A. You have to file a notice, a proposal to the Joint Committee on Administrative Rules -- its short name is JCAR -- in order to increase fees pursuant to rule.

Q. Okay. And JCAR is a committee that consists of legislators; is that correct?

A. Yes.

Q. It's a Joint Committee on Administrative Rules, and it consists of six members of the House, Illinois House, and six members of the Illinois Senate; is that right?

A. Yes.

Q. And they -- they then take the recommendation from the secretary of state's office, review it, and either approve it or reject it; is that right?

A. Yes.

Q. Okay. And do you remember -- did you participate in the process of dealing with JCAR in 1995 to get the rate increase

13515

through?

A. Not directly.

Q. Who would have been responsible for that?

A. At my direction, the director of legislative affairs.

Q. And who was that?

A. Chip Woodward or Mike Madigan.

Q. Now, do you recall at any time in 1995 being contacted by any of the Currency Exchange Associations to ask you to approve or to ask for your help in approving a rate increase?

A. No.

Q. And do you recall when the rate increase went through in 1995?

A. Late summer or early fall.

Q. Do you have a specific recollection?

A. No, I don't.

Q. Okay. Let me show you a document that might refresh your recollection. I'm showing you what I'm marking as Defendant's Exhibit Ryan 1479, directing you to the right side of the page.

Does that refresh your recollection as to when the rate increase went through?

A. Yes.

Q. And when was it?

A. November 27th of '95.

Q. Okay. November 27th of '95. And the rate increase was

15514

the claim?
A. Yes.
Q. The date on this agreement appears to be, in the upper right-hand corner, December 7th, 1997. Is that what it looks like anyway?
A. Yes.
Q. Why the lag between when you started work on the claim in December and this agreement -- receiving the agreement in February of '97?
A. I am not sure on that.
Q. Do you have any personal recollection as to that?
A. If you look at the log notes that I have in some of my comments, I had requested documentation several times throughout the handling of this claim. And due to certain circumstances, I was unable to obtain them until later on.
Q. At some point, though, did you request this agreement for your file?
A. It is required, yes.
Q. Is it your policy not to pay a settlement check until this is received?
A. No.
Q. Is that your policy, not to pay a settlement check until it's received?
A. We will not make a payment until we receive this document.

15515

Q. This document, sir -- first of all, is this a standard form that's typically used for public adjusters?
A. Yes.
Q. In this case it says, "I hereby employ Lash Warner & Associates to assist in the adjustment, preparation and negotiation of my claim for loss and damage by water which occurred on the 25th day of December 1996 at 233 East Wacker Drive, Number 4709, and agree to pay and do hereby assign to them for their services 10 percent of the amount of the adjusted claim plus any costs advanced for emergency purposes; i.e., board-up, emergency electric, emergency plumbing, or emergency carpentry repairs.
"I acknowledge receiving a complete copy of this agreement and a copy of the Illinois Insurance Code, Section 512.58, fire insurance claims agreement, for representation avoidance, which is printed on the reverse of this agreement."
Is that what it says?
A. Yes.
Q. And then it says "Accepted by" and has a signature for Lash Warner & Associates; and then a signature on the right of the "Accepted by insured, George H. Ryan."
First of all, do you recognize or know the signature on the left?
A. No.

15516

Q. In terms of Mr. Ryan's signature, do you have any knowledge or familiarity to know whether that's actually his signature or not?
A. No.
Q. Now, did State Farm in fact pay Larry Warner or Lash Warner 10 percent of this settlement claim?
A. No.
Q. Why not?
A. We were asked to make the payment directly to the named insured.
Q. When you received this agreement from Mr. Warner reflecting 10 percent, do you know why he wrote 10 percent in there if he was not going to be receiving a fee?
A. Ten percent is an industry standard of what public adjusters charge traditionally.
Q. I understand it's an industry standard. Public adjusters traditionally receive that 10 percent; is that correct?
A. Correct.
Q. Well, do you know why --
MR. GENSON: Objection. Objection to leading, among other things, Judge.
MR. FARDON: I will ask my next question.
THE COURT: Thank you.

15517

BY MR. FARDON:
Q. Do you know why Mr. Warner, if he wasn't receiving anything, indicated 10 percent on this form?
A. No.
Q. Sir, in terms of your policy at State Farm, if Mr. Warner had written zero percent on this form, would you still cut your settlement check?
A. Yes.
Q. Did State Farm have any interest or care one way or another what percentage Mr. Warner was receiving?
A. No.
Q. Now I want to lastly ask you about the check itself, which is Government Exhibit 32-004.
MR. FARDON: If we can put that up, please, Ray.
BY MR. FARDON:
Q. You testified that this is the check that State Farm actually issued pursuant to this claim?
A. Yes.
Q. And the amount on the check -- I won't go back to the first page of the other exhibit, but $10,509.44, is that the total negotiated amount that appeared on the first page of the claim file that we just looked at?
A. Yes.
Q. So was that the entirety of what was paid out under this claim?

15518

A. Yes.
Q. The check itself is paid to the order of George H. Ryan, Sr. and Lura Lynn Ryan; is that right?
A. Correct.
Q. What would the normal policy be in terms of writing the check out where a public adjuster is involved in the claim?
MR. GENSON: Objection. Asked and answered twice now.
MR. FARDON: Judge, not in the context of discussing this particular check.
MR. GENSON: No, he discussed it in the context of the contract, discussed it in the context of the negotiation. Now he is discussing it in the context of the check. He has asked it twice.
MR. FARDON: I will ask a different question, your Honor.
BY MR. FARDON:
Q. Sir, you didn't put Lash Warner on this check; is that right?
A. No.
Q. Why not?
MR. GENSON: Objection. The check speaks for itself.
THE COURT: Overruled.
You may answer.

15519

BY THE WITNESS:
A. We were asked not to.
MR. FARDON: That's all my questions, your Honor.
THE COURT: Cross-examination?
Mr. Genson.
CROSS-EXAMINATION ON BEHALF OF THE DEFENDANT WARN
BY MR. GENSON:
Q. Larry Warner told you at the very beginning he was doing a favor; is that correct?
A. I can't recall that.
Q. Well, do you recall talking to the FBI agents about it?
A. I don't know specifically if we used the word "favor."
Q. Well, when you – Larry told you he was in charge of nobody, didn't he, right at the beginning? You knew that, didn't you?
A. I can't assume that, no.
Q. You can't assume it, or you don't remember it, or you don't know, or it's not true?
A. I don't remember that conversation.
Q. As a matter of fact, Larry Warner – you knew the name Larry Warner; is that correct?
A. Yes.
Q. You knew the name Lash Warner; is that correct?
A. Yes.
Q. You knew the name Lash Warner as being a fire adjuster

15520

that's in the business; is that correct?
A. That's correct.
Q. You had worked with people that worked for Larry Warner before; is that correct?
A. Yes.
Q. You had worked with people on what you call major losses; is that correct?
A. That's correct.
Q. "Large losses" is what you called them; is that correct?
A. That's correct.
Q. When you worked with them on large losses – by the way, how many employees would you have made – would you have worked with from Larry Warner?
A. I can't speculate as far as how many times or how many employees I had worked with, with his company.
Q. All right. But you had worked with him before; is that correct?
A. Yes.
Q. Now, when you talked to the FBI agent – when you talked to the FBI agent – do you remember talking to the FBI agent, Mr. Lombardo, on 10-28-2003?
A. Yes.
Q. Do you recall talking to him, sir?
A. Yes.
Q. Do you recall on that date him asking you questions and

15521

you giving him answers; is that right?
A. Correct.
Q. When you talked to Mr. Lombardo, you recall he was taking notes; is that right?
A. That's correct.
Q. Did you say to Mr. Lombardo that Larry Warner – or Lanham would call Warner – Lanham is you, right?
A. That's correct.
Q. – would call Warner stating something to the effect that he was "just doing a favor for George Ryan as his friend and associate."
Do you recall saying that to –
MR. GENSON: Page – 10-29-2003, Page 2.
MR. FARDON: I object as sort of compound and confusing.
MR. GENSON: All right. I will withdraw it. You are right. And then I will ask it again so it won't be confusing to you, but I don't think it was confusing to you (indicating).
THE COURT: Mr. Genson, let's ask the next question.
BY MR. GENSON:
Q. The next question was, do you recall on 10-28-2003 talking to Mr. Lombardo on that date and having – and saying to him, quote, you recall Warner stating something to the

A. Yes.
Q. And what was the purpose of preparing these briefings?
A. To prepare George Ryan for the event and give him information about the event.
Q. So once these briefings were prepared, they would be handed to Mr. Ryan?
A. Yes.
Q. Now, in terms of this particular one, does it relate to an event then scheduled at the -- it indicates "the home of Richard "Dick" and Michelle Parrillo" on Tuesday, August 18, 1998; is that correct?
A. Yes.
Q. And, again, just to give us some context, August 18th is a few months prior to the November 1998 gubernatorial election date; is that correct?
A. Yes.
MR. FARDON: And, Ray, if we could just scroll down the page a little bit from there.
BY MR. FARDON:
Q. Under Contact, what's the significance of Contact on one of these briefing sheets?
A. If George Ryan were to have any questions or one of his staff people needed anything regarding that event, they would contact that person.
Q. And the contact for this event is Mr. Warner, is that

dinner for you last year at Lino's. Many of the same people will be in attendance (a list of those attending is attached). This year, the dinner is being held at the home of Dick and Michelle Parrillo."
Is that what the first paragraph says?
A. Yes.
Q. And then below that, does it say: "Larry Warner and Dick Parrillo have asked guests for various contribution amounts. The minimum donation is $2,500 per person, but most guests have contributed 5,000 to $10,000 each. This event will net $175,000"? Is that what it says?
A. Yes.
Q. Ms. Altounian, do you remember, generally speaking, this event?
A. I did not attend the event, but I remember, I remember the event occurring, yes.
Q. And Mr. Warner was a host of the event?
A. Yes.
Q. And what did you do versus Mr. Warner do in terms of preparing for and hosting this event?
A. I recall us not having very much -- he -- the logistics were taken care of by himself or the Parrillos. We did not secure catering or anything like that for the event, because it was in the Parrillos' home and they took care of it.
Q. Okay. As to some private fund-raisers, would CFR provide

correct?
A. Yes.
Q. And then below that, under Staff, it has Ms. Twiss and your name and certain Citizens for Ryan numbers associated with you guys at that time; is that right?
A. Yes.
Q. Now, if we -- the attendance for this one anticipated, at the bottom of the page, is 70 people.
And, again, the purpose of preparing this and saying that is to let Mr. Ryan know how many people to expect; is that right?
A. Correct.
MR. FARDON: If we could look at the next page, Ray.
BY MR. FARDON:
Q. At the top of the page, it says: "Dignitaries: List will be provided," and then it says Description of Event and then it says Background.
And, again, I'll get to the substance in a minute, but in terms of this -- sort of these categories of information you're providing Mr. Ryan, was this your standard practice to provide this kind of information?
A. Yes, it was.
Q. And under the Background section for this particular event, it says: "Larry Warner and Dick Parrillo have organized this fund-raiser for you. Larry hosted a similar

catering?
A. Some we would, yes.
Q. Okay. Now, on this one, you did not?
A. Correct.
Q. And in terms of invitations, putting out the invitations, deciding who was on the list, did you at Citizens for Ryan play any role of -- in connection with any of those things for this fund-raiser?
A. I don't remember doing any of that for this fund-raiser.
Q. Okay. So, to your recollection, this was pretty much done by Mr. Warner and Mr. Parrillo?
A. Correct.
Q. Now, the event, it says: "The event will net $175,000."
To the best of your memory, did the event net approximately about that much money?
A. I believe it did.
Q. And in terms of that as compared to other private fund-raisers, was it small, medium, large?
A. I would say large.
Q. Okay. Do you recall any other private fund-raisers that netted more than $175,000?
A. I don't recall any right now, no.
Q. If we'd just look briefly at the next page.
This is a memo under the header of "George Ryan, Governor" to Mr. Warner from you dated September 11th, 1998,

at the Pennebakers'?
A. Yes.
MR. FARDON: And if we could flip over to the next page, please, Ray.
BY MR. FARDON:
Q. Does the list of attendees include, about halfway down the page, Larry and Cindy Warner and indicate "Owner, Lash, Warner & Associates"? Do you see that?
A. Yes.
MR. FARDON: Now, that's all my questions about that exhibit. Thank you. Thank you, Ray.
BY MR. FARDON:
Q. Ms. Altounian, I want to ask you to next look at Government's Exhibit 28-072, and this is a document that references "George H. Ryan Finance Committee Dinner, September 1st, 1998," which is the same month as the fund-raiser you just testified about.
Can you first just tell the jurors, Ms. Altounian, what the George Ryan finance committee was.
A. The finance committee was organized specifically in relation to this event, and it was a $10,000 commitment. With that $10,000, you purchased a table.
And some finance committee members would write a check for $10,000, others would commit to sell a table of ten $1,000 seats or some combination of.

Q. Okay. So to get on the committee required some sort of commitment to raise $10,000 or pay $10,000?
A. Correct.
MR. FARDON: And if we could just look briefly at the next page.
BY MR. FARDON:
Q. And is this one of the pages that list the committee members?
A. Yes.
Q. And do you see toward the bottom right-hand side of the page, "Lawrence E. Warner, Lash, Warner & Associates"?
A. Yes.

Q. Do you know whether Mr. Warner wrote a check himself for 10,000 versus raised it through other people in connection with this dinner?
A. I don't know.
Q. Above him, two people, there's the name Donald Udstuen. Did you know who Mr. Udstuen was while you worked for Citizens For Ryan?
A. Yes, I did.
Q. Generally who was Donald Udstuen?
A. I knew him to be a good friend of George Ryan's and to work at the Medical Society.
Q. And did Mr. Udstuen have any role, generally speaking, in connection with Citizens For Ryan or fund-raising efforts?
A. Yes. He was a Secretary's Club member and he would occasionally talk to Susan Twiss regarding fund-raising matters.
Q. And did he have that role, in essence, the entire time you worked for Citizens For Ryan?
A. Yes.
Q. Now, we've looked at some fund-raisers related to the 1998 gubernatorial campaign. Prior to 1998, did Mr. Warner also host and participate in certain Citizens For Ryan fund-raisers?
A. Yes.
Q. And, in fact, in the first exhibit that I showed you,

Ms. Altounian, 28-069, which was the briefing sheet for the event of Mr. Warner and Mr. Parillo, there's a reference to "Larry hosting a similar dinner for you last year at Lino's."
MR. FARDON: It's on the third page of that exhibit, Ray, under background.
BY MR. FARDON:
Q. Do you see the second sentence there says, "Larry hosted a similar dinner for you last year at Lino's." And so that would have been a reference to the fall of 1997; is that correct?
A. Yes.
Q. And do you recall that, in fact, there was a fund-raiser hosted by Mr. Warner at Lino's in the fall of 1997?
A. Yes.
Q. As you sit here today, do you recall or know how much Mr. Warner raised for Mr. Ryan in that fund-raiser?
A. I do not.
Q. Now, in addition to that fund-raiser -- you started, you said, in early '96; is that correct?
A. Yes.
Q. Were there one or more other fund-raisers that Mr. Warner had some role in or some participation in while you were there prior to 1998?
A. I don't recall specifically.
Q. Okay. Well, let me ask you to look at just a couple

other documents beginning with Government's Exhibit 28-067.
MR. FARDON: If we can pull that one up, Ray.
BY MR. FARDON:
Q. And I just want to ask you briefly, this is -- I don't speak Italian, so I won't try to read it, but this is a fund-raiser. Under the where part, it says the Galleria Marchetti on West Erie here in Chicago; is that correct?
A. Yes.
Q. And the date it says is Thursday, October 17th, 1996; is that correct?
A. Yes.
Q. So this is six or seven months after you had started at Citizens For Ryan?
A. Correct.
Q. And there appears to be a list of committee members associated with this fund-raiser at the bottom of the page; is that right?
A. Yes.
Q. Now, on the far right-hand side, second to last, do you see Larry Warner, chairman, Lash Warner & Associates?
A. Yes.
Q. And if we could just look briefly at the next page, is this one of these briefing sheets that you and Ms. Twiss prepared back in 1996?
A. Yes.

Q. Regarding this event, and it was characterized as a cigar event honoring Secretary of State George Ryan. What does that mean, a cigar event?
A. The theme was there was, I believe, cigars available.
Q. Okay. And at the bottom of the page, does it indicate attendance of 250 people and also it says media Jonathan Scott from Chicago Cigar; is that right?
A. Correct.
Q. Now, the next page, indicates that the event should net $75,000; is that correct?
A. Yes.
Q. Sort of halfway through the background section.
And then last, lastly --
MR. FARDON: If we could just go to the next page, Ray.
BY MR. FARDON:
Q. Under the committee members, it may be a little bit easier to read again toward the bottom, it says Lash Warner -- it says Larry Warner, chairman, Lash Warner Associates as a member of this committee.
What did it mean to be a member of a committee connected to a fund-raiser, Ms. Altounian?
A. That you would solicit attendees for the event.
Q. Now, there's a couple of more documents in this file that I'd just like to ask you briefly about, beginning with

A. This is the RSVP list for the event.
Q. Okay. And I want to ask you about a couple of other names that appear on the event. On the next page, Ray. Just a couple names I want to ask you about.
In the middle of the page, do you see the name R.L. Duchyssois, or Duchyssois? I'm not sure how you would pronounce it.
A. Yes.
Q. Do you know Mr. Duchyssois?
A. Yes. I don't know him personally, but I know -- I knew of him through Citizens For Ryan.
Q. And how did you know of him through Citizens For Ryan?
A. He was a Secretary's Club member and hosted, I believe, at least one fund-raiser for George Ryan.
Q. Okay. Do you remember where that fund-raiser occurred that he hosted?
A. I believe it was on his boat.
Q. Now, if we could flip two pages further in on this list, toward the bottom of the page, do you see the name Al Ronan?
A. Yes.
Q. I think five people up from the bottom. Did you know who Mr. Ronan was while you were at Citizens For Ryan?
A. Yes.
Q. And who was he?
A. A good friend of Scott Fawell and George Ryan's who was

the next page, Ray, if we could. Sorry. Before that.
This is a page titled directions for tickets to be picked up at door. Do you recognize what this is or know what this is?
A. It looks like a will-call list that was given to us.
Q. And in terms of -- when you say a will-call list, it's a will-call list, it's George Ryan event, October 17, 1996, which is the date of the cigar event.
A. Correct, for that event.
Q. And will-call list meaning what?
A. Meaning we probably didn't receive their response ourselves, so we were to leave reservations at the door for these people.
Q. Okay. And in terms of the top of the list, it says Illinois State Medical Society, Don Udstuen and J. Holden. It has number ten plus. What does that mean?
A. That they would be bringing ten or more people with them.
Q. Now, do you recall what the ticket value was for this particular fund-raiser?
A. I don't recall.
Q. There is also a list attached that was part of this event file that begins at the next -- at the next page.
Do you know what this, just generally speaking, what this list is?

a Secretary's Club member and participated in numerous secretary -- or numerous Citizens For Ryan fund-raisers.
Q. And if we could flip to the next page.
About two-thirds of the way down, maybe a little less, Ron Swanson and it says, "Yes, one comp per GHR."
First of all, do you know who Ron Swanson was or did you know at the time?
A. Yes.
Q. And who was he?
A. A friend of George Ryan's.
Q. When it says, "Yes, one and then comp per GHR," what did that mean in connection with this fund-raiser?
A. Not to charge him for this event, that he would just receive a complimentary invitation to the event.
Q. Okay. And then the last page of this list in connection with this fund-raiser, you see Mr. Warner's name toward the top of the page, it says, "Yes, one"?
A. Yes.
Q. Okay. And that's all my questions about that exhibit. And I apologize, Ms. Altounian.
MR. FARDON: Ray, can we go back to that exhibit real quick? 28-067. And what should be page 10 of the exhibit once you're in it.
BY MR. FARDON:
Q. Do you see -- two below Mr. Swanson's name, do you see

15990

A. Mine, I can't –
Q. I'm sorry. Is it out of focus? I will zoom in.
Can you see that?
A. Yes.
Q. Is this that index that you created?
A. Yes.
Q. Okay. And it indicates the date the gift was received?
A. Yes.
Q. It describes the gift?
A. Yes.
Q. Shows who gave it?
A. Yes.
Q. And then there's a column that says Exception.
Do you see that?
A. Yes.
Q. What – it says Nominal Value at the top.
Do you see that?
A. Yes.
Q. And that very first entry, that gift is flowers, correct?
A. Yes.
Q. Is Nominal Value intended to suggest that the flowers had nominal value?
MR. LEVIN: Objection to what it's intended to suggest, Your Honor. Object to the form of the question.
THE COURT: I'll allow it.

15991

BY THE WITNESS:
A. Could you repeat it again, please.
BY MR. McCAFFREY:
Q. Sure. Was this column – well, let me ask it a different way, if I could.
When you were preparing this book, did you put that information in that column?
A. Yes.
Q. You took over preparing this book from another person?
A. Yes.
Q. Who had prepared it for a time period before that?
A. Yes.
Q. Okay. Who did you take it over from again?
A. Leslie Nibby.
Q. Lessee Nibby.
When you took over responsibility for preparing this book from Leslie Nibby, did she explain to you how she did it?
A. No, because she was already gone when I started doing it.
Q. No one trained you on how to keep or maintain this book?
A. Correct.
Q. To learn how to do it, you looked at the old books?
A. Yes.
Q. And did the old books say Nominal Value in that column?
A. Yes.
Q. Did you believe when you were creating this book – for example, if we look at a "March honorary membership" at the bottom, did you believe that you were supposed to assign a dollar value to an honorary membership?

15992

A. I don't, no.
Q. Would you have known how to assign a dollar value to an honorary membership?
A. No.
Q. On a few occasions, the travel staff used the book to confirm that thank-you notes had been sent; is that right?
A. Yes.
Q. To your knowledge, Roger Bickel never looked at that book?
A. I do not know.
Q. To your knowledge, none of George Ryan's accountants ever asked you to see that book?
A. Not me personally, no.
(Counsel conferring.)
BY MR. McCAFFREY:
Q. Ms. Easley, in all the 28 years that you worked for or around George Ryan, did you ever see Ron Swanson give him cash?
A. No, I did not.
Q. In all the 28 years that you worked for or around George Ryan, did you ever see Larry Warner give George Ryan cash?
A. No, I did not.
MR. McCAFFREY: That's all I have, Your Honor.

15993

THE COURT: Mr. Genson.
MR. WEBB: Mr. Genson, just one second.
(Counsel conferring.)
MR. WEBB: Just one quick question.
MR. McCAFFREY: I'm sorry, Your Honor. I forgot something.
THE COURT: All right.
BY MR. McCAFFREY:
Q. We talked earlier about gifts being given by Citizens for Ryan to lobbyists?
A. Yes.
Q. Did Citizens for Ryan also give gifts to political supporters?
A. Yes.
Q. Because political supporters were important to the organization?
A. Yes.
MR. McCAFFREY: That's it.
THE COURT: Now Mr. Genson.
CROSS-EXAMINATION
BY MR. GENSON:
Q. I just have a few little questions.
A. Okay.
MR. LEVIN: How many?
MR. GENSON: Forty-seven, forty-seven questions.

22460

MR. MITCHELL: Right.
MR. FARDON: And then, Your Honor, the next one does relate to instruction H, if I'm reading it right. It relates to an application of this McCormick principle in the mail fraud context.
We have made our argument. We don't think it applies in this context. We made our argument in that regard yesterday. You know, I defer to the Court as to whether it wants to hear further argument on the issue.
THE COURT: Well, this one, we talked about this. Mr. Martin, and I know I'm -- I know that he talked about it in connection with the United States versus Martin case, and I understood that case to hold that the standards really aren't different.
MR. MARTIN: Your Honor, I read all those cases this morning, did some independent research.
I think Your Honor's reading, as expressed in your opinion and yesterday, is correct. If you want me to give an argument on it, I can.
MR. FARDON: Judge, I did say yesterday, and I will reiterate, the government's position is that Martin does not hold that the McCormick principle applies in the mail fraud context.
I can and I have re-read Martin, as the Court recommended yesterday, and we persist in that view and

22461

opinion.
I can argue the matter, if the Court pleases. I don't want to take up a lot of the Court's time.
I certainly think that -- and I said this yesterday. I don't expect to disabuse Mr. Martin of his view and I don't expect that he is going to disabuse us of ours. I really think it's really just the Court's decision and the Court's ruling.
I will also note that if the Court were inclined to give this kind of instruction, there is a different principle at issue, and that is at the end of the second paragraph, it says: "Only when a person gives a campaign contribution, knowing that it was given in exchange for a specific official act, does the conduct violate the bribery or official misconduct statute."
THE COURT: Now, we should be back to mail fraud, right?
MR. MITCHELL: Yeah, that's a --
THE COURT: That's a typo?
MR. MITCHELL: Yeah.
MR. FARDON: And then assuming that's a typo and we're back to mail fraud, the reason that's inaccurate, Judge, is there is this separate prong of mail fraud liability related not to bribery, but to concealment of an undisclosed financial conflict of interest.

22462

And that specifically the Court has already ruled, it will provide an instruction along those lines, and we argued that at some length, was government's instruction 65.
So it's really -- the only component is it's inaccurate in this context. And I -- it is not to say that that inaccuracy couldn't be cured, but it is inaccurate in this context.
THE COURT: Because you're saying that there could be mail fraud in other circumstances?
MR. FARDON: That's correct.
THE COURT: Right. I think this instruction should be limited to -- well, it kind of is.
It's limited to the campaign contribution context, isn't it?
MR. DeJONG: The last sentence is specific to campaign contributions.
MR. FARDON: It is that, Judge, and I guess the point is if the Court is -- and, again, the government objects to this. I want to be very clear about that.
If the Court is going to instruct essentially a bribery, a McCormick type bribery instruction onto the federal mail fraud statute, then, you know, I think the Court has to be careful not to undo the other prongs of the mail fraud statute. And --
THE COURT: But the point here -- okay. The point

22463

here is that we need to make sure that this instruction is drafted in a way that makes it clear that we're talking about only that form of mail fraud that would involve campaign contribution receipt, because there are other forms of mail fraud, there are other violations, there are other potential violations of the mail fraud act that don't have anything to do with this.
MR. BHACHU: But if you gave a -- Judge, if you gave a -- just talking out loud here.
If you give a campaign contribution where you didn't disclose that you had given the campaign contribution, that would be a circumstance there where a campaign donation would violate the mail fraud statute outside the parameters of the instruction, I think.
THE COURT: Right.
MR. FARDON: That's the point, Judge.
THE COURT: That's a good point, that's a good point.
MR. FARDON: And that's essentially what 65, government's instruction 65, which the Court has accepted modified, speaks to.
And I do think it requires some rewriting of that, of that last sentence, if the Court is inclined to give this instruction.
I also do want to, you know, state again, and I

Let's recall what the defense attorneys said the case was about and what the defendants were up to in their opening statements.

Now, you will recall Mr. Gillespie was the 09:55AM gentleman who gave the opening statement on behalf of Mr. Warner. And Mr. Gillespie, in his opening statement, described Mr. Warner as being one of your neighbors, one of your peers. He talked about Mr. Warner as being a person with an extraordinary work ethic. In getting the contracts 09:55AM and leases that are the subject of this case, Mr. Gillespie said that Mr. Warner merely used information that he learned, that everybody, all businessmen knew.

According to Mr. Gillespie, Warner did it without the assistance, without the direction, without the input of 09:56AM George Ryan, who never participated in Warner's efforts to get his business.

According to Mr. Gillespie, as Warner became financially secure, he didn't stop working. It wasn't about the money. It was about the challenges, Mr. Gillespie said. 09:56AM According to Mr. Gillespie, Mr. Warner did his business in the open, as a private citizen.

Mr. Webb told you that Mr. Ryan got no corrupt payments, that no one got cheated out of anything, that George Ryan had almost nothing to do with leases and 09:56AM contracts.

He just signed them after professionals and attorneys had signed off on them. George Ryan didn't know the details of Larry Warner's business relationship with clients, according to Mr. Webb.

09:56AM Larry Warner was a skilled, talented, respected businessman, according to Mr. Webb. George Ryan went out of his way -- out of his way -- to make sure that employees weren't supposed to be doing political work on state time.

With respect to the IG, inspector general's, 09:57AM investigation, Mr. Webb said that none of them were swept under the rug and that the evidence would clearly establish that nothing was done improperly with respect to the IG investigations. The investigations took their normal course, according to Mr. Webb.

09:57AM You have now heard the evidence. You have seen the exhibits that have come in. So which was it? Was this just government operating as it should, out in the open, with no one getting cheated out of anything? Warner just pursuing challenges, not doing it for the money? Or was this a 09:57AM betrayal of the public trust?

Does the evidence that you have heard in the past five months show that these defendants are just like your friends and neighbors? Or does it show that they were in fact part of a select club of corrupt, arrogant politicians 09:58AM and profiteers who were willing to sell their public office

for their own personal benefit?

The answer is obvious. And the truth has overwhelmingly come to light during the past five months in this courtroom. The evidence has proven beyond a reasonable 09:58AM doubt that George Ryan and Larry Warner are guilty as charged in this indictment with pillaging the state, stealing from the taxpayers, fixing contracts and leases to line their pockets.

The notion that Larry Warner was just like one of 09:58AM your neighbors, doing business in the open, without any assistance from George Ryan is preposterous. The notion that Larry Warner wasn't doing it for the money also doesn't square, in the least, with the evidence that you have heard in this case.

09:58AM The notion that these leases and contracts were merely done in the ordinary course of business, flowing from the bottom up, is likewise ridiculous.

The evidence has established that again and again Ryan steered these contracts and leases to Warner or other 09:59AM friends, like Klein.

The evidence has further established that Warner was exactly like Mr. Fardon told you, shaking down these vendors and exploiting the inside information that he had obtained from Mr. Ryan, from George Ryan, to make money hand 09:59AM over fist for himself.

Warner hit the jackpot during George Ryan's terms as secretary of state and as governor, around $3 million -- $3 million in total benefits in leases and contracts Larry Warner received during those 12 years.

09:59AM George Ryan also made out very nicely with all the hidden benefits that he was receiving as part of the corrupt partnership that he had formed with Warner, Swanson, Klein, and the others.

You have heard of 12 days of Christmas. This was 10:00AM 12 years of Christmas for Ryan, for Ryan's friends and his family, with all of the vacations, the gifts, the money, the benefits that they received during this period.

The people like Larry Warner, Ron Swanson, and Harry Klein, who were on the receiving end of so much 10:00AM government money, did a very nice job of taking care of George Ryan.

We have on the screen now a picture of George Ryan during one of the free stays that he had in Jamaica. This was the villa that was owned by Harry Klein, the gentleman 10:00AM who ended up getting one of the leases that's the subject of this case, the lease at South Holland.

This wasn't the only trip that George Ryan took during these years. There were many trips, many -- much personal travel during this time period. There was Jamaica 10:00AM in January, there was Cancun in February, the NCAA finals in

March, Orlando in May, Las Vegas, New York, and on and on it went. Yes, the Larry Warners, the Ron Swansons, the Harry Kleins took care of George Ryan quite nicely during these 12 years in office.

10:01AM Now, there are a number of charges in this indictment that you will hear about. But the core of the case is this: That George Ryan, as a public official, had a duty to provide honest services to the people of the state of Illinois who had elected him. And the evidence in this case

10:01AM has shown that he repeatedly violated that duty. He violated that duty by giving state benefits, like contracts and leases, to his friends -- Warner, Swanson, Klein -- while at the same time they were providing various undisclosed financial benefits to him and his family and to his friends.

10:01AM The benefits included free vacations, loans, gifts, campaign contributions, as well as lobbying money that Ryan assigned or directed to his buddies.

In short, Ryan sold his office. He might as well have put up a "for sale" sign on the office.

10:02AM Your Honor, I don't know if there is any feedback or if the mic is working. A little bit of feedback.

THE COURT: You can slide it further down. That will help.

MR. LEVIN: As Mr. Fardon told you in his opening,

10:02AM this case is all about a breach of public trust. It was a

buried his name in layers of paperwork.

He did something similar with respect to the Bellwood property -- the Bellwood property -- in which he buried his name in layers of paperwork with respect to that

10:03AM property as well.

And with respect to both of these acts of concealment, there was evidence that he and George Ryan discussed this, that he told George Ryan that he was burying his name in layers of paperwork.

10:04AM Larry Warner concealed his effort to buy property for the secretary of state's office. You will remember that before he bought that Joliet property on Maple Road, he had considered buying another property in Joliet. This was a property owned by a man named Darryl Minor. And in

10:04AM connection with that purchase, Larry Warner used his secretary, Anne McGuire, on the offer, when she had absolutely nothing to do with the transaction, used her essentially as a front person on that transaction to conceal his involvement.

10:04AM Larry Warner concealed his ADM lobbying role. ADM, of course, was the stickers company. And early on in the Ryan years Larry Warner had shaken them down and was starting to get monthly payments from them for a number of years. He never registered as a lobbyist for ADM. There was never a

10:05AM public filing indicating that Larry Warner was a lobbyist for

breach of trust. It was accomplished through lying and concealment and deceit.

The lying and concealment served two purposes.

First, in the actual commission of the crimes; that

10:02AM is, the steering of the leases, the fixing of the contracts. The lies and concealment were part and parcel of how those deals were done in order to make it hard for anyone, whether it be the public or law enforcement, to get behind that curtain to see what was going on, to see the rampant

10:02AM corruption there. That was the first part of why the lies and concealment were so important.

The second purpose for the lies and the deceit was the coverup after the fact, what they had done. In other words, covering up, lying about what had occurred when the

10:03AM investigation began and subsequently which led to the prosecution.

But let's just recall briefly some of the concealment, deceit, and lies by both Warner and Ryan, both at the time of the transactions as well as after the fact.

10:03AM In terms of Mr. Warner and the acts of concealment and deceit, some of them that we have seen during the course of the evidence in this trial, Larry Warner concealed his interest in the Joliet property. This was the building on Maple Road that ended up being leased for the administrative

10:03AM services department, in which Larry Warner buried his name,

ADM over all these years that he was getting money from them.

Larry Warner concealed his lobbying role in connection with Viisage. Viisage was the company, of course, that produces the digital driver's licenses. And Larry

10:05AM Warner, when he hooked up with them and was getting money from them, he got a certain amount for every single digital driver's license that was produced in this state. He never registered for Viisage. In fact, another man, the front man in this transaction, was a man named Irwin Jann. Irwin Jann

10:05AM was the registered lobbyist. Once again, Larry Warner is behind the curtain.

Larry Warner concealed Don Udstuen's receipt of ADM money. Now, you will recall that Don Udstuen testified early in the case -- or that early, in around 1991, Warner came to

10:05AM him and they made this arrangement that had the blessing of George Ryan whereby Warner was giving Don Udstuen a cut of the lobbying money that he received. That cut was exactly one-third of the lobbying money that Warner got from ADM and from IBM, was being siphoned off to Udstuen.

10:06AM Well, of course, the role of Udstuen, his receipt of money was concealed both by Udstuen never being registered as a lobbyist for ADM -- there was never any public filing of that. And in addition, the money is siphoned through this American Management Resources, another entity. So once

10:06AM again, concealment with respect to ADM.

Similarly, with respect to IBM, money being siphoned off to Udstuen, concealment because Udstuen is never registered as a lobbyist for IBM, and the money also is siphoned and funneled through American Management Resources, 10:06AM the company of Alan Drazek.

Finally, Warner concealed Swanson's receipt of Viisage money. Ron Swanson, a close friend and crony of George Ryan, got $36,000 of Viisage money for doing nothing, just like Udstuen had gotten the ADM and IBM money for doing 10:07AM nothing. And Swanson -- this $36,000, Swanson got it because George Ryan wanted him to get it for doing nothing, so Warner gave the $36,000 to Swanson. There is no filing indicating that Swanson was ever a lobbyist for Viisage. Viisage is never told about Swanson's role with respect to that money.

10:07AM So you can see concealment, concealment, concealment, and deceit throughout the commission of these offenses.

George Ryan. George Ryan lied repeatedly, both at the time of the commission of the offense as well as after 10:07AM the fact.

One of the biggest lies that George Ryan told in connection with the offenses is these Jamaican payments, the Jamaican payments that he was making to Harry Klein in connection with his stays in Jamaica year after year.

10:08AM You will recall that George Ryan, for a number of

years, went down to Jamaica. He gives Harry Klein a check that's generally for $1,000, and he gets $1,000 cash in return. So it's free. He is not paying anything for it.

But when the investigation -- when things come to 10:08AM light and the public learns about the Jamaica stays, George Ryan publicly says, "I paid for those stays down there." When the FBI interviews George Ryan about the Jamaica stays, he says, "I paid for them."

They are lies to cover up the conflict of interest, 10:08AM to cover up his misconduct in getting these free stays from someone that he is giving a government lease to, the South Holland lease.

So many of these lies are lies both that George Ryan made to the public when things began to come to light as 10:08AM well as lies that he made to law enforcement when the investigation got underway.

George Ryan lied about the secretary of state leases and contracts that are the subject of this case. Once again, when the public looked into anything, when the press 10:09AM looked into it, when law enforcement looked at it -- looked into it, George Ryan basically said he had nothing to do with the secretary of state leases and contracts, even though we know again and again, at least with respect to Larry Warner, with respect to Harry Klein and Ron Swanson, he was right in 10:09AM the middle of these transactions. He is the one who steered

these leases and contracts to these men. He knew exactly what was going on. His finger was on -- his fingers were on these transactions.

George Ryan lied about his contact with Larry 10:09AM Warner in connection with these leases and contracts, lied publicly about the fact that he and Warner had in fact communicated about them, these contracts and leases, and he denied that publicly.

We have a clip now, which was shown during the 10:10AM trial, of a statement by George Ryan in June of 2002 in which he lies about his involvement -- or his conversations with Larry Warner.

(Said videotape played in open court.)

MR. LEVIN: Just an outright lie.

10:10AM I think the mic may still be too loud or feedback.

THE COURT: It might be that when it picks up in both of these, I think that might be the -- you know what --

MR. LEVIN: Is this one still on?

THE COURT: So that's not the explanation.

10:10AM MR. LEVIN: I wonder if we can just turn that one on and turn this one off, if I stay right around here.

THE COURT: Sure.

(Brief pause.)

THE COURT: You know what? It's really not 10:10AM bothering me, but if it's bothering you, you should --

MR. LEVIN: Well, I --

THE COURT: You are worried that it's bothering the jurors?

MR. LEVIN: Yes. I am just worried that there is 10:11AM some feedback.

Is that on?

THE COURT: It's on.

MR. LEVIN: Okay.

Getting back to the lies that George Ryan told 10:11AM during the investigation and after the investigation. George Ryan lied about the inspector general department and what was going on with the IG department, both publicly and to the FBI. He claimed that these IG investigations of fund-raising tickets or people who were selling licenses in order to get 10:11AM money for fund-raising tickets, he claimed that those investigations were thorough, that they were getting to the bottom of any indication of fraud, that those investigations were pursued vigorously.

George Ryan lied about the Gramm money. You will 10:11AM recall that Phil Gramm, when he ran for President, the primary in 1995 and 1996, George Ryan got some money from that campaign. I believe it was around $11,000. He actually directed or assigned that it be paid to his daughters. But ultimately, later on when he files amended returns in late 10:12AM 2002, he lies to the IRS about it, claiming that the Gramm

campaign had wanted him to be paid, which, of course, was a lie.

George Ryan lied about the DeSantis money that he received. You will recall that Anthony DeSantis was an
10:12AM elderly gentleman who testified during the case. He testified about giving George Ryan several checks, four checks that were broken down into $500 amounts, and it was done at the request of George Ryan. George Ryan had asked him to break it down; give one to George Ryan, one to his
10:12AM wife, one to George Ryan's son, and one to the daughter-in-law. And George Ryan did it in order -- because he thought that was a way that he could avoid putting it on any public disclosure form. That was George Ryan's idea.

When this is -- comes up in the investigation, he
10:12AM lies to the FBI about it, saying, "No, no. That wasn't my idea to break the checks up in that way," which, of course, it was.

George Ryan lied about his $50 gift policy when the FBI interviewed him about that, claiming that he had a $50
10:13AM gift policy, that he wasn't taking gifts in excess of $50, which, of course, we know from the evidence, evidence that came in toward the end of the case, that he was taking gifts in excess of $50.

And George Ryan lied about numerous tax issues.
10:13AM One that comes to mind is Nancy Smith --

MR. GENSON: This is my only objection, but with regard to the statements and with regard to the tax issues, these do not apply to Mr. Warner.

THE COURT: I am going to remind the jurors that
10:13AM some of the evidence you heard was admitted with respect to one defendant but not another, and I will ask that you remember those instructions as you listen to the arguments as well.

Mr. Levin, you may proceed.
10:13AM MR. GENSON: I won't interrupt again, Judge. I will rely on the jury.

THE COURT: Thank you.

MR. LEVIN: When I say George Ryan lied about the tax issue, you will remember Nancy Smith was the woman who
10:13AM testified. She was the caretaker for George Ryan's mother-in-law. She testified that she got $6,000 of campaign funds in 1998. She did no campaign work, yet George Ryan, when he spoke to Dean Olsen, a reporter -- and this came in through stipulation -- George Ryan tells the public through
10:14AM this reporter -- he says that she did campaign work. He is trying to justify spending campaign money on her, which was just a complete and utter lie.

It goes on and on. You can take your pick. The lies, the concealment, the deceit, there is plenty of it in
10:14AM this case.

Now, if this was just business as usual, if this is government in the open, if this is the way it was supposed to be done, what's all this lying about? What's all this concealment and deceit, if this is just your neighbor with
10:14AM the extraordinary work ethic, who's not in it for the money? What's it all about? What's all this lying about?

Make no mistake about it, ladies and gentlemen. The notion, as expressed by Mr. Webb in his opening, that George Ryan was merely relying on professionals, was relying
10:15AM on professionals for recommendations and was not involved in this conspiracy is nonsense. From beginning to end, George Ryan had his fingerprints all over these leases and contracts that are involved in this case.

He was integrally and personally involved in many
10:15AM of the acts which form this conspiracy.

Let's take a look at another slide which shows George Ryan's personal involvement in many of these transactions.

George Ryan had personal involvement in the South
10:15AM Holland transaction. That is the lease to Harry Klein. He was the one who set that process in motion to get that lease to Harry Klein. George Ryan had personal involvement both in the Joliet lease as well as the Bellwood leases that went to Larry Warner.

10:15AM Once again, George Ryan sets those things in

motion. George Ryan is there when Larry Warner tells him that his name is buried in paperwork. George Ryan is calling secretary of state employees, telling them about the Joliet and Bellwood deals.

10:16AM George Ryan had personal involvement in the Lincoln Towers lease. This is a lease that Ron Swanson was a broker for. He got a commission for it. That deal starts with George Ryan and Ron Swanson talking about it in George Ryan's office.

10:16AM George Ryan had personal involvement in the inspector general matters. One of the most memorable personal involvement incidents of George Ryan is when he talks directly to Russ Sonneveld, one of the IG investigators, in connection with a Naperville 1994
10:16AM investigation of someone who may have been selling fund-raising tickets as part of a scheme where they are selling licenses illegally. George Ryan talks personally to Russ Sonneveld, and after that conversation, that investigation is shut down.

10:16AM George Ryan had personal involvement in ADM issues. In connection with the sticker company, George Ryan was the one who, when he learned that they were -- that his own people, the professionals, were trying to revise the specifications for that contract to open them up to greater
10:17AM competition, it's George Ryan personally who shuts that down,

reverses it so that the specifications remain as they are, favoring ADM and favoring money for Larry Warner, the lobbying money that Larry Warner is getting.

George Ryan had personal involvement in the Viisage
10:17AM transaction, the digital driver's license transaction. You will recall there is evidence about an attempt by George Ryan to arrange what's called a marriage between a company called Unisys and Viisage. And his attempt to form that marriage between two companies had nothing to do with any state
10:17AM interest, any legitimate interest. The attempt to form that marriage was for nothing -- no other reason than to spread some of the lobbying money to more than one of George Ryan's cronies. That was the purpose of that attempted marriage.

George Ryan had personal involvement in the
10:18AM Honeywell/IBM transaction. You will recall the testimony of Robert Cook, Bob Cook. He was a lobbyist. He testified early in the case about going to meet George Ryan after Warner and Udstuen had tried to shakedown Honeywell for money early in George Ryan's term. And Bob Cook told George Ryan
10:18AM directly what Warner and Udstuen were doing in that conversation.

George Ryan's personally involved there.

George Ryan, of course, is personally involved in the Gramm campaign. As I indicated, he himself is getting
10:18AM money from the Gramm campaign.

George Ryan, of course, is personally involved in Citizens for Ryan and tax issues. He is the one who decides how much CFR money is going to be spent. He is the one walking around with that CFR credit card, spending the money.
10:18AM And George Ryan is personally involved in the issuance of low-digit plates. That was a perk that was given out to people. In particular, it was given out to Mr. DeSantis in this case. And George Ryan walked around with a -- had to approve every low-digit plate that was
10:19AM granted during his term as secretary of state. That's what Scott Fawell testified. That was how interested George Ryan was in the low-digit plates.

Now, what were the governmental benefits that George Ryan was giving out to Larry Warner, to Ron Swanson,
10:19AM to Harry Klein during these years in office?

Our case is focused on a number of leases and contracts that were awarded during George Ryan's term that benefited Warner, Swanson, and Klein. And I am going to put these up on the screen, and we are going to be talking about
10:19AM them, I am and Ms. Barsella is, in the course of our remarks today.

So the leases we are talking about -- and I have already mentioned many of them -- are the Joliet lease, that was the lease that Larry Warner got; South Holland, that's
10:19AM Harry Klein; Bellwood is another Larry Warner lease; Lincoln

Towers was the one that Ron Swanson got a commission on; and 17 North State, that was early in Ryan's term, '91, '92 time frame. Larry Warner got a commission on that one.

The contracts that we are going to be focusing on
10:20AM and that were the focus of the case are the American Decal Manufacturing, that's the ADM vehicle sticker contract; the IBM/Honeywell, the mainframe computer contract; Affordable Temperature Control, this was a contract that was given early on in George Ryan's term.
10:20AM You may remember there was a man named Ken Brodsky who got a contract in around 1991, '92 to provide some heating equipment -- or to do some work down in Springfield. This was a friend of Larry Warner's. And after this man got the contract, Larry Warner then shook him down for payments
10:20AM for a percentage of the money that he was getting from the state contract.

There is the Viisage contract. There is the McPier lobbying contract. The McPier lobbying contract is the contract that netted Ron Swanson $180,000 over a three-year
10:21AM period. It's a lobbying contract where he did next to nothing and got $180,000 for it in the time frame '99 -- or 2000, 2001, and 2002, I believe.

And finally, there is the Grayville contract. This was for a state prison. And you will recall the evidence was
10:21AM that George Ryan tipped off Ron Swanson that Grayville had

been selected for the site of a state prison. This was in approximately late February of 2001. Then, after receiving that tip, Ron Swanson went out and ripped off the people of Grayville by charging $50,000 for a lobbying contract when
10:21AM the decision had already been made. They, nonetheless, paid him to lobby to get Grayville selected as the site when they -- Grayville had already been selected as that site.

Now, it is important to keep in mind -- and I have already alluded to this Warner-Udstuen arrangement where the
10:22AM money was shared.

And the Warner-Udstuen arrangement, we heard about it through the testimony of Don Udstuen as well as the bank records that show this one-third of Warner's money for ADM, for IBM, that he was receiving was siphoned off to pay Don
10:22AM Udstuen for paying nothing -- for doing nothing. When Warner set up that arrangement with Don Udstuen in around 1991, he told Don Udstuen that it had been blessed by George Ryan and that he, Warner, was taking care -- was taking care of George Ryan.
10:22AM But Warner wasn't the only one who was taking care of George Ryan. Ryan had similar arrangements with people like Swanson and Klein, by which these individuals were giving Ryan or his family various things of value -- like free vacations, gifts, other benefits -- at the same time
10:22AM that Ryan was giving them government money in the form of

leases.

Now, Mr. Webb told you in his opening that you would not hear about any corrupt payments of money going to George Ryan.

10:23AM But the notion that we don't have a case unless we can show that Larry Warner or Ron Swanson paid George Ryan a specific amount of cash for each dirty deal, that is simply not the law.

We will talk about the law more later, but it's

10:23AM important to keep in mind that there is more than one kind of corruption. And Mr. Webb's effort to recast this case in terms of whether a cash bribe was paid is misleading and should be rejected.

During the testimony of many witnesses in the case,

10:23AM like Mr. Fawell, the defense asked them whether they had ever seen Mr. Ryan take any money to influence any decision or action. And again and again people said no. Well, George Ryan may have been greedy, but he was not stupid.

He did not make announcements or press releases

10:23AM when Warner, Swanson, or Klein gave him or his family something in order to influence his decision-making. The loans, the vacations, the other benefits did not come in packages with bright red lettering that said, "This is to influence you."

10:24AM Most importantly, keep in mind that this is not a

case in which a public official had a specific price for each official act that he did, like a menu in a restaurant where you pick an item and it has a particular price. The type of corruption here -- that type of corruption where you give me

10:24AM this, I will give you that, is often referred to as a quid pro quo.

The corruption here was more like a meal plan in which you don't pay for each item on the menu. Rather, there is a cost that you pay, an ongoing cost, and you get your

10:24AM meals.

And for Warner, Swanson, and Klein it was not a cash bar. This was an open bar during Ryan's terms as secretary of state and as governor.

Now, one thing you need to keep in mind, too, as

10:24AM you consider the evidence and the proof in this case is that the benefits -- the benefits do not have to go to the public official himself. They can, as they were in this case in many instances, lead to his family or to third parties to whom that he has directed they be given.

10:25AM Let's spend now a couple minutes talking about the charges in this case. And later on in the closing argument, we will discuss in more detail the elements as to these various charges that the law requires us to prove for you to find the defendants guilty of these very offenses.

10:25AM But as to the crimes themselves, here is what the

defendants are charged with:

Count 1 is the racketeering conspiracy. The pillars of this case -- there are a total of 22 charges. But the pillars of the case are really the racketeering

10:25AM conspiracy charged in Count 1 and the mail fraud scheme that is charged in Counts 2 through 10.

Now, just a few words about the concept of conspiracy. A conspiracy is nothing more than an agreement to commit criminal acts. It need not be in writing or any

10:26AM sort of formal agreement. A racketeering conspiracy is, in essence, an agreement to commit certain kinds of crimes that are connected in a pattern. The different kinds of crimes that Defendants Ryan and Warner conspired to commit, according to the indictment, included mail fraud, extortion,

10:26AM bribery, money laundering, and obstruction of justice.

The racketeering conspiracy that is the centerpiece of this case had two purposes: performing official governmental acts for the personal and financial benefit of Ryan, Ryan's family members, Citizens for Ryan, and certain

10:26AM of Ryan's associates, including Warner and Swanson; and second, promoting, concealing, and otherwise protecting the purposes of the racketeering enterprise from public exposure and possible criminal prosecution.

The mail fraud scheme that is charged in Counts 2

10:26AM through 10 was a scheme to deprive the citizens of Illinois

of money, property, and their right to honest services of its officials, including George Ryan. In other words, it was a scheme to cheat the citizens and taxpayers of Illinois out of their right to the honest services of George Ryan and other

10:27AM public officials.

Now, under the mail fraud law, as the Judge will explain to you, if there is a scheme to defraud as charged in the indictment, any time there is a mailing, say of a letter or a check, that is in furtherance of that scheme, then that

10:27AM can be charged as a separate crime, a separate count in the indictment. These various counts, 2 through 10, are in fact various different mailings of checks or, say, payments in connection, for instance, with Larry Warner's lobbying money.

Let's move on now to Counts 11 through 13. These

10:27AM are the counts in which George Ryan is charged with false statements that he made during interviews with the FBI, which Agent Ruebenson testified to at the end of the government's case.

Count 14 charges Warner with extortion, attempted

10:28AM extortion in connection with his attempt to get money from the sticker company ADM in September of 1998. You will recall that a man named Aristotelis Mpougas testified about that extortion. He was a man who had become the president of ADM.

10:28AM Counts 15 and 16 are money laundering counts, and

But in addition, in the secretary of state's office, we had the governmental structure. And the governmental structure we are now putting on the screen.

Incidentally, I should tell you that I will try to remember to mention what exhibit numbers each of these things we are putting on the screen is. I may forget. If I do forget, we have tried to put exhibit stickers on each one of these things that I will be putting on the screen. So if I forget it, if you want to jot it down, feel free to.

There are some things I will be putting on the screen during the course of my remarks that are not in evidence, that are not exhibits, so you won't have them when you deliberate. Those things won't have exhibit numbers or stickers on them as they are put up on the screen.

But in any event, this is the organizational chart of the secretary of state's office.

So we have the CFR organizational chart. We have the CFR. The CFR and the SOS.

One of the problems, which we will talk about later, is that Ryan and Fawell often diverted or essentially stole the secretary of state workers, who are on this chart, in order to do campaign political work as part of the Citizens for Ryan structure.

Now, CFR was much more than a political organization. CFR took in large amounts of money, and that

money was controlled by George Ryan.

He could spend it for whatever he wanted, political or personal.

Of course, if he spent it personally on himself, he was supposed to declare it on his income tax returns.

CFR was, for all intents and purposes, George Ryan's pot of gold. It was his campaign fund, but it was much more than that. It was his expense money, it was his retirement fund, it was his nest egg all wrapped up into one.

Whatever you want to call it, it was his to spend for whatever he chose. And as it was replenished year after year by these fund-raising tickets by the -- to secretary of state employees, many of whom were low-level employees, they were the ones who were, in large measure, replenishing that fund, CFR fund.

Now, many of you may have worked at offices where each year someone collects for some charity events or Girl Scout cookies or high school band trip. This was different. This was a twice-a-year collection to pony up for the boss' expense account and retirement fund. Now, that's not what they called it, but you have seen what he was using the money for. And it was, as I said, in effect, his nest egg.

We are talking big dollars here. CFR took in around $16 million in the '98 campaign. That pot of gold, that nest egg still totaled $2.3 million after George Ryan's

1998 campaign for governor. And I have on the screen the D-2 for the end of 1998.

Now, all of this ticket-selling, this fund-raising ticket-selling, was going on regularly under George Ryan's watch at the secretary of state's office. And he knew it, and everyone at the secretary of state's office knew it.

Secretary of state employees working for Ryan were expected to buy tickets for Ryan fund-raisers. There is no question that the employee sales of fund-raising tickets were the single greatest source of money for Citizens for Ryan. The employee ticket sales -- and several people testified to this. The employee ticket sales amounted to around $500,000 per year.

Now, here is the ticket distribution list which Nicole Altounian, the CFR fund-raiser, testified about. You see that it breaks down by departments. This is Government Exhibit 28-076 in which it's broken out as to how many fund-raising tickets are to go to each of the departments at the secretary of state's office.

And you will see that the largest allotment of fund-raising tickets go to the drivers services department. Those are the ones who are issuing driver's licenses, including CDL licenses, to drivers who are out there on Illinois highways.

Employee ticket sales were the fuel that kept the

CFR machine going during the secretary of state years. George Ryan knew that it was wrong and in violation of his own policy for these tickets being sold at the secretary of state's office to these employees. And he knew that this $500,000 didn't just drop out of the sky.

The evidence has shown that George Ryan was very protective and defensive about the CFR money. He treated it as his personal nest egg over the years, and he even lied to his highest aides and advisors about the money in that account.

Both in the '94 and the '98 campaigns, there was evidence that Ryan lied to Fawell about the money in the account. Essentially both those campaigns, '94 and '98, George Ryan had taken some money, shifted it to another account, and didn't tell Fawell about it. And when Fawell is looking into it, can't figure out why there isn't enough money, Ryan essentially lies to him, doesn't tell Fawell what he has done with the money. He misled Fawell. He mislead Juliano as to how much money was in the CFR bank accounts because he wanted the money for himself, wanted it for his retirement fund.

This nest egg concept was so significant that not only did Ryan lie to Fawell, but it even caused Deb Detmers, the woman who was the fund-raising chief at CFR at the time, to be demoted by Fawell and otherwise scared to death because

she was blamed for this deficiency that really didn't exist. It was only because George Ryan was lying about the amounts in the account.

Now, as you have heard and as I have already said, 10:39AM the secretary of state employees played a big part in George Ryan's nest egg. But employee ticket sales were not the only source of funds for Citizens for Ryan.

There were also private fund-raisers that helped to bring in money for Citizens for Ryan.

10:39AM I am now putting on the screen Government Exhibit 28-069. This is a memo concerning a fund-raiser that was put on by Larry Warner in August of 1998. Nicole Altounian, who was one of the women who was involved in fund-raising for CFR, she testified about this particular 10:39AM fund-raiser, testified that she recalled it as being the single largest fund-raiser that had been held in the '98 campaign. $175,000 in funds were raised in this particular campaign, according to Ms. Altounian.

So there were these private fund-raisers in addition to the ticket sales by secretary of state employees. 10:40AM

Now, what did George Ryan do with all this money that he was taking in from Citizens for Ryan? Some of it was spent on the campaigns, but a large portion of it, a large portion was spent to finance George Ryan's lifestyle. All of 10:40AM the meals at Lino's, Nick's Fishmarket, the other fancy

Chicago restaurants, the travel, the gifts, that CFR pot of gold was based on keeping that fund-raising money flowing to support that lifestyle.

I now -- we are putting on the screen -- this is 10:40AM Government Exhibit 27-016. This is one month of American Express credit card invoices for the CFR credit card. And it gives you a feel for the lifestyle that was being financed by these CFR ticket sales.

December 7th, Tavern on Rush. December 8th, 10:40AM Jamaica boat phone. December 11th, Shubert Theatre. December 11th, Nick's Fishmarket. December 14th, Madison's. December 14th, another Madison's. December 16th, Lino's restaurant. December 17th, Benihana.

Hundreds and hundreds of dollars for these fancy 10:41AM restaurants in Chicago and for travel.

December 17th, another Lino's. December 17th, Ravisloe Country Club. December 21st, Riva restaurant. December 22nd, Lino's, Lino's, Lino's, and on and on it goes.

The CFR fund-raising ticket sales were financing 10:41AM this great lifestyle. And under no circumstances was George Ryan going to allow anyone to do anything that would cut that flow of money off.

Which brings us now to the inspector general department and how George Ryan used the inspector general 10:41AM department to protect this personal pot of gold that he had.

Nothing -- nothing illustrates the deep-seated corruption and fraud in George Ryan's secretary of state years better than his approach to the inspector general office, the IG's office, as it is known.

10:42AM Basically Ryan used the IG as the means of protecting that CFR pot of gold.

Now, what was the IG supposed to be? The IG was supposed to be the watchdog of integrity, of honesty in the system. They were supposed to be the ones, if there was any 10:42AM wrongdoing, no matter who had committed it, even up to the highest person in the office -- that is, the secretary of state himself -- they were supposed to be the ones who would find out about it, who would investigate it, who would bring it to light, who would do what needed to be done to stop it.

10:42AM That was their job, to protect integrity and honesty.

That's not the what they did during George Ryan's terms as secretary of state.

And nothing illustrates George Ryan's approach to the IG department better than the December 1994 memo that 10:42AM Scott Fawell gave to George Ryan.

Now, this is Government Exhibit 01-019. It's December 14th, 1994. It's a memo that Fawell sends to Ryan at the end of the first term of secretary of state. This is a memo that discusses the reorganization -- proposed 10:43AM reorganization of the secretary of state's offices and other

changes that Fawell is recommending.

He addresses the IG department in this memo. It's on Page 10, which we are going to look at now.

He discusses Dean Bauer, who's the inspector 10:43AM general, and talks about -- says in this portion of the memo, "This is another tough one for you personally, I know." Keep in mind he is talking to George Ryan. "I know Dean's health" -- that's Dean Bauer -- "is not good, but this place needs help. My suggestion is we move Dean and get rid of 10:43AM Jech" -- Jech was one of the investigators -- "and start over. Dean could go to Jack's shop" -- that's Jack Peccoraro -- "in a deputy or chief deputy title if we can move Will Thompson."

This is the key, most revealing part of this memo, 10:44AM the part I am going to read now.

"Let's get someone in there who won't screw our friends, won't ask about fund-raising tickets."

" . . . someone in there who won't screw our friends, won't ask about fund-raising tickets."

10:44AM What is he talking about? What's he talking about? It is clear. It's clear that Fawell views the IG department not so much in terms of what they should be doing, but more in terms of what they should not be doing. And the number one goal is to get an IG department that will not screw our 10:44AM friends and will not ask about fund-raising tickets.

Now, who are these friends that Fawell is talking about in this memo?

This is a picture -- this is Government Exhibit 01-015. These are the friends. These are the

10:44AM friends that Fawell is referring to in the memo.

In the middle of this picture there is a woman named Marion Seibel. You have heard some testimony about her. She was a person who worked at the McCook CDL facility who eventually -- this comes later, 1999. She ends up

10:45AM getting arrested. They find that she has sold $80,000 in CFR tickets for -- over the years. A woman who's being paid somewhere around 30,000 or so has sold $80,000 in tickets over the years.

This is a picture of the friends who were the

10:45AM cornerstone of the Ryan CFR machine. And there she is, right at George Ryan's side, the $80,000 woman, Marion Seibel. And who knows how many dinners at Lino's or Nick's Fishmarket were due to the efforts of Marion Seibel and other secretary of state employees who were selling these fund-raising

10:45AM tickets year after year.

Now, getting back to the December '94 memo, another important thing to keep in mind is that memo went right to George Ryan. George Ryan is in the loop, and he personally approves the corrupt proposals that are made by Fawell.

10:45AM That's important for a couple reasons.

Now, let's spend a couple minutes just talking about this Dean Bauer and who he was.

Dean Bauer is the last person you would want to head an IG department. He was incredibly loyal to George

10:47AM Ryan, was essentially a political hack from George Ryan's days in Kankakee, and was incompetent and saw his job as being one thing and one thing alone: To protect George Ryan and to make sure that George Ryan was not embarrassed.

In similar fashion to the Fawell-Ryan relationship,

10:47AM the Bauer-Ryan relationship was one of trust, of communication, of commitment to corruption.

In Bauer, Ryan had someone he could count on to quash any investigation that got too close to that goose that laid the golden egg, the Ryan CFR ticket-selling machine.

10:47AM Now I want to go back now and discuss the repeated occasions in which fund-raising reared its ugly head during IG investigations and how again and again Dean Bauer, with George Ryan's full backing and support, made sure that these investigations went nowhere.

10:48AM But before I do, I want to make a couple observations about the corruption that Ryan's IG was designed to protect.

The corrupt practices that kept the money coming into CFR coffers had their cost, a cost that is steep and

10:48AM probably can never be measured. Again and again, the

First, the fact that Fawell felt comfortable talking in that memo as openly as he did about a corrupt purpose shows the relationship between the two men, a relationship that had been firmly planted in the late 1980s

10:46AM and was based on a deep and mutual understanding and agreement as to the corrupt objectives and purposes of public office.

Second, the memo demonstrates and underscores again that Ryan was directly in the loop and fully endorsed and

10:46AM supported the corrupt actions that occurred during his years at the secretary of state.

Any politician of integrity who received a memo like this, endorsing an action as corrupt as being proposed by Fawell, would have fired Fawell on the spot. Not only

10:46AM doesn't George Ryan fire Fawell, he adopts the recommendations of Fawell.

And as the testimony and documents demonstrate, Ryan goes ahead, he disbands the IG department, this agency that is supposed to be protecting the integrity and honesty

10:46AM of the system. Disbands them, transfers the IG function to the secretary of state police, where it effectively is put out to pasture to die.

And these decisions are made with the full knowledge, agreement, and consent of the man at the top,

10:47AM George Ryan.

investigators in the IG department found links between the sale of CDL licenses to the purchase of fund-raising tickets. There was a real cost to that. Secretary of state employees under pressure to sell fund-raising tickets were taking

10:48AM bribes to issue CDL licenses to truck drivers who shouldn't have been out on the road, and the bribes were then used to buy Ryan fund-raising tickets.

And that is how the Marion Seibels of the world ended up being hosted at these lunches by George Ryan. At

10:49AM lunches not to honor their diligent work as secretary of state employees, but to honor their extraordinary efforts in raking in money for the George Ryan CFR machine.

Now, by the time that Ryan received that December 1994 memo, he was well aware from all these previous

10:49AM incidents that the illegal sale of driver's licenses had repeatedly been linked to fund-raising tickets. And I want to talk briefly now about the various IG investigations that you have heard about as part of the evidence in this case.

The first incident I want to talk about is

10:49AM Midlothian. And for each of these incidents that we will be putting on the screen, we have in parentheses the name of the managers of the facility who were involved in that particular incident.

Now, Midlothian is not an incident that involves

10:49AM fund-raising tickets, but it is an incident that really

reveals George Ryan's approach to the integrity of his office, what his mindset was, if anyone had a good idea or any sort of idea about how things could be improved, perhaps to protect and detect fraud.

10:50AM Now, you will recall that this was an incident in which there was -- the IG's office, the secretary of state, and the Cook County State's Attorney's office were having a joint press conference concerning some arrests of secretary of state employees for illegal activity concerning licenses.

10:50AM And what happens during the briefing beforehand, before the cameras are rolling in the press conference, is there is a man named Pat Quinn, who's head of the public integrity unit in the Cook County State's Attorney's office. And he has a suggestion that he makes to Ryan as to how maybe to prevent

10:50AM this same sort of fraud from happening in the future. And he tells Ryan, George Ryan, in the presence of Jack O'Malley, who's a State's Attorney, he tells him what his idea, what his suggestion was.

And Ryan did not want to hear it, because for Ryan

10:50AM the secretary of state's office was his own empire, and he was not interested in hearing anyone's idea of how fraud might be cut back.

So when Pat Quinn, who was a professional who works in the State's Attorney, when he makes his suggestion Ryan

10:51AM says to him -- and this is from the testimony in the case.

happen exactly as Pat Quinn testified.

Now, moving back to the chronology of IG department incidents, the next one chronologically is the Libertyville incident in March of 1993.

10:52AM And the testimony concerning Libertyville was that there were raids at the Libertyville driver's facility and at the Roma driver' school in Chicago. And they were based on information that this man named Jim Quinn -- Jim Quinn, the manager of the facility -- might be illegally issuing

10:52AM licenses.

The investigators, they go to the driving school that's involved in this scheme. They seize fund-raising tickets and cash there. They also go to the office of Jim Quinn, who works at the Libertyville facility.

10:53AM And an IG investigator who testified in this case, a man named Mark Lipe, he finds -- in Quinn's office in a briefcase he finds 65 fund-raising tickets and $2500 in cash in the briefcase of Jim Quinn.

Now, Dean Bauer, the inspector general, he is

10:53AM there. He comes into the office where Lipe has found the money and fund-raising tickets, and Bauer takes the envelope with the money and tickets from Lipe.

And what is the first thing Dean Bauer does, first thing he does after he sees those fund-raising tickets and

10:53AM money? He immediately calls George Ryan.

The question was, "Sir" -- and this is to Pat Quinn when he was on the witness stand.

"Sir, when you explained this to Mr. Ryan in the presence of Mr. O'Malley, what happened next?

10:51AM "A. Mr. Ryan turned to Mr. O'Malley and, 'F you, Jack. These are my guys.'"

That is George Ryan's attitude, his approach to someone, a professional making a suggestion as to how to cut back fraud and corruption in his office. He doesn't want to

10:51AM hear it.

Now, you will recall that Mr. O'Malley testified in the case. He didn't remember those remarks being made by Mr. Quinn.

We also -- the defense called a man named Tim

10:51AM Touhy. He didn't recall those exact remarks being made, but he did recall that was generally what Mr. Ryan was communicating during that session.

But in our rebuttal case, we called a man named Jerry Nora, who was the supervisor for Pat Quinn, and he did

10:52AM recall that on that day, he wasn't at the press conference. But sure enough, Pat Quinn came back to his office and reported to Mr. Nora exactly what Mr. Ryan had said.

And Mr. Nora testified, given that kind of remark from a public official, it was not the sort of thing that he

10:52AM would forget, and Mr. Nora did not forget it. And it did

Lipe -- Mark Lipe testified. He testified he didn't stand around listening to exactly what Dean Bauer was telling his boss, George Ryan. But we know that Bauer was not calling Ryan just to tell him or ask him what the weather

10:53AM was like in Springfield.

And shortly after the discovery of the tickets and the money, George Ryan and Scott Fawell get on a plane. They come up to Libertyville, and they are briefed on the investigation. And they are told in the briefing about the

10:54AM discovery of the fund-raising tickets and the money.

So if George Ryan didn't already know about the link the fund-raising tickets had to illegal activity, to the illegal sale of driver's licenses, he certainly knew it by the March -- by March of 1993.

10:54AM Now, moving forward, in March of 1994, a secretary of state employee named George Offord was caught on tape by a TV station selling fund-raising tickets to an auto rebuilder; in other words, a business that he was supposed to be regulating. IG investigator Russ Sonneveld, who testified in

10:54AM this case, interviewed Offord's supervisor and is starting to look into what happened only to be told to go no further. Shut it down. Close it up. He was told that, and that investigation went nowhere.

Moving forward to April of 1994. This was the

10:55AM Naperville incident, which I talked about briefly before.

This involves Russell Nisivaco, who was the manager of that facility. Now, what happens here is, some money is missing from the facility, state money. These are receipts and fees from the day's business at the facility.

10:55AM So Investigators Sonneveld and Hammer are assigned to investigate. This Russell Nisivaco, he is the principal subject. Sonneveld and Hammer go out. They interview him a couple times, and his story keeps changing. He fails a lie detector test. And fund-raising tickets, fund-raising

10:55AM tickets once again rear their ugly head here.

Sonneveld and Hammer learn that Nisivaco had been given 50 fund-raising tickets. And by now Sonneveld and Hammer know that fund-raising tickets keep surfacing in these IG investigations. So given the evidence, Sonneveld and

10:55AM Hammer do exactly what you would want a trained competent thorough investigator to do. They try to follow up on this fund-raising ticket issue.

Sonneveld goes to Roger Bickel. Roger Bickel was the lawyer, the legal counsel for the secretary of state's

10:56AM office. They ask Roger Bickel if they -- or Sonneveld asks him if he can get the list of ticket distribution. And Bickel -- Bickel responds to Sonneveld by asking him, "Whose F'ing side are you on?"

In essence, Bickel adopts the approach of Dean

10:56AM Bauer to this internal investigation; that is, the job is to

being done by the IG, why was it on this one that Dean Bauer talked to George Ryan and Ryan wanted to talk personally to the investigator? Well, it certainly wasn't to commend him on the great job that he was doing, to encourage him to dig

10:58AM deeper, to get to the bottom to see what had happened. It certainly wasn't for that. That's what an honest secretary of state would have done.

George Ryan shut it down because it was getting too close to the golden goose of fund-raising tickets.

10:58AM Time and time again the evidence has shown, when those investigations got too close to fund-raising, they were shut down.

Here is what Ryan had to say about investigations when he was interviewed in April of 1998; completely and

10:58AM utterly false, and he knew it was false when he said it.

(Said videotape was played in open court.)

MR. LEVIN: Complete and utter false statements.

Let's go back now to the chronology of the other IG investigations and incidents.

10:59AM The McCook facility was the facility where Marion Seibel worked. There were -- as Investigator Sonneveld testified, in late 1993 there was a first investigation involving possible corruption by Marion Seibel and a driving school. Then, over the next few months or a year or so,

10:59AM there was a second, there was a third, there was a fourth,

protect George Ryan, not to expose any possible corruption.

In any event, Sonneveld then reports back to Bauer about what's going on with the investigation.

Bauer then tells Sonneveld to call George Ryan

10:56AM personally. He gives him a phone number so that he can talk to George Ryan personally.

Now, keep in mind, Sonneveld has never talked to George Ryan personally about any investigation that he has conducted, but now, the next thing he knows is, he is on the

10:57AM phone with the secretary of state talking to him about what's going on in this particular investigation.

And he tells him what he has done, that he discovered the fund-raising tickets, the results of the lie detector test. And what happens after that conversation with

10:57AM George Ryan, where George Ryan is put on notice of what has happened, what they are discovering?

Within a day or two of that investigation Sonneveld -- of that conversation -- I am sorry -- Sonneveld is told by Bauer to write up a report, do nothing more. Case

10:57AM closed.

Now, the Naperville investigation is perhaps the prime example of how the Ryan regime handled investigations when fund-raising tickets surfaced as a possible motive. Shut it down, close it up, go no further.

10:57AM And why? Given all the investigations that were

all of which were linked in some way to Marion Seibel.

By October of 1994, Sonneveld knew that Marion Seibel was a big ticket-seller. And by that point her name had surfaced again and again in one form or another in

10:59AM connection with four separate investigations.

That takes us to November of 1994. Sonneveld comes to work on November 13th, 1994 and sees a Tribune article about a fatal crash in Wisconsin and learns that Marion Seibel had given the driving test to the person involved in

11:00AM that crash. So by this time, Marion Seibel is known as a big ticket seller. Her name has come up again and again in connection with people getting driver's licenses. And now someone got a license from her, is involved in a fatal crash.

And Russ Sonneveld proposed to do exactly what you

11:00AM would want a trained, conscientious investigator to do: Look into the matter, see how that driver got his license.

So what does Sonneveld do? He talks to Dean Bauer, tells him what he is going to do, and Bauer shuts him down. Before he even gets on base, so to speak, before he even gets

11:00AM up to the plate, he is shut down in this investigation. Let the Wisconsin authorities handle it. Sweep it under the rug. We don't want to know what happened. If an investigation in any way, shape, or form might expose the CFR fund-raising machine, the investigation was doomed. No matter how serious

11:00AM the matter was, it was going nowhere from the start in the

Ryan regime.

Now, what did Bauer do with this particular investigation after he took it away from Sonneveld? Did he assign it to someone else? Did he handle it himself? Did he

11:01AM follow up with the Wisconsin authorities as to what they were doing? The answer is, none of the above.

On November 15th, 1994, Willie Thompson, who was the number two man at the secretary of state police, talked to Bauer. And then he wrote a memo immediately about what

11:01AM Bauer had told him concerning this investigation.

We have got this on the screen now. This is Government Exhibit 38-001.

Bauer tells Thompson that he is actively pursuing a case on the above individual. He says that there is a strong

11:01AM possibility that the individual obtained his CDL illegally. Bauer requested that any information or inquiries regarding the individual be forwarded to him immediately.

So what happens? Is anything done to follow up on this serious matter? Nothing. Zero.

11:02AM This investigation was dead from the beginning, given the possible links to fund-raising tickets.

And Dean Bauer's successor, Don Strom, the inspector general who then came in, in 1999, under Jesse White, he testified. He testified that when he came into

11:02AM office, he got a grand jury subpoena. He turned that office

upside down trying to find any file, any record of anything that had been done in connection with this investigation. He could find nothing.

So potentially the most serious wrongdoing that had

11:02AM occurred -- the Ryan inspector general had encountered, and nothing was done to investigate it. So it was all about protecting George Ryan.

We don't have to infer or assume that that's what it was all about, because those are almost the exact words.

11:02AM MR. COLLINS: Your Honor, I am sorry. Could we have a break?

THE COURT: We will take a recess.

(Jury out at 11:03 a.m.)

MR. LERMAN: Your Honor, I need to raise something

11:03AM with the Court.

Mr. Levin just displayed to the jury a copy of Government Exhibit 38-001.

THE COURT: Yes.

MR. LERMAN: Which there was a great deal of

11:03AM discussion and work with the Court, and between myself and Mr. Collins, I believe, in terms of redacting this memo from Will Thompson. And in particular, the reference to "mud flap frame" in the first paragraph, that last portion of the sentence was redacted and never shown to the jury before.

11:04AM It's now been on the screen.

As I looked at it, your Honor, I thought it was wrong. I went to check with Courtney. She confirmed for me that this had been redacted in what was shown to the jury.

And Mr. Collins asked for a break just as I was about to

11:04AM raise it with the Court by objection.

But the whole -- your Honor, the risk of showing the jury that what happened was he lost a portion or object of his load, and then underneath there it says "mud flap frame," as we all know, that -- that relates to issues

11:04AM regarding the Wisconsin accident that the Court and the parties have worked hard to keep out from this jury. That was now up on the screen for at least a minute.

There is no question that the jury has read it. They weren't supposed to see it, your Honor. And this is a

11:04AM huge issue from the defense standpoint.

I don't know how this got into the government's display. Your Honor --

THE COURT: I don't know either. We will address it.

11:04AM But remember, to the extent this is a huge issue, there is an assumption that every juror or at least one of them, that the word "mud flaps" instantly brings something to their minds. And I will tell you completely honestly, Mr. Lerman, it didn't for me.

11:05AM MR. LERMAN: I understand what you are saying, your

Honor. We are going to move -- your Honor, I do this reluctantly, but we have to do it. We are going to move for a mistrial at this point.

This was an important piece of this document that

11:05AM had been redacted. We argued this document extensively, your Honor. And it's now been shown to the jury. And the prejudicial impact of this, we have to move for a mistrial.

THE COURT: Does Mr. Genson -- Mr. Genson and Mr. Martin, you join in the motion?

11:05AM MR. MARTIN: Yes, we do.

THE COURT: Response?

MR. COLLINS: Judge, in terms of whether it's the exact document that was in evidence, it's the document we had in our cbart -- in our cart. That's the part that got --

11:05AM that got put into the exhibits.

So I mean, if there is any error, it was completely and totally inadvertent. But this was the exhibit that was in our trial cart, which is -- which is how we loaded in all these exhibits.

11:06AM The notion, Judge, that "mud flap frame," when we have taken out the name Guzman, we have taken out the kids -- the notion of the additional part of the exhibit which talked about the fatalities, the notion that "mud flap frame," Judge, is a trigger to this specific incident and nothing

11:06AM else is -- or that is the important trigger is just not --

it's not fair, and it's a complete overstatement.

If there is an error, Judge, it's because we had in our trial cart with a government exhibit sticker this exhibit.

11:06AM MR. LEVIN: Your Honor, the other thing that I should point out is I made no reference or did not highlight the mud flap. I think this is really making a mountain out of a molehill.

As I understand it, Mr. Collins provided the

11:06AM defense with the exhibits that I was going to be using before I started my closing remarks. They have them.

MR. ROONEY: Well, like 30 seconds before.

MR. LERMAN: Your Honor, this was not provided to us over the weekend. This was provided this morning. We are

11:06AM working through these exhibits with Mr. Levin.

When I saw this, I realized this portion of the document that was redacted before it went before the jury when Mr. Thompson testified, this was an important discussion that we had with the Court and that Mr. Collins and I had.

11:07AM And I know when he looked at this on the screen that he was aware of the fact that this shouldn't have been up there as well. I know that.

MR. COLLINS: No, that's not true, Mr. Lerman.

The reason I stood up with Mr. Levin, Judge, is

11:07AM because a juror --

with Courtney -- this was -- we had made these redactions, Judge, and they are significant redactions, including Mr. Guzman's name, and the issue about the six dead kids or dead children.

11:22AM THE COURT: Right.

MR. COLLINS: This change about the mud flap frame, Judge, was a change made at the last minute, so much so that my recollection is -- and I believe Courtney just confirmed it -- that this was done by Courtney at the very last minute,

11:22AM and we never got a copy of what the change she made.

Now, does the admitted document in evidence have that on? The answer is yes. But I just want the Court to know that the original exhibit that we showed the witness that's in evidence that was in our cart does not have the

11:22AM change because Courtney made the change on her computer, Judge.

And we ask the Court to rule on this mistrial motion. I believe what your Honor was saying was somewhat facetiously regarding picking a jury next week, and I do

11:22AM think the record should be clear.

THE COURT: I don't think it's a bit facetious to recognize that if I grant a motion for a mistrial, we have to retry the case, and we have to start immediately. I want that perfectly clear. I mean Monday.

11:22AM MR. FARDON: Can I also, just for the record, make

THE COURT: There was a juror.

MR. COLLINS: -- who was indicating he needed to take a break.

THE COURT: There was a juror --

11:07AM MR. COLLINS: This absolutely had nothing -- so Mr. Lerman talks about what's in my head. I stood up to ask for a break because a juror was signaling for a break.

MR. LERMAN: Then the government should have known, your Honor, because this was not a small issue. And they can

11:07AM say -- I am not arguing that they did it on purpose. It doesn't matter why they did it. It happened. It was up on the screen for over a minute, and the whole reason that we took out the "mud flap frame" reference is because this is prejudicial and it does run the risk of bringing into this

11:07AM case something that we had worked hard to keep out.

THE COURT: All right. I am going to enter and continue your motion. And I will expect everybody to be ready to pick another jury next week, if that's appropriate.

We will take a recess.

11:08AM (A brief recess was taken at 11:08 a.m. until 11:21 a.m.)F

MR. COLLINS: Judge, I want to make a record. At the break we did pull the original government exhibit sticker on this chart, and it does have the handwriting on

11:21AM it. My recollection -- and I believe I just confirmed this

clear that nobody is playing games, Judge. Nobody is playing games with this exhibit or any other exhibit.

Mr. Lerman saying that is the first I noticed or ever has come up in our preparation process, that that may

11:23AM not be what Courtney had ultimately put up on the screen in front of this jury.

MR. WEBB: We are not saying --

MR. FARDON: I just wanted to make it clear for the record.

11:23AM MR. LERMAN: And that is not the issue. The issue is there are several exhibits in this case that, before they were used in the courtroom, certain redactions were made, and they were made at the last minute.

THE COURT: Well, Mr. Lerman, you --

11:23AM MR. LERMAN: Your Honor, it's not my contention that Mr. Levin would knowingly do this. I am not saying it. But the fact is that in -- in important discussions of this Will Thompson -- this was -- this was argued and discussed between counsel and with the Court. This memo we objected

11:23AM to, and there was redactions made. And this was not an insignificant redaction.

THE COURT: Mr. Lerman, I have entered and continued your motion. Why don't you do me the favor right now of looking through the stack of exhibits that has been

11:23AM presented to you, and if you see something else that's going

to draw a motion for a mistrial, please let us know before Mr. Levin gets there.

MR. LERMAN: We will, your Honor.

THE COURT: Let's bring in our jurors.

11:25AM (Jury in at 11:25 a.m.)

THE COURT: You may be seated.

We will proceed then, Mr. Levin.

MR. LEVIN: Thank you, your Honor.

I am going to go back now and pick up on my

11:26AM discussion of the IG department and its role in the Ryan corruption scheme.

As I was saying before we took our break, the role of the IG under Secretary of State Ryan was to protect George Ryan. We don't have to infer or assume that that is what

11:26AM Dean Bauer wanted to do. Those are almost the exact words that Bauer tells his own staff time and time again. That's what he told Russ Sonneveld. That's what he told Ed Hammer. That's what he told Mark Lipe.

Those were the professionals who were working under

11:27AM Dean Bauer who were taking directions from him. That's what our mission is. That's what our purpose is, to protect George Ryan.

We are putting up on the screen now some of the testimony of Mark Lipe, who was one of the IG investigators

11:27AM who testified during the trial. He was asked these questions

and gave these answers:

"Q. What did Mr. Bauer say to you and what did you say to him regarding the purposes of the inspector general's office?

11:27AM "A. Mr. Bauer stated that his purpose was -- our purpose collectively was to protect George Ryan.

"Q. What did you say in response to that?

"A. I disagreed with him. I thought our responsibility was to protect the integrity of the office.

11:27AM "Q. And what did Mr. Bauer say in response?

"A. He disagreed. He said, 'No.' He said, 'We are here to protect George or George Ryan.' And I said, 'Okay.' And we had a little more conversation, and I posed the question, 'What if that individual is in some manner

11:28AM corrupt?'

"Q. What did Mr. Bauer say to that?

"A. He never responded."

He never responded.

You know that the problem that Mr. Lipe had

11:28AM identified was exactly what has been proven in this case, that George Ryan was corrupt, and he had a corrupt IG working for him.

So with the IG's office, as with so many other aspects of Ryan's governmental office, there was a public

11:28AM face that he put on in order to get votes and to gain public

support, and then there was the behind-the-scenes reality of his office where corruption flourished thanks to an IG that made sure that these important investigations went nowhere.

And it all boiled down to money. All about getting

11:28AM money for CFR, which was, for all intents and purposes, money for George Ryan.

Russ Sonneveld in his testimony also mentioned at one point that Dean Bauer had him do an electronic sweep of the political offices of CFR.

11:29AM Now, this was a state investigator who was asked by his boss, the IG, to do an electronic sweep of a political office. So at the same time that Bauer is telling Sonneveld not to investigate this, not to investigate that, he is also telling him, "This is something I do want you to do. Go out

11:29AM and make sure that the political headquarters of George Ryan is not bugged."

It's totally offensive, shameful use of state resources for the personal benefit of a politician of George Ryan to be using a state investigator, a state worker, to go

11:29AM out and do an electronic sweep of his political headquarters. But that's what it was all about, protection of George Ryan.

So when in December of 1994, December of 1994, about one month after that fatal incident that was never investigated, Fawell sends Ryan this memo. And Fawell

11:29AM recommends that, "Let's get someone in there who won't screw

our friends, who won't ask about fund-raising tickets."

Fawell is doing nothing more than restating the purpose and objective of the IG's office as had already been established by Ryan and Bauer. It was to protect the

11:30AM political money-making machine of George Ryan.

Now, in 1995, following Fawell's recommendation, Ryan agrees to have Jack Peccoraro come in and run the IG shop. But in short order and contrary to Fawell's advice, Ryan then moves Peccoraro out and reinstates Bauer as the

11:30AM head of the IG. And it's Ryan who makes that decision, not Fawell. And in reinstating Bauer, Ryan knew he had someone that he could count on to quash any fund-raising investigation.

In the case of the Marion Seibels, who were out

11:30AM there taking bribes to get money for tickets, well, the reinstatement of Bauer pretty much meant that they were out of harm's way and could continue to sell driver's licenses to unqualified drivers.

Ryan's inspector general department sacrificed

11:31AM public safety and integrity to ensure that money kept pouring into CFR. And that was what the inspector general's department was all about in this scheme and this conspiracy.

Now, I want to move on now to a different topic, and that is the leases that I have already discussed

11:31AM somewhat. And the first lease that I am going to be talking

And, of course, keep in mind, Chamness doesn't know -- Chamness doesn't know that Ryan is getting these free vacation stays in Jamaica.

But, in any event, what is it that Ryan does tell Chamness when Chamness asks, "What should we do about the termination clause"? Mr. Ryan asks, "What does Harry want? What does Harry want?"

And, of course, Harry -- Harry wants the best deal he can get. But why on earth are the Illinois taxpayers yielding to the financial interest of this building owner, this man who's giving George Ryan free stays in Jamaica? Why are we doing that?

Why is it that George Ryan is basically putting the financial interest of his buddy who's giving him these stays above the financial interest of the taxpayers of the State of Illinois? That is corruption, plain and simple.

Now, it was during this -- during this process that Chamness -- Chamness' marching orders were to get this deal done. And when Ryan mistakenly thought that Chamness had gone ahead and told Klein that the deal was done, Ryan blew up at Chamness. He yelled at him. He told him that, if he couldn't follow orders, Ryan would find somebody who could.

And after being yelled at by Ryan, Chamness made it a point to call Ryan when some issues came up in the lease negotiations so that Ryan would make the call on whether

there should be a termination clause, whether they should put Klein -- pay him up front for the buildout.

And it's at that point that there is that conversation that I just talked about in which Ryan basically tells Klein, "What does" -- tells Chamness, "What does -- do what Klein wants," or, "What does Harry want?"

Now, you will also recall that Chamness was so nervous after Ryan had yelled at him and humiliated him in this way, that he went ahead and prepared a memo documenting what had happened. That memo, which I don't -- it's not going to go up on the screen, but it's Government Exhibit 01-006. It's the memo that Mike Chamness prepared after his conversations with George Ryan, and it relates to his involvement with this lease.

So George Ryan continued to take a personal interest in this lease, and it, with the Joliet lease, are the only two that we know of that George Ryan signed personally.

Now, in terms of the loss to the taxpayers here -- and there was a loss to the taxpayers -- the most accurate way to calculate that loss is to look at what was going in Lake Calumet versus what the state ended up paying in South Holland.

And during Mr. Esslinger's testimony, we elicited or brought that out in terms of what the difference was.

Now, with respect to South Holland -- and one thing to keep in mind about Lake Calumet, the Lake Calumet lease had to be terminated to move into South Holland. The Lake Calumet lease had gone into effect in March of 1995. It was a five-year lease. The state could have stayed there for approximately two and a half more years rather than moving to South Holland.

Under the South Holland lease, if you consider the buildout and the rent that was paid for that two-and-a-half-year period, you come up with $373,000 versus if the state had stayed in Lake Calumet, that would have cost $200,000. So the state is being ripped off here for $173,000 by moving to South Holland, by moving out of Lake Calumet, all so that Harry Klein, who's giving these free stays to George Ryan in Jamaica, so that he can get some state money.

In other words, he has a financial interest going over -- being considered more important than the state interest, than the money of the state taxpayers.

Now, let me say -- let me just talk briefly about one other thing that George Ryan does for Harry Klein in addition to this lease, and for the five-year term of this lease, the $120,000 a year that Harry Klein gets, a total of $600,000 that Harry Klein gets for that five years of that South Holland lease.

The other issue with respect to Harry Klein -- it's

a smaller one -- is you will recall that, as George Ryan mentioned to Fawell in 1994, Harry Klein owned many currency exchanges. And the rates of the currency exchanges were controlled by the state in the secretary of state's office.

The rate that the currency exchanges could charge on the sale of those little validation stickers, that was controlled by the state.

And at some point on one of the Harry Klein trips Ryan talked to Klein about currency exchange rate increases, and Klein, of course, supported them. It would mean more money in his pocket if the rates would go up.

And then in 1995, for the one and only time during his term as secretary of state, Ryan granted a rate increase for currency exchanges, which, of course, was a significant benefit for Harry Klein.

Now, of course, the rate increase didn't only benefit Harry Klein. It benefited all the other currency exchange owners in the state. But it provides another situation, another example where George Ryan had an undisclosed conflict, and he took it upon himself to take a governmental action on his own initiative; that is, from the top down, which provided a benefit to someone who was providing these undisclosed, concealed benefits to him.

Let's talk for a minute about the Lake Calumet driver's facility because we have heard testimony from

important facts yet intentionally shut his eyes for fear of what he would learn, you may conclude that he acted knowingly," as I have used that word. "You may not conclude that the defendant had knowledge if he was merely negligent in not discovering the truth."

So when Fawell tells Ryan, this is what we are doing, this is how we are gearing up with these state workers to work on the campaigns for the HRCC, for the House Republican races, and Ryan tells him, "I don't want to know about it," Ryan had certainly a strong suspicion that things were not what they seemed. He was sticking his head in the sand. And under this instruction, he did -- you may infer knowledge from that behavior, knowledge of the criminal wrongdoing that was going on.

Moving back to the campaigns, we move forward now to the '97-'98 race. And in a lot of ways, the Citizens for Ryan organization, the machine saved their best and their boldest diversions for the '98 campaign.

You heard from Scott Fawell, Rich Juliano that in the '98 campaign, the CFR operation diverted employees, supplies, and other secretary of state resources to improperly benefit George Ryan.

First, beginning in the summer of '97, there was the Juliano secretary of state contract, where he is put on contracts by the state, where basically he is just out there

doing campaign work.

But where was it that Juliano -- Juliano had an office. He was in the office. He was right there just a few feet away from Ryan's office, so Ryan knows that this guy is there. He is doing campaign work. He is in the SOS office. He is being paid by SOS. He is doing campaign work.

Fawell and Juliano also testified that Fawell authorized a split-salary schedule for a number of employees where they were paid partially by the state, partially by CFR. But it was a farce, because these people were not complying with these schedules. The people were basically doing campaign work 100 percent of the time; whereas, only 50 percent of their salary was being paid by the campaign. It was essentially a pillaging of the state coffers for the campaign.

Roseberry told you how he got the suburban office up and running by actually stealing supplies from the secretary of state's office.

Juliano told you how the secretary of state's office provided a large industrial shredder for the campaign.

Now, did George Ryan know about each and every one of these thefts? Of course he did not.

Did George Ryan put Fawell in charge? Yes, he did.

Did George Ryan repeatedly reward and pat Fawell on the back for what he was doing? Yes, he did.

Was it any secret about how Scott Fawell was conducting business? No, it wasn't.

Then, finally, in the '98 campaign, there is a showdown in early 1998 when a man named Glen Bower -- this is not Dean Bauer, Glen Bower -- who's a close friend and associate of Ryan's, he is put in the SOS office essentially where Fawell was. Fawell goes over to the campaign. Glen Bower then becomes sort of the chief deputy at the secretary of state's office.

Well, Glen Bower begins to see what's going on, that secretary of state employees are not where they are supposed to be. They are overworking at the campaign, when they are being paid for by the state. And he raises that issue with George Ryan. And George Ryan's reaction to it is very revealing, in terms of his approach to this whole issue.

Now, Glen Bower is the governmental guy. Scott Fawell is the political guy. Does George Ryan go to the governmental guy and say, "I will not tolerate this. You tell Fawell that this will not be condoned. You can't do this"? No.

Ryan goes to his political guy, Fawell, and he tells Fawell -- he tells him, "Glen is complaining about the girls. Work it out, will you?" That's his reaction. Not, "We have got to do it right. We have got to comply with the law." That's not his reaction. "Work it out."

And, of course, he knows what Fawell is going to take that to mean. And Fawell does then have a meeting. He calls Glen Bower in. He calls a number of other high-level SOS officials in. These are people who are very close to Ryan. And in the presence of all these people, he reams out Glen Bower. He basically tells him, "I am in charge. We are going to do things the way I want to do them, and I don't care what you are saying, Glen Bower."

Did Fawell care about this? Did he worry about reaming out Glen Bower in front of all these other high-level secretary of state employees? No, he didn't, because he knew he had George Ryan's full support in stealing state resources for the campaign.

Now, George Ryan gave the keys to his political future to Scott Fawell. Ryan cared about results and about climbing the political ladder, and Fawell made it happen.

Never once was Fawell reined in. Fawell himself testified to that. Rather, Ryan gave Fawell more and more rope, leading up to the 1998 campaign when George Ryan obtained the highest office in Illinois by cheating.

There is one other instruction before we wrap up this section that I would like to discuss with you, and that is, when you have a conspiracy such as is charged here, a person doesn't have to personally participate or even know about every specific act that is committed in furtherance of

referenced it. So I make that record just because I think it goes ultimately to the merits of the motion.

MR. LERMAN: Your Honor, I'd have to check my notes to see what we did. I did not have an opportunity to do that.

THE COURT: Well, I'm sure we'll have the time to do that. We can bring in our jurors.

MR. COLLINS: We've tendered Ms. Barsella's charts to both sides, Judge. Mr. Genson already made notice of one issue, and we're going to try to resolved that before Ms. Barsella starts.

THE COURT: Great. Thank you.

(Discussion off the record.)

MR. COLLINS: I hate to give Mr. Genson any concessions, but we still think we're going to do this in five hours. It's that we just had two hours and 15 minutes of time, so we still think we're going to get done in about five hours.

(Jury in.)

THE COURT: You may be seated.

Ladies and gentlemen, just a reminder. Mr. Ryan's statements to Government agents and the press is not evidence against Mr. Warner.

You may proceed then, Mr. Levin.

MR. LEVIN: Thank you, Your Honor.

CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT (Resumed.)

MR. LEVIN: Just one comment before we move on to the

necessary for us to prove a quid pro quo. I used that term before, I think. In other words, that it was I give you this, you give me that; it doesn't have to be that sort of relationship.

The defense throughout its questioning of witnesses and in opening statement has repeatedly attempted to focus you on corrupt payments of money or cash bribes, but that's not the case that we have charged here. What the Government's case is about is that George Ryan received these financial benefits for himself and steered other benefits to third parties, benefits that were not disclosed to the public, from the very individuals and during the very time frame that George Ryan was steering these various people profitable and lucrative leases and contracts.

So it's this undisclosed flow of benefits that was charged in the indictment, it's this undisclosed flow of benefits that is in violation of the law, and it's this undisclosed flow of benefits that were proven in this case beyond a reasonable doubt.

One of the instructions that the Judge will be reading to you concerns a conflict of interest by a public official, what that means and what the significance of it is. The Judge is going to instruct you that a public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or

next section, the flow of benefits. Before lunch, I showed you some of the jury instructions on the screen that the Judge will be reading to you. I want to emphasize that these are not the only instructions. The instructions I put up there are just excerpts of some of the instructions the Judge will be reading to you.

I don't want to imply that these are the most important ones. These are some of them that apply to some of the things that I'm talking about. But I think there's going to be over 100 instructions that she's going to be reading to you, so I just want you to understand that these are not by any means the only or even necessarily the most important ones, just so that you understand that.

I'm going to be referring to some other instructions as we go along in the balance of my argument. I think I've probably got about maybe 35, 40 minutes left, and then I'm going to pass the baton to Ms. Barsella to continue for this afternoon.

I want to go now to the next section which I call "flow of benefits," and the flow of benefits that we're talking about here are the flow of benefits that Mr. Ryan, his friends and family received as part of the conspiracy, as part of the scheme.

In discussing the undisclosed benefits that Ryan and his family received, it's important to remember that it is not

knowingly fails to disclose a material personal or financial interest, also known as a conflict of interest, in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services if the other elements of the mail fraud offense are met.

And this instruction, the conflict of interest comes into play here because the benefits that we're talking about were really undisclosed. They weren't disclosed on George Ryan's statement of economic interest. They weren't disclosed on lobbyist registration statements that were filed by Mr. Swanson and Mr. Warner.

Anyway, a couple more legal propositions. You don't have to get cash for it to be illegal. You can receive other financial benefits as part of a scheme as has been charged here. You don't have to take the benefit yourself. If you direct it to a third party, a relative, a friend, that also can be part of a scheme. That also can be part of an undisclosed benefit.

In the case of George Ryan, a person who had the CFR funds to use, many of the undisclosed benefits that we're talking about that you heard about in this case did go to his family and friends. In terms of this issue, that is, benefits going to third parties, the Judge is going to instruct you that a participant in a scheme to defraud may be guilty, even if all

the benefits of the fraud accrued to others, so long as the Government has proved the other elements of mail fraud beyond a reasonable doubt. The public may be deprived of its public official's or employee's honest services, no matter who received the benefit of the fraud, so long as the Government has proven the other elements of mail fraud beyond a reasonable doubt.

So let's take a look at the flow of benefits that we're talking about. The first category that is on the screen now is benefits to George Ryan and his wife personally, what they received. There are various Warner-related gifts and benefits probably -- including $250,000 in solicited contributions for Ryan's campaign fund, and the $250,000 figure comes from Nicole Altounian's testimony about the $175,000 fund-raiser that I talked about this morning as well as another fund-raiser that raised $75,000 in 1996.

One of the interesting things about it, this is not Larry Warner's money. This is money, for instance, in that fund-raiser in 1998, he sponsored that fund-raiser. He was the one who put it on. He solicited money from other people. And as is typical of Larry Warner's activities in connection with the campaign contributions, his name is not on the D2s. It's the names of these other people whose money he got who then contributed to George Ryan's campaign fund. It's their names that appear on the D2. Once again, his name is on the other

people who gave money. Once again, as he so often is, Larry Warner is behind the curtain on the campaign contributions that he's bringing in for George Ryan.

Next on the list is something that I've talked about quite a bit already, and this is the $13,500 in cashback transactions with Larry Klein. What this is essentially is the free vacation stays in Jamaica year after year.

The next item is the two Palm Springs vacations in '94 and '96 with Harry Klein, and I've mentioned these already. Harry Klein had the condo in Palm Springs where George Ryan stayed a couple times.

There's the Cancun vacation in February of '95 with Swanson where the Ryans stayed down there in Swanson's time-share.

In addition, there are $3,000 in check payments from Anthony DeSantis. Anthony DeSantis testified he wasn't and isn't a friend of George Ryan. He gave George Ryan this money. The checks were broken up into $500 amounts. George Ryan took that money and put it in his bank account, and he also then ends up approving low-digit plates for Anthony DeSantis.

Then finally on this list are various Swanson-related gifts and benefits, and a lot of these gifts and benefits, the Swanson-related gifts and benefits, aside from the Cancun vacation, a lot of these come out of Swanson records that were admitted as part of stipulations, part of the Grace Davis

stipulation. There's actually two Grace Davis stipulations that are in the record that will be available to you.

These gifts and benefits we know about either from Sandra McAvoy's testimony, and she testified, for instance, when they were in Mexico on one of the trips, Mr. Swanson bought a Lladro figurine for the Ryans. That was one of the gifts she testified to. Most of these gifts -- and I'm just going to run through them quickly -- these are things that come out of Swanson's business records, and that's how we know they were purchased and that they were for the Ryans.

There is what's called a Lalique figurine, and this is the invoice for it out of Swanson's records. It cost about $1200, and according to the stipulation of Grace Davis' testimony, she wrote the name "Ryans" on it, on that credit card slip on the left side of the page, at Swanson's direction. In other words, this was a gift that Swanson was giving to the Ryans in May of 1996.

There's a golf bag. I think $350 comes off of a Swanson business record. This is Belding Sports' record of this golf bag that Swanson buys for Ryan.

There's a $400 Santa that Swanson buys at the Illini Country Club that Sandra McAvoy testified about.

There's also a $550 payment gift that's recorded in Swanson's business records for 1995, and this comes from Government Exhibit 16-029. Swanson has got it on a list of

business promotions for that year, for 1995. So this is one of the gifts that Swanson gave to the Ryans.

None of these items, none of these items that I've been discussing, these Swanson gifts, are reported on either Swanson's lobbyist registration statements or on George Ryan's statement of economic interest.

Now, the next category of flow of benefits are flow of benefits to Ryan friends. What this is all about, what these benefits are to Ryan friends, this is essentially George Ryan, for all intents and purposes, going in Larry Warner's bank account and telling Larry Warner how he wants some of his money directed to friends of George Ryan.

In other words, Larry Warner is making money from his activity from his lobbying activity. George Ryan directs or tells him: I want some of that money to go to Don Udstuen. I want some of that money to go to Ron Swanson.

And let's talk about a couple of these. The first one up here is the Ryan-approved payments to Udstuen from Warner's ADM and IBM proceeds. This gets back to the Warner-Udstuen arrangement whereby Larry Warner goes to Udstuen in 1991 and tells him with George Ryan's blessing there is going to be an arrangement where Warner is getting this lobbying money and Udstuen is going to be getting a cut of it. And Udstuen, he tells him: You've done more for anyone -- for George Ryan in all these years that you've supported him.

the benefits of the fraud accrued to others, so long as the Government has proved the other elements of mail fraud beyond a reasonable doubt. The public may be deprived of its public official's or employee's honest services, no matter who received the benefit of the fraud, so long as the Government has proven the other elements of mail fraud beyond a reasonable doubt.

So let's take a look at the flow of benefits that we're talking about. The first category that is on the screen now is benefits to George Ryan and his wife personally, what they received. There are various Warner-related gifts and benefits probably -- including $250,000 in solicited contributions for Ryan's campaign fund, and the $250,000 figure comes from Nicole Altounian's testimony about the $175,000 fund-raiser that I talked about this morning as well as another fund-raiser that raised $75,000 in 1996.

One of the interesting things about it, this is not Larry Warner's money. This is money, for instance, in that fund-raiser in 1998, he sponsored that fund-raiser. He was the one who put it on. He solicited money from other people. And as is typical of Larry Warner's activities in connection with the campaign contributions, his name is not on the D2s. It's the names of these other people whose money he got who then contributed to George Ryan's campaign fund. It's their names that appear on the D2. Once again, his name is on the other

people who gave money. Once again, as he so often is, Larry Warner is behind the curtain on the campaign contributions that he's bringing in for George Ryan.

Next on the list is something that I've talked about quite a bit already, and this is the $13,500 in cashback transactions with Larry Klein. What this is essentially is the free vacation stays in Jamaica year after year.

The next item is the two Palm Springs vacations in '94 and '96 with Harry Klein, and I've mentioned these already. Harry Klein had the condo in Palm Springs where George Ryan stayed a couple times.

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And, of course, we know that was true. Udstuen had been a long-time political supporter of George Ryan. So the arrangement that Warner and Ryan work out here is that Warner is going to be getting this lobbying money, but some of it is going to be siphoned off and directed to Don Udstuen for all the support, for everything he's done for George Ryan.

So as I said, what's going on here is essentially Larry -- George Ryan is going into Larry Warner's bank account and telling him: I want some of that to go to Don Udstuen.

That's what that's all about, and a similar thing happens to the Viisage money. The Viisage money is money that Larry Warner gets from this company that is making the digital driver's license. He's getting paid by them for his so-called lobbying activity. George Ryan goes into the bank account of Larry Warner on that as well and tells him: I want Swanson paid some of that money.

How do we know that? We know that because Fawell testified that Warner complained to him that he had to pay Swanson some of the money from Viisage. So $36,000, there's 12 checks for $3,000 apiece that are paid by Warner to Swanson for doing nothing. That's all of these payments being paid to people for doing nothing. They're Ryan-directed payments to Udstuen and to Swanson for doing nothing. That's what these are, benefits to Ryan friends, benefits from Larry Warner's bank account.

The next category of benefits in this flow of benefits to Ryan's friends and family are benefits to the Ryan family, and there's a host of them. The first one is a $95,000 loan that says it's to Comguard, but it's a little more involved than that. There was this company called Comguard which Tom Ryan, George Ryan's brother, was involved in. I'm going to spend a couple of minutes now talking to you about Comguard and what it was and how it fits into the case.

Comguard was an electronic monitoring company that had a contract with the State of Illinois to provide electronic monitoring devices, and it was a company that was a financial mess from the beginning. All during the 1990s Comguard had this contract with the state, they were never making decent money. We heard from a couple witnesses in the trial about what a financial disaster it was. What happens on a couple of occasions is that Larry Warner ends up pumping some money into Comguard, and I'll talk about that in a couple minutes.

But just to finish up on Comguard and how it fits in, you heard testimony from a woman named Cynthia Hansen who worked for Comguard for a couple of years. There was a problem with Comguard paying her as an employee because Comguard was in such terrible financial shape. So what happens is Tom Ryan tells her: Don't worry about it. I will get George to take care of it.

Then the evidence has shown that, indeed, George Ryan

through his secretary Lynda Long directed Kevin Wright, Kevin Wright, to have the comptroller's office expedite payments to Comguard. In other words, Comguard had a contract with the state. The payments were not coming out quickly enough. The checks weren't being cut quickly enough, so George Ryan steps into the mix. He gets the comptroller's office to expedite those payments so that his brother's company can get paid faster.

So what's going on here is George Ryan, public official, Secretary of State, is essentially playing interference. He's getting involved on behalf of his brother, Tom Ryan, who has his own private financial interest. George Ryan is using his official authority to help get those payments to Comguard expedited, and the evidence is that Comguard then continued to be paid in this expedited manner by the state thereafter. So that's basically a nutshell of what Comguard was.

Let's get back now to the $95,000 loan. What happens with this $95,000 loan -- and I think we've got another screen that lays this out because, as I said, it's not really a loan directly to Comguard -- what happens here is this.

In September of 1997, Comguard got a loan from Kankakee County. They got it, I think, around '93. They got into default. They were late in their payments. It was a mess. It was embarrassing. When '97 comes around, it's

getting bad publicity. It's very bad timing because George Ryan is announcing his candidacy for governor in August or early September of 1997, so politically it's embarrassing.

And you may recall the testimony of Bruce Hewitt, who was the Kankakee County Board President, I believe, at the time. He testified he had a conversation with Tom Ryan about how this was nasty politically. The publicity was bad. Something needed to be done about it.

To make a long story short, what happens here is that after Comguard -- Comguard reaches an agreement with Kankakee County to settle this thing, but it's still -- there's still some bad publicity there. So what happens then is a friend of George Ryan's, a Kankakee businessman named Harry Lockman, he steps up. He pays off the loan, and he does it through this attorney, Richard Ackman, who then comes up with the money to pay off the county so that there won't be any more embarrassing publicity about George Ryan's brother's company.

So the loan gets paid off. That's around September of '97. Mr. Warner's role in this is that he then steps up behind the scenes to help George Ryan's friend out, Harry Lockman. Larry Warner then comes up with the $95,000 to pay Harry Lockman who's already paid off the Comguard loan. It's kind of confusing, but basically what happens is he takes Harry Lockman out of the deal by supplying Lockman with the $95,000 that he has already paid to pay off the loan.

So then when it's repaid -- and the money is eventually repaid -- it sort of reverses direction. It comes back from the county to Richard Ackman, to Harry Lockman, and then to Larry Warner.

But this is the first benefit that was on that other chart. This is the $95,000 that Larry Warner has supplied this friend of George Ryan in order to sort of stem this negative publicity that was being created by the financial mess that Comguard was in.

Now, going on here, what's interesting about the $95,000 loan, it comes after Warner has already thrown $50,000 into this Comguard mess. I think it's June of 1994, Larry Warner had loaned $50,000 to Comguard, and loaning money to Comguard was like throwing it down the toilet. Because it was such a mess, you were never going to get it back. And the evidence was that I think he was only repaid about $8,000 out of the $50,000 that he had lent to Comguard.

So here he is a couple years later, '97, never having been repaid most of the $50,000, but he still comes forward and puts out another $95,000 to get George Ryan's friend, Harry Lockman, to get him out of the equation, to help George Ryan. So there are a couple of these financial transactions with this Comguard company, Tom Ryan's company, that Larry Warner pumps money in to help George Ryan out. Those are benefits to George Ryan provided by Larry Warner.

Moving on, we've heard evidence of $9,000 in insurance and construction benefits to Michael and Linda Fairman, the daughter and son-in-law of George Ryan. As you know, Larry Warner was in the insurance adjusting business. Over the years, there were some insurance claims, some insurance construction -- well, some construction, I believe, that was done for Linda Fairman, and then there was some insurance adjusting done for Michael Fairman that totals around $9,000.

With respect to Linda Fairman, she never pays off the entire amount that she owes Larry Warner for that, for that construction that was done. These are benefits, once again, to the Ryan family provided by Larry Warner.

There's $6,000 in investments that Larry Warner makes in George Ryan's son's cigar business. Once again, this is like throwing money down the toilet because the business is a failure. There's no way that Larry Warner expects to get anything of that money -- expects to get any return out of it.

There's a $5,000 loan to Ryan's son-in-law, Michael Fairman. Michael Fairman, you'll recall, was the one who had a serious gambling problem. This also is like throwing money down the toilet. The one thing about these Larry Warner loans, if your last name is Ryan, if you're a family member of George Ryan, you know you don't have to repay the loans because, by and large, these loans were not repaid and Larry Warner didn't

expect them to be repaid, by and large.

The final benefit in terms of Warner is the $3,000 -- $3,185 payment for the band at the wedding of Ryan's daughter Jeanette. What happens here, this is the check. We've got it on the screen now. This is Government Exhibit 23-003. What happens here is Larry Warner literally gives George Ryan a blank check, a blank check to cover some of the costs of the band at his daughter's wedding.

What this is is George Ryan is paying the costs of his daughter's wedding. He's entered into a contract with the band to pay for the band. Larry Warner had nothing to do with that. This is not a gift to Jeanette for her wedding.

So in any event, George Ryan hires the band. He's going to pay the band, and he does pay a deposit for the band. I don't know if it's one-third or one-half. Whatever it is, the contract is in evidence.

Then the day of the wedding comes, the day of the wedding, and what's interesting is this date when the check is written, this is, I think, maybe five days after Viisage, Viisage, the company that Larry Warner is representing, they've just gotten their big state contract.

So here we are five days later at Jeanette's wedding, and Larry Warner comes up with this blank check. This check has both Larry Warner's signature on it, but the other handwriting on it is George Ryan's. So this is a $3,185 gift

to George Ryan with, as I said, George Ryan's handwriting. He writes in the name of the band. He writes in the name and the amount. It's given to George Ryan by Larry Warner just within days after Larry Warner has received the Viisage contract.

Going down the list now in terms of benefits to Ryan friends and family, there's a $2200 vacation to Ryan's daughter Julie Koehl, one of his daughters and her family. This is in 1999. This is a Swanson benefit. Mr. Swanson pays for Julie Koehl and her family to stay at Disneyworld. He pays the hotel costs which amount to $2200 for Julie Koehl and her family to stay at Disneyworld. This comes in 1999, just shortly before Ryan then arranges for Swanson to get the McPier lobbying contract which, as I said before, is going to amount to $180,000 of lobbying fees for Ron Swanson.

Finally, there's $1,000 in check payments from DeSantis to Ryan's son, George Junior, and his wife. What this is -- and I talked or I alluded to it earlier -- is when George Ryan talks to Anthony DeSantis, Anthony DeSantis, who is a political supporter but not a friend, he wants to give George Ryan some money. George Ryan figures out a way where he thinks it won't be reported on any form, and the way he figures it out: Well, you split it up in $500 checks. You give some to my son, some to his wife, some to me, some to my wife, so it's split up into four different pieces.

This is the money that's then directed to the son and

Transcript of Proceedings AM (Barsella, Webb Closing) P. 23059-173 3/7/2006 9:38:00 AM

23095

Decal and from IBM.

Now, Udstuen got that money from Warner for pretty much doing nothing, or close to nothing, because, you see, Ryan blessed that arrangement.

10:31AM Now, Mr. Udstuen is by no means a choirboy. I mean, we've heard about the things that he has done. But, you see, he is a longtime friend of George Ryan. He supported George Ryan at every turn, at every point of George Ryan's ascent in his political career. And he has done nice

10:31AM things for George Ryan's family.

Don Udstuen was very close to Ryan since the 1970s, and he was in Ryan's inner circle. And he had a vantage point to see many things with regard to how George Ryan operated.

10:31AM Now, like Fawell, Don Udstuen got a good deal that's going to reduce the amount of time that he will do in prison. But he is guaranteed that he is going to prison, under the terms of the plea, and most probably will be in the range of 10 to 16 months. He has also had to give up his

10:31AM ill-gotten gains.

Now, he did get a good deal, but it's important to note that a large piece of the criminal conduct that he has admitted to involved this Metra kickback scheme, and that was information that the government didn't even know about until

10:31AM he started cooperating.

23096

So the government's plea agreement with him incorporates the cooperation that he gave not just in this case, but also in connection with that Metra kickback scheme that it didn't even know about.

10:32AM Now, again, Don Udstuen hasn't yet been sentenced. And that is something that Judge Pallmeyer will be deciding at a later point.

Now, one of the -- the fourth point that Mr. Webb made in his opening statement is that the State of Illinois

10:32AM was not cheated or defrauded.

And he said, basically, that the state was not cheated out of anything and all the contracts and leases were necessary and recommended by the professionals.

I want to spend a few minutes on this.

10:32AM Mr. Webb focused on tangible contracts and leases when he told you this, but let's just put that to the side for a second.

The evidence in this case has shown over and over and over that the state and the public have been cheated and

10:32AM defrauded out of the honest services of George Ryan. And these are services that they were owed, and Judge Pallmeyer will instruct you on that.

So, first of all, right off the bat, the state and the public have been defrauded, and they have been defrauded

10:33AM of the honest services of George Ryan.

23097

But now, if we want to talk about tangible things that they were defrauded of, we have plenty to talk about.

First of all, Mr. Levin showed you yesterday a number of the contracts that really resulted in tangible

10:33AM dollar-amount losses for the State of Illinois.

He talked about how the secretary of state's moves to South Holland and to Lincoln Towers cost actual money that can be quantified.

Also, with regard to the moves to Joliet and

10:33AM Bellwood, the state overpaid for those contracts, and that's basically because there was no competition. Likewise, there was no competition in the sticker contract. And so that's another tangible benefit -- or tangible loss to the state, because competition, of course, is what drives prices down.

10:33AM When you don't have competition, you don't necessarily have the lowest price.

And with regard to that McPier contract that I talked to you about just a few minutes ago, that's $180,000 of tangible loss to the state.

10:34AM And with regard to the diversions that Mr. Levin talked to you about yesterday, you heard all about how, during all these political campaigns, state resources were used in order to advance political campaigns; workers working on state time and materials being taken from state offices in

10:34AM order to advance people's political campaigns.

23098

Also, with regard to Ryan's activities involving the inspector general department, it's clear that the investigative function of that office was severely compromised, and that also is a loss to the state and to the

10:34AM public.

Now, although all these items show that the state was in fact cheated and defrauded of various assets as a result of the defendants' scheme, it's important, though, to know this; and that is, the government does not have to show

10:34AM one penny of loss in this case for you to find the defendants guilty of participating in the charged mail fraud scheme.

The government is -- I am sorry. The Judge is going to instruct you, when it comes time for the instructions, of the following instruction. She is going to

10:35AM tell you: "The mail fraud statute can be violated whether or not there is any loss to the victim of the crime or gain to the defendants."

So let's just keep that clear. We didn't have to even show you a loss. And yet there were losses, and there

10:35AM were many losses. Mr. Levin went through them with you yesterday.

The fifth point that Mr. -- that came up during the opening statement of Mr. Webb was providing benefits to supporters is part of politics, not a crime.

10:35AM Mr. Webb told you that we all live in the real

about it for several hours.

MR. COLLINS: Judge, objection to "the people at this table," Judge. We don't believe this case is in trouble. Objection.

12:10PM THE COURT: Let's move on.

I am going to remind the jurors that the comments made by lawyers are based on the evidence in this case.

You may proceed, Mr. Webb.

MR. WEBB: Let me say it this way. This case is in

12:11PM trouble. And this case is in trouble because of what I have put on one page here. And I am going to talk about it for some extended period of time on behalf of George Ryan.

I am going to start with the first point on the chart. No witness testified that George Ryan accepted

12:11PM personal or financial benefits to perform official acts.

That issue is critical to your verdict in this case, not because I tell you that; because Judge Pallmeyer is going to give you legal instructions, and you are going to read those instructions and apply them to the facts.

12:11PM Courtney, can I have Tab 132?

I want to show you an instruction that I am going to call to your attention right now that relates to this issue, and I ask you, when you go back to deliberate, look for this instruction. And I am going to read it off because

12:11PM the language is critical as far as what the government has to

prove.

"A public official" -- George Ryan -- "public official's receipt of personal or financial benefits or the receipt of such benefits by the public official's family,

12:12PM friends, employees, or associates does not, standing alone, violate the mail fraud statute, even if the individual providing the personal or financial benefit has business with the state," like Larry Warner or Ron Swanson.

The Court goes on to state, "Instead, that

12:12PM receipt" -- the receipt of personal or financial benefits -- "that receipt violates the law only if the benefit was received with the public official's" -- that's George Ryan's -- "understanding it was given to influence his decision-making."

12:12PM That's the law. That's the instruction.

And come back to Chart 1 for a minute with me, Courtney.

Because that's why I put the first point on this chart, this, okay. Because when you compare that instruction

12:12PM to what I have down as the first point on this chart, no witness has testified that George Ryan accepted any personal or financial benefits from anybody, ever, to perform official acts.

The bottom line is, this trial is over. The

12:13PM government cannot call any more witnesses to the stand. That

is the law and that is the evidence. And that is what has happened.

You have heard -- you heard during this trial, the government did a seven-year investigation. They literally

12:13PM tore apart this man's life. For seven years they did this. They talked about doing 650 interviews of people. They subpoenaed every document, every event, everything this man has done in his life. They have torn it apart, and we have now had a five-and-a-half-month trial, five and a half

12:13PM months.

They called 83 witnesses. 83 witnesses have been called to testify in this trial. And what I put on this chart here is the truth, that no witness testified that George Ryan accepted anything from anybody to perform his

12:14PM official acts.

Maybe they proved he made some mistakes in judgment. Maybe he did things you don't think he should have done as a public official. But that is something he did not do. And no one has testified that he did.

12:14PM What that is, that first item I have on the chart, that's basically the 100-pound gorilla sitting in this courtroom that the government does not want to acknowledge exists, because -- you know, Mr. Levin yesterday, he talked about -- but all the rhetoric in the world cannot change

12:14PM that, not mine and not theirs.

So when I heard Mr. Levin yesterday talk about 12 years of Christmas and "for sale" signs and Ms. Barsella talking about kingdoms and fiefdoms, that can't change it.

In fact, if you want to use rhetoric, how about

12:15PM this: Seven years of hell. Because that's what he has been through as they have torn apart everything he has done in his life, everything he has done as a governor, as a secretary of state. All those interviews, all these witnesses, and they -- by the way, if there was somebody out there in the

12:15PM world that could have walked into this courtroom and said that George Ryan accepted some money or some -- anything to affect his official judgment and put the facts on the table, these people would have done so.

Remember, we have the FBI investigating him. We

12:15PM have the Internal Revenue Service investigating him. We have the postal inspection investigating him. We have the United States Attorney's Office investigating him. We have the entire machinery of law enforcement at the federal level here in Chicago investigating George Ryan because he is a

12:15PM prominent public official. And seven years later, a trial with 83 people testifying, and they didn't put anybody on the stand to say that.

And that's critical. It's critical because of the law and the instructions that I just showed you on the

12:16PM screen.

horrific interview we did in a hotel room that they picked, at the time they picked, with two lawyers in the room, with furniture they arranged, with a four-month time-out. Unfair? Is that an unfair thing we did to Mr. Ryan in February 2001?

04:13PM So he was mad at us, so mad at us, that as the governor of the State of Illinois, his press secretary stood up and said, "We commend this Operation Safe Road investigation. Go get them."

March 2001, ladies and gentlemen. That's what Mr.

04:13PM Ryan said to the public.

And it didn't stop there, ladies and gentlemen.

You heard Scott Fawell, Rich Juliano, Don Udstuen, Alan Drazek, Andrea Coutretsis. You even heard about a plea agreement with Dean Bauer. This investigation did its job,

04:13PM and the seven years of hell kicked in when the evidence got closer to George Ryan.

That's the truth of the matter, because as of March of 2001, George Ryan was saying, "Go get them, Feds. Go get them. Do the job, keep the roads safe."

04:13PM So the Inspector General department, Mr. Webb boiled it down to the March -- the May '95 memo.

Is that the story, ladies and gentlemen? Are those the truths in the details? Is that the facts? Is that what really happened? You decide.

04:14PM Who cares? Who cares about the Inspector General

department? You decide.

And, ladies and gentlemen, when I cover these sequences, I want to just reference -- and I'm going to talk more about the indictment tomorrow -- I'm going to reference

04:14PM what part of the indictment the Inspector General's Office relates to.

That only relates to the racketeering count, Count 1. There's no mailings associated in 2 through 10. But that's what it relates to.

04:14PM And it does not relate to Mr. Warner. I want to make that clear.

Harry Klein, this is another good one. Truth's in the details. I'm going to tell you everything. I'm going to blow through all the facts. None, zero, zippo. Let's talk

04:14PM about Harry Klein.

What was the story we heard about Harry Klein that Mr. Webb told you yesterday?

He told you, ladies and gentlemen -- and I'm not sure I got this right -- that this Harry Klein guy, this

04:15PM friend of George Ryan's, even as he testified, this guy who doesn't want to hurt George Ryan, not in the least bit -- he likes George Ryan, he's a nice man -- Mr. Webb now, for the first time, suggested yesterday to you that Mr. Klein had a business interest to take these checks from George Ryan,

04:15PM because, he said, he wanted to get money to Mr. Canfield,

who's a co-owner.

That's what Mr. Webb said, okay? So keep that in mind, because that's what he boiled down the Klein story to.

That's not the way it happened. That's not the

04:15PM truth in the details. That was speculation. Let's talk about the facts.

Jamaica story. Next slide, please, 22.

Ladies and gentlemen -- and, again, I'm putting up the slide because it is important.

04:15PM This benefit, this case that they trivialized, what was the benefit that George Ryan got from Jamaica?

This is a pretty nice place, folks. This is a pretty nice place. He went there '93, '94, '95, '96, '97, one year there was two, two, '99, 2000, 2001, 2002. It was a

04:16PM significant benefit, ladies and gentlemen, to George Ryan. They can poo-poo it, but it was a significant benefit to George Ryan.

Did it influence his official action? You decide.

But let's talk some more about the facts.

04:16PM So he gets this benefit every year. Well, where's the fraud, Mr. Webb wants to ask? Where's the fraud? Well, it starts in 1993.

Every check, every check that Mr. Ryan wrote or Lura Lynn Ryan wrote, every check was cash back, every check.

04:16PM Deceit, that's what fraud is. It's cheating, it's stealing,

it's lying. That's what fraud is. It's saying what something is when it's not.

Every one of those checks is a fraud, it's a lie, it's a deceit, and it's from the Secretary of State's Office

04:16PM and it is from the sitting governor.

And should he be held to a higher standard? No, but he does take an oath. Mr. Warner didn't, but Mr. Ryan did.

Now, let's talk again about how this went down,

04:17PM number 25.

Scott Fawell -- and, again, we heard about Scott Fawell. I'm going to talk about him a little bit.

The latest version of Scott Fawell, I heard Mr. Webb embrace him, 95 percent of what he said, but, oh-hoh,

04:17PM he's lying about the edges on some things, lying about the edges on that Gramm thing and that Viisage thing, lying about the edges, you can't believe him. What?

He's -- 95 percent of what he says is true, but the two things, one of which is not even all that significant, he

04:17PM is lying on the edges? Well, he didn't tell -- say he was lying on the edges on this one. And what did he say here?

"With respect to lodging, what did Mr. Ryan say regarding the issue at that table there?"

We're talking about a Jamaican picnic table where

04:17PM they drink Red Stripes.

Transcript of Proceedings AM (Collins Rebuttal) P. 23729 - 23839 3/10/2006 8:56:00 PM

23741

Mr. Webb didn't talk about the Bruce Clark campaign. Bruce Clark campaign, you recall, George Ryan's relative is running for the House down in Kankakee. You heard from Mr. Juliano. He attended a meeting with George
10:04AM Ryan to talk about that campaign during the middle of the day. You heard Deb Detmers talk about getting phone calls from George Ryan to talk to Brad Roseberry, who was the guy down on the ground in Kankakee.

Brad Roseberry testified that he was the guy down
10:04AM on the ground in the Kankakee, and that he was summoned up give an update, and there was a question about him doing campaign work on state time. That very issue.

And Fawell said -- and, again, say what you want about Scott Fawell, but you know what? He said it. He said,
10:04AM "We ain't going to do that. We aren't putting you off the payroll. We are going to keep you on. We are going to keep cheating the taxpayers." Scott Fawell said that.

Where was George Ryan? Sitting in that room. What did George Ryan say? Nothing.
10:05AM 1994. George Ryan is running for reelection. Scott Fawell is the campaign manager. He is running this campaign against this guy Pat Quinn, a contested election, a statewide election.

Folks, this November '93 memo that they are selling
10:05AM you, this is right after the November '93 memo. Don't do any

23742

work on state time. You are prohibited from doing campaign work on state time.

Where is Scott Fawell? Running the campaign for George Ryan. Mr. Levin put up the chart, the floor plan. He
10:05AM was -- the only thing that separated Scott Fawell, the hub of the campaign, from George Ryan was a conference room, ten feet away from Scott Fawell. Scott Fawell testified that he had repeated campaign conversations on state property on state time with George Ryan. Did George Ryan know? You
10:06AM decide.

Was that November '93 memo the truth, or was it what George Ryan wanted the public to believe?

Was that an effort for integrity in government, or was that part of the coverup? You decide.
10:06AM December '94, that Magna Carta I talked about yesterday, Government Exhibit 01-019, last page. A very important document, folks, for you to look at. Campaign -- and this is the last page of this document.

"As you know" -- Scott Fawell writing to George
10:06AM Ryan. "As you know," as you, George Ryan, know -- "I have met with almost all of the staff that were part of the organizational structure of the campaign. Most of them are looking for very little. They are happy, but some do need to be plugged in. I will go through these with you later or
10:06AM just handle myself."

23743

Scott Fawell testified that basically he handled them himself.

George Ryan is on notice. You don't even need
10:07AM ostrich. George Ryan knows it right here, Number IV, that Scott Fawell is doling out state benefits, jobs, perks, promotions because of what people did politically.

That ain't what the taxpayers pay people to do. You don't get a promotion because you did a nice job for George Ryan on the campaign.
10:07AM George Ryan is being told that by Scott Fawell. Say what you want about Scott Fawell, but he tells it like it is: Factually.

So what happened then?

Go back to the cover slide, 4.
10:07AM Next campaign. Ladies and gentlemen, if there ain't ostrich, then there ain't ostriches, because this is it. 1996, HRCC campaigns. Mr. Webb didn't talk about this. Scott Fawell testified he was having a conversation with George Ryan. He was putting together -- again, these are
10:07AM House races, a statewide campaign. The Fawell-Ryan organization is going to get some political credit for helping people get elected throughout the state. They are these targeted races, certain races. They are trying to have Republicans control the House. Nothing wrong with that,
10:08AM folks. But these are all state workers, SOS employees.

23744

Scott Fawell has arranged for them to get paid. He comes to George Ryan to tell him about it. What does George Ryan say? "I don't want to know. I am sticking my head in the sand. Scott Fawell, you know what to do. I taught you
10:08AM in 1988. Do what you got to do."

Did George Ryan know?

1995, 1996, the Gramm campaign. Ladies and gentlemen, the Gramm campaign, Mr. Webb called it a tempest in a teapot, I believe. It's relevant on a number of levels.
10:08AM There is a diversion component to it. You heard testimony from Juliano and Fawell that they did campaign work on state time for the Gramm campaign in 1995 and 1996. Where did they do it? Feet from George Ryan, sometimes in Mr. Ryan's office. That's where they did political campaigning.
10:09AM That November '93 memo: Do not do political campaign on state time. It's happening in his office, folks. In his office.

The Gramm campaign. I also want to talk about a real fraud with the Gramm campaign. George Ryan is getting a
10:09AM secret payment, consulting payment. You heard him, Novembe of '95 -- '05. In the middle of this trial, you heard him make a statement about, "I earned every penny of the Gramm campaign." Did John Weaver know about that? Did Phil Gramm know about that?
10:09AM Phil Gramm, when he was asked about, "Would you

Transcript of Proceedings AM (Collins Rebuttal) P. 23729 - 23839 3/10/2006 8:56:00 PM

23761

August. You heard testimony of a Warner fund-raiser at Lino's. And Mr. Genson is right. You are going to get an instruction, folks, that a campaign contribution, standing alone, there has to be a specific quid
10:31AM pro quo if it's standing alone.
But, folks, this isn't even a campaign contribution. You can look through all the D-2s in evidence -- all the years, folks -- and you will never see Larry Warner's name once. I think once you see a $500 LE
10:31AM development -- LE Warner Development. Larry Warner, this m of means, he wasn't going to put his name on the D-2s. Scott Fawell told you he had a conversation with Larry Warner. He doesn't want his name public. Conceal. Hide behind the curtains.
10:31AM Well, these are benefits, folks, to George Ryan. September '97. These guys go to Las Vegas together, the Golden Nugget. Those are in evidence. Ryan's bill was paid in cash. Could he have won at the casino that night? Well, it's possible. We don't have evidence that he
10:32AM did or didn't. What we can tell you about this casino stuff, folks, is, George Ryan never declared one penny during the time of this scheme. You look at his tax returns. He never declared one penny of gambling winnings.
1988, before we have alleged the scheme began, is
10:32AM the only time, based on the records in evidence, that George

23762

Ryan reported gambling winnings.
October of '97. $95,000 loan to Comguard. And I do want to talk about this for a minute.
Number 17.
10:32AM This is this Comguard-related loan. And there was an explanation of this three-, four-step transaction.
Harry Lockman. You heard about Harry Lockman. When we interviewed George Ryan, Ray Ruebenson testified Harry Lockman, 40-year friend of George Ryan's, longtime
10:32AM friend of George Ryan. He is not a friend of Tom Ryan's. You heard no evidence of that. He is George Ryan's friend.
So what was Larry Warner doing? Larry Warner -- Harry Lockman had basically stepped in to help Comguard. Larry Warner is basically taking Harry Lockman out of the
10:33AM equation. So he is pumping in 95,000, so Harry Lockman is assigned.
Now, October 7th of '97. You heard testimony in evidence about what happened in '97. Well, Mr. Ryan just announced for governor. He started to clean up his act.
10:33AM What have you heard about, folks? You heard Scott Fawell came to him and said, "You got to stop gambling. You can't go to the riverboats. If you want to go, go to Vegas."
Guess what? I just talked about it.
September '97. Warner and Ryan are in Vegas. No
10:33AM more riverboats, because the public, the people who are

23763

voting for you, might see you gambling. This is too serious. Go to Vegas if you need to go gambling. Okay. They got to clean him up.
What else does he do? Let's hire an accountant.
10:33AM Let's clean up those tax returns. You are running for governor. That's serious business. So however you have been conducting yourself in the past, it's time to clean up. Take a shower, take a shave, clean you up.
What else did you hear? Michael Fairman. He was
10:34AM getting those consulting payments, $55,000. Look at the D-2s. When did those stop? Right around the time George Ryan announced for governor.
So, folks, this is just -- this is October. This is one month after Mr. Ryan announced for governor. This is
10:34AM cleanup. This is cleanup time. We don't want embarrassment in the town of Kankakee for the guy who's running for governor's brother.
Again, is there anything criminal about trying to clean up your act? Of course not. But then to say that
10:34AM Larry Warner is not providing a benefit to George Ryan about this is nonsense. Nonsense, to use Mr. Genson's word.
$95,000, folks. $95,000.
So now let's step back. Let's look at calendar year 1997. Is this just one friend to another -- and, by the
10:34AM way -- by the way, what is in this record, folks, about what

23764

George Ryan gave to Larry Warner, other than, obviously, governmental stuff, which you all know about. These friends, these longtime friends who exchange gifts, what is it in the record that George Ryan ever gave to Larry Warner?
10:35AM You heard something about a pinball machine, and there is actually a conflict in the record whether Warner gave it to Ryan or Ryan -- so what is it? What is in the record, folks, of what George Ryan ever did for Larry Warner? How did George Ryan reciprocate this longtime friendship?
10:35AM Governmental business is how he did it. $3 million worth of government business. Was it a quid pro quo? No, it wasn't. Have we proved a quid pro quo? No, haven't. Have we charged a quid pro quo? No, we haven't.
We have charged an undisclosed flow of benefits
10:35AM back and forth. And I am going to get to the instructions in a minute, folks, but that's what we have charged.
We haven't charged cash bribes that Vicki Easley saw or George Ryan called out from his office. We have charged an undisclosed flow of benefits, which, under the
10:36AM law, is sufficient, as I will talk about in a moment.
What did Larry Warner do wrong? Let's look also at the second part of it, on the right-hand side of it.
There is basically three charts that I am going to run through quickly here, all of which, basically, are Larry
10:36AM Warner, his lobbyist registration statements, because, folks,

Transcript of Proceedings AM (Collins Rebuttal) P. 23729 - 23839 3/10/2006 8:56:00 PM

23769

purpose of returning a unanimous verdict.

"The 12 of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement which is consistent with the

10:42AM individual judgment of each juror.

"You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt."

You are a team, folks. We are not going to send

10:42AM you into 12 different rooms. We are going to send you into one room to talk, to discuss; yes, to argue; yes, to debate; yes, to change your minds back and forth, based on the evidence. That's going to be your duty. That's what you have sworn to do. It's not to get a divorce before you have

10:42AM gotten married.

Now let's talk about the mail fraud instruction.

There are three elements to this mail fraud instruction. Again, it's Counts 2 to 10, and it's a core part of this racketeering, and I am going to get into it a

10:42AM little bit more. But I want to give you the basics.

There is three elements. First, "Defendant knowingly devised or participated in a scheme to defraud or to obtain money or property by means of materially false pretenses, representations, or promises ."

10:43AM The defendant has to knowingly participate in the

23770

scheme. That's Count 1. And there has to be some lies, there has to be some misrepresentations, there has to be some fraud. Mr. Webb is right.

Second, "The defendant did so knowingly and with

10:43AM the intent." Intent, absolutely key. He has got to have the intent. It can't be guess. It can't be conjecture. Defendant Ryan, Defendant Warner have to know what they are doing. They have to have intent. That's important.

Number 3, there has to be a mailing in furtherance.

10:43AM Again, that's the part I don't think is in high contest. When Ms. Barsella got up, she gave you actually the exhibit number for each of the mailings. There has to be a mailing in furtherance of the scheme for each of the counts. And I submit to you, that's not really in dispute. I haven't heard

10:43AM much dispute about it.

Number 23. So what's a scheme? We have all been using that term. I have used it a lot. What's a scheme?

"A scheme is a plan or a course of action formed with the intent to accomplish some purpose. A scheme to

10:43AM defraud "-- that's a particular type of scheme -- "is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the potential loss of money or property to another or to deprive the people of the state of Illinois of their intangible right to the honest services

10:44AM of their public empoyees -- pubic officials or employees."

23771

So, folks, there is two different types of schemes. There is one that's for money or property. That is when you are given state business for leases and you are lying about it. You are giving away property. When you are given --

10:44AM when you are stealing from the state, people's resources, that's property. That's money. You can't do that and lie about it, and there is a mailing in furtherance of it. That's money or property.

The second thing you can't do is deprive the people

10:44AM of their intangible right to the honest services of public officials. That's this trust issue that we have been talking about. And I want to give you some more instructions about that.

You are going to get all these, folks, but this is

10:44AM the heart of the matter. For the first ten counts of the indictment, it is the heart of the matter.

It's about trust. Mr. Ryan's honest services. That's what it's about.

Conflict of interest, Number 25.

10:45AM "A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest (also known as a conflict of interest) in a matter over which he has

10:45AM decision-making power, then that official deprives the public

23772

of its right to the official's honest services if other elements have been met."

So, folks, on this honest services, on this scheme, this first element, it can be met with a conflict of

10:45AM interest.

We talked about yesterday with Jamaica. Folks, this isn't some high-powered legal theory that Mr. Ryan, the pharmacist from Kankakee, can't understand. He told you about it through the testimony of Scott Fawell. When he

10:45AM brought Scott Fawell down to Jamaica in 1994, he said -- and I showed it to you yesterday -- "We are going to do this thing with Harry Klein because Harry Klein owns currency exchanges, our office regulates currency exchanges, so we have to appear to be impartial when we decide on currency

10:46AM exchanges. We have to appear to be impartial. So we can't be taking this free vacation."

Ladies and gentlemen, that is a classic conflict of interest, because Mr. Ryan was telling Scott Fawell: We are going to take this vacation, we are going to be partial, we

10:46AM are going to take Harry's benefits, but to the public, to the world, it's going to be that we are arm's length.

That's what this instruction is about, folks. And that is the heart and soul not only of the South Holland situation, but each and every Warner situation, because that

10:46AM flow of benefits that I talked to you about, George Ryan was

23773

operating under a conflict of interest every time he dealt with Larry Warner, because the benefits were flowing from Larry Warner.

He had a duty to disclose them in many different 10:47AM respects, and he didn't. And he continued to operate in an official capacity leases, contracts to the benefit of Larry Warner.

A related instruction, Number 26. Again, these are all within this mail fraud statute. Honest services.

10:47AM "Again, not every instance of misconduct or violation of state statute by a public official constitutes a mail fraud violation. Where a public official or employee misuses his official position (or material nonpublic information he obtained in it) for private gain for himself 10:47AM or another, then that official or employee has defrauded the public of his honest services, if the other elements have been met."

So, folks, when he takes the official information that Mr. Ryan gets, when he decides he can tell Larry Warner, 10:47AM "Go work with Alex Nelson on this Bellwood lease," or, "I am going to call Alex Nelson; You work with him on the Bellwood lease"; when he tells Len Sherman, "Work with Larry Warner on the Bellwood lease"; when he is using his official decision-making power to steer benefits to George Ryan -- to 10:48AM Larry Warner, while he is operating under a conflict of

23774

interest, he is breaching his duties. He is violating his honest services. That's an important instruction.

Number 27. This goes, folks, to this issue of who the benefits can go to. George Ryan doesn't have to put a 10:48AM penny in his own pocket. He does not have to put a dollar in his own pocket. He does not have to get any benefits for himself.

This says, "A participant in a scheme to defraud may be guilty, even if all the benefits of the fraud accrue 10:48AM to others, so long as the government has proved the other elements beyond a reasonable doubt. The public may be deprived of its public officials' or employees' honest services no matter who received the benefits of the fraud so long as the government has proved the other elements of mail 10:49AM fraud beyond a reasonable doubt."

So, folks, if you find that the Udstuen money was blessed by George Ryan, if you find that that Viisage $36,000 that I will get to in a minute was blessed by George Ryan, that he was, as Mr. Levin said, reaching into Larry 10:49AM Warner's bank account in a cooperative way to give money, a benefit to a third-party, as a secretary of state official, he is violating his duties. That's sufficient.

Folks, another important instruction you are going to get, that, "In order to prove a scheme to defraud, the 10:49AM government does not have to prove that the defendants

23775

contemplated actual or foreseeable harm to the victims."

So they don't have to sit around and talk about, well, we are going to screw the taxpayers today. They don't have to talk about it. They don't even have to do it.

10:49AM You don't have to find -- we have given you some tangible, tangible calculations of loss. But we didn't have to do that. We don't have to do that. We just have to show that Mr. Ryan violated his honest services based on these other instructions and meet the other elements of the mail 10:50AM fraud.

Now, folks, I want to talk about the critical facts for some of these sequences. I am not going to spend a lot of time, but I do want to -- to answer this question, "Where is the fraud?" I want to hit these sequences in a fairly 10:50AM quick way, but I want to hit these sequences to give you some of the highlights of what should be focused on and where is the fraud in these sequences. And I want to start with the leases. Now, folks --

Number 30.

10:50AM You heard Mr. Webb -- I think Mr. Mr. Genson did this, too -- with regard to leases and whether competitive bidding was required. And there is some issue about what the law really said, and there is some testimony in the record -- I am not contesting it -- that some people believe that it's 10:50AM not a state law that you have to competitively bid

23776

properties.

But, folks, violations of state law, whether they existed or not, do not make the mail fraud scheme. You have a duty of honest services.

10:50AM What did Mr. Esslinger say? Mr. Esslinger said, "We do salient fact sheets. We look at three properties. We put these things together." And that's competitive bidding. It's a competitive process. Whether the law required it or not, that's what -- Mr. Esslinger said that that was their 10:51AM policy to do.

George Ryan. He was interviewed by the FBI. "Sir, what, if anything, did he say" -- this is Agent Ruebenson talking about the George Ryan interview.

"What did he say about whether competitive sites 10:51AM should be looked at in the drivers' services leasing process?"

This is George Ryan now. George Ryan is saying competitive sites should be looked at in the process.

"Q. Later in an interview, on the same subject of 10:51AM competitive sites, what did he say about -- what did he say was his only concern regarding the leasing process?

"A. His only concern was that competitive sites were looked at and everything was done according to the law."

Obviously, there is two ways to look at it. Was 10:51AM George Ryan telling us the truth, or was George Ryan telling

Instead, that receipt violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making.

Similarly, the providing of personal or financial benefits by a private citizen to and for the benefit of a public official or to and for the benefit of a public official's family, friends, employees, or associates, does not, standing alone, violate the Illinois bribery statute, even if the private citizen does business with the state, so long as the personal or financial benefits were not intended to influence or reward the public official's exercise of office.

A public official's receipt of campaign contributions, standing alone, does not violate the Illinois bribery or misconduct statutes, even if the contributor has business or expects to have business pending before the public official or the state in which the public official holds office. Rather, public officials may receive campaign contributions from those who might seek to influence the candidate's performance as long as no promise for or performance of a specific official act is given in exchange.

Similarly, the giving of a campaign contribution to a public official, standing alone, does not amount to a violation of the Illinois bribery statute, even if the person making the contribution has or expects to have business pending before the public official. Only when a person gives a campaign

contribution knowing that it is given in exchange for a specific official act does this conduct violate the bribery statute. The intent of each party can be implied from their words and ongoing conduct.

A conspirator is a person who knowingly and intentionally agrees with one or more persons to accomplish an unlawful purpose. A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy.

Therefore, if you find defendant Ryan guilty of the conspiracy charged in Count 1, you should find defendant Ryan guilty of Count 2, 3, 4, 5, 6, 7, 8, 9, and/or 10, if you find the Government has proved beyond a reasonable doubt that the offense and the count under consideration was committed, A, by his fellow conspirators in furtherance and as a foreseeable consequence of the conspiracy charged in Count 1, B, while defendant Ryan was a member of the conspiracy charged in Count 1.

Likewise, if you find defendant Warner guilty of the conspiracy charged in Count 1, you should find defendant Warner guilty of Count 2, 3, 4, 5, 7, 8, and/or 9, if you find that the Government has proven beyond a reasonable doubt that the offense in the count under consideration was committed, A, by

his fellow conspirators in furtherance and as a foreseeable consequence of the conspiracy charged in Count 1, B, while defendant Warner was a member of the conspiracy charged in Count 1.

Instructions regarding Counts 2 through 10, mail fraud, 18 U.S.C. section 1341. Defendants Ryan and Warner are both charged with mail fraud in Counts 2, 3, 4, 5, 7, 8, and 9, and defendant Ryan is charged individually with mail fraud in Counts 6 and 10.

To sustain each charge of mail fraud, the Government must prove the following propositions: first, that the defendant knowingly devised or participated in the scheme to defraud or to obtain money or property by means of materially false pretenses, representations, or promises as charged; second, that the defendant did so knowingly and with the intent to defraud; and third, that for the purpose of carrying out the scheme or attempting to do so, the defendant used or caused the use of the United States Mails or a private or commercial interstate carrier in the manner charged in the particular count.

If you find that each of these propositions has been proved beyond a reasonable doubt as to a particular count, then you should find the defendant guilty of that count. If, on the other hand, you find that any of these propositions has not been proved beyond a reasonable doubt as to a particular count,

then you should find the defendant not guilty of that count.

A scheme is a plan or a course of action formed with the intent to accomplish some purpose. A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the potential loss of money or property to another or to deprive the people of the state of Illinois of their intangible right of the honest services of their public officials or employees.

Counts 2 through 10, the mail fraud counts, charge that the defendants participated in a single scheme to defraud or to obtain money or property by means of materially false pretenses, representations, or promises. Proof that there were multiple schemes is not necessarily proof of a single scheme, nor is it necessarily inconsistent with the existence of a single scheme.

Proof of several separate or independent schemes will not establish the single scheme alleged in Counts 2 through 10 unless one of the schemes which is proved is included within the single scheme alleged in those counts. If, therefore, you find beyond a reasonable doubt that there were two or more schemes to defraud and that the defendant was a member of one or more of these schemes to defraud, and you further find beyond a reasonable doubt that the proved scheme to defraud was included within the charged scheme to defraud, you should find that defendant guilty of the particular count you are

23904

considering, provided that all other elements of the mail fraud charge have been proved.

If, on the other hand, you find that there were two or more schemes to defraud and that the defendant was not a member of any proved scheme included within the charged scheme to defraud, you should find that defendant not guilty of that count.

A false pretense, representation, or promise is material if it has the natural tendency to influence or is capable of influencing the decision of the decision-making body to which it was addressed. In order for the Government to demonstrate a scheme to defraud the public of its right to the honest services of a public official or employee, only one participant in such scheme must owe a duty of honest services to the public.

Accordingly, a defendant who schemes with a public official or employee to deprive the public of its right to that public official's or employee's honest services may be guilty of a scheme to defraud the public of its right to honest services, provided all the elements of the offense as set forth in the instructions are met.

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat the people of the state of Illinois in order to cause a gain of money or property to the defendants or others or the potential

23905

loss of money or property to another or to deprive the people of the state of Illinois of the right to the honest services of their public employees -- officials and employees. Such intent may be determined from the evidence admitted as to each defendant.

Good faith on the part of the defendant is inconsistent with the intent to defraud, an element of the mail fraud charges. The burden is not on the defendant to prove his good faith; rather, the Government must prove beyond a reasonable doubt that a defendant acted with intent to defraud.

A public official has a duty to provide honest services to the people of the state of Illinois. The Government does not allege that defendant Warner was a public official during the time period relevant to this case. Because of his official position, defendant Ryan owed a duty of honest services to the people of the state of Illinois.

A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest, also known as a conflict of interest, in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services if the other elements of the mail fraud offense are met.

The law does not require that the Government identify

23906

a specific official act given in exchange for personal and financial benefits received by the public official so long as the Government proves beyond a reasonable doubt that the public official accepted the personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return.

Likewise, the law does not require that the Government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the Government proves beyond a reasonable doubt that the personal and financial benefits were given with the understanding that the public official would perform or not perform acts in his official capacity in return.

A benefit or benefits received by a defendant or given by a defendant with the intent that such benefit or benefits would ensure favorable official action when necessary can be sufficient to establish the defendant's intent to defraud the public of its right to honest services. You need not find that such a benefit was conferred or received in exchange for a specific official action.

A public official's receipt of personal or financial benefits or the receipt of the benefits by the public official's family, friends, employees, or associates, does not, standing alone, violate the mail fraud statute, even if the individual providing the personal or financial benefit has

23907

business with the state. Instead, that receipt violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making.

Similarly, the providing of personal or financial benefits by a private citizen to and for the benefit of a public official or to and for the benefit of a public official's family, friends, employees, or associates, does not, standing alone, violate the mail fraud statute, even if the private citizen does business with the state, so long as the personal or financial benefits were not intended to influence or reward the public official's exercise of office.

A public official's receipt of campaign contributions, standing alone, does not violate the mail fraud statute, even if the contributor has business or expects to have business pending before the public official or the state in which the public official holds office. Rather, public officials may receive campaign contributions from those who might seek to influence the candidate's performance so long as no promise for or performance of a specific official act is given in exchange.

Similarly, the giving of a campaign contribution to a public official, standing alone, does not amount to a violation of the mail fraud statute, even if the person making the contribution has or expects to have business pending before the

public official. When a person gives and a public official receives a campaign contribution, knowing that it is given in exchange for a specific official act, that conduct violates the mail fraud statute if the other elements of the mail fraud offense are met. The intent of each party can be implied from their words and ongoing conduct. Not every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation.

I instruct you that the following state laws were among the laws applicable to state officials throughout the relevant time frame except as otherwise noted. One, Article 8 section 1(a) of the Illinois Constitution provided that public funds, property, or credit shall be used only for public purposes.

Two, 720 ILCS 5/33-3 provided that a public officer or employee commits misconduct when in his official conduct he, with intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority or solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

Three, 5 ILCS 420/4A-101 provided that a person holding an elected office in the Illinois executive branch which includes the office of the Secretary of State and the Governor's office, is obligated to file annually a statement of economic interest with the State of Illinois wherein he is

required to disclose various economic and associated information which is specified on the forms that are in evidence.

Four, from January 1, 1999, and continuing through 2002, 5 ILCS 425/10 provided that a public officer was prohibited from soliciting or accepting any gifts from any prohibited source or in violation of any federal or state statute, rule, or regulation.

Prohibited sources included, among others, anyone who is registered or required to be registered with the Secretary of State under the Lobbyist Registration Act, which act obligated persons to register as lobbyists if they undertook to influence executive, legislative, or administrative action, or employed another person for the purpose of influencing executive, legislative, or administrative action.

A number of items were specifically excluded from this prohibition, including lawful campaign contributions, gifts from relatives, gifts given to an officer or employee of the executive branch from another officer or employee of the executive branch, gifts of personal hospitality of an individual other than a registered lobbyist, and gifts from any one prohibited source during any calendar year having a cumulative total value of less than $100.

Also excluded from this prohibition was anything provided on the basis of a personal friendship, unless the

officer had reason to believe that the gift was provided because of the official position of the officer and not because of friendship.

In determining whether a gift was provided on the basis of friendship, the officer was to consider the history of the relationship between the individual giving the gift and the officer, including any previous exchange of gifts between those individuals, whether the officer knew the individual who gave the gift personally paid for the gift or sought a tax reduction or business reimbursement, and whether the officer knew the individual who gave the gift also gave the same or similar gifts to other public officials.

Five, 10 ILCS section 5/9.25.1 provided that, quote:

"No public fund shall be used to urge any elector to vote for or against any candidate or proposition or be appropriated for political or campaign purposes to any candidate or political organization."

Under Illinois statute, 30 ILCS section 505/6, prior to July 1, 1998, certain purchases and contracts were not required to be competitively bid including, A, purchases and contracts for data processing equipment, software, or services, B, where the services required were for professional skills pursuant to a written contract and, C, in emergencies where immediate expenditure was necessary for repairs to state property in order to prevent or minimize serious disruption of

state service or to ensure the state records.

Again, not every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation. Where a public official or employee misuses his official position or material nonpublic information he obtained in it for private gain for himself or another, then that official or employee has defrauded the public of his honest services if the other elements of the mail fraud offense have been met.

A public official may deprive the public of its right to honest services even if the same official action would have resulted absent the official's deprivation of the public's right to honest services. The mail fraud statute can be violated whether or not there is any loss to the victim of the crime or gain to the defendants.

A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrue to others so long as the Government has proved the other elements of mail fraud beyond a reasonable doubt. The public may be deprived of its public official's or employee's honest services no matter who receives the benefits of the fraud so long as the Government has proved the other elements of mail fraud beyond a reasonable doubt.

In order to prove a scheme to defraud, the Government does not have to prove that the defendants contemplated actual

or foreseeable harm to the victims of the scheme. The Government must prove that the United States Mails or a private or commercial interstate carrier were used to carry out the scheme or were incidental to an essential part of the scheme.

In order to use or cause the use of the United States Mails or a private or commercial interstate carrier, a defendant need not actually intend that use to take place. You must find that the defendant knew that it would occur in the ordinary course of business or that the defendant knew facts from which that use could reasonably have been foreseen. However, the Government does not have to prove that a defendant knew that the carrier was an interstate carrier. The defendant need not actually or personally use the mail or interstate carrier.

Although an item mailed or sent by interstate carrier need not by itself contain a fraudulent representation or promise or request for money, it must further or attempt to further the scheme. Each separate use of the mail or interstate carrier in furtherance of the scheme to defraud constitutes a separate offense.

In connection with whether a mailing was made, evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion

was in conformity with the habit or routine practice. You should consider this evidence in the same manner that you consider all circumstantial evidence.

Instructions regarding Counts 11 through 13, false statements, 18 U.S.C. section 1001(a)(2). To sustain the charge of making a false, fictitious, or fraudulent statement or representation as charged in Counts 11 through 13, the Government must prove the following propositions: first, a defendant made a false, fictitious, or fraudulent statement or representation; second, the statement or representation was material; third, the statement or representation was knowingly – made knowingly and willfully; and fourth, the statement or representation was made in a matter within the jurisdiction of the executive branch of the Government of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

A statement is false or fictitious if untrue when made and then known to be untrue by the person making it. A statement or representation is fraudulent if known to be untrue and made with intent to deceive. A statement made with

good-faith belief in its accuracy does not amount to a false statement. This is so even if the statement is, in fact, erroneous. A defendant is under no burden to prove good faith. Rather, the prosecution must prove knowledge of falsity beyond a reasonable doubt.

A statement that is nonresponsive but literally true is not false. In determining whether Mr. Ryan's answers were untruthful and in determining whether he knew they were false, you should consider the context of the questions and answers. The context of the question and answer is often of critical importance if it is claimed that the question was ambiguous or was misunderstood. A statement may not be false if it is based on an ambiguous question where the response may be literally true and factually correct.

The Federal Bureau of Investigation is a part of executive branch of the Government of the United States, and statements or representations concerning matters being investigated by the Federal Bureau of Investigation are within the jurisdiction of the executive branch.

A statement is material if it had the effect of influencing the action of the Federal Bureau of Investigation or was capable of or had the potential to do so. It is not necessary that the statement actually have that influence or be relied on by the Federal Bureau of Investigation so long as it had the potential or capability to do so. An act is done

willfully if done voluntarily and intentionally and with the intent to do something the law forbids.

Counts 11 and 12 each contain multiple alleged false, fictitious, or fraudulent statements made by defendant Ryan. To find the defendant guilty of those counts, the Government must prove beyond a reasonable doubt that at least one of the alleged statements contained in each count was false, fictitious, or fraudulent. However, as to each count, you must unanimously agree on which statement was false or fictitious, or you must unanimously agree on which statement was fraudulent.

For example, with respect to Count 11, if some of you find the defendant Ryan's alleged statement in subparagraph 2(ii) that he was unaware of the pricing and contents of the South Holland lease and did not personally take part in its negotiation was false, and the rest of you find that the statement in subparagraph 2(ii) was not false but that the alleged statement in paragraph 2(iii) that Ryan had no recollection or knowledge of the original negotiations of the Joliet lease was false, then there is no unanimous agreement as to subparagraph 2(ii) or 2(iii). On the other hand, if all jurors find that the statement in subparagraph 2(ii) was false, then there is unanimous agreement with respect to which statement was false.

Instructions regarding Count 14, attempted extortion,

23982

THE CLERK: 02 CR 506, United States versus Warner and Ryan regarding a note from the jury.

MS. BARSELLA: Good afternoon.

Laurie Barsella and Joel Levin for the United

04:25PM States.

MR. WEBB: Dan Webb for Mr. Ryan.

MR. GENSON: Ed Genson on behalf of Mr. Warner.

THE COURT: We have a note from the jurors that reads as follows:

04:25PM "Dear Judge: I am requesting 'transcript.'

The following names are listed: "Covert, Jim; Motter, James; Mpougas, Aristotelis; Reed, John; Anderson, John."

MR. WEBB: Could you read those? I am sorry, your

04:25PM Honor.

THE COURT: Sure.

MR. WEBB: I apologize.

THE COURT: It would be Jim Covert --

MR. WEBB: Covert, yes.

04:25PM THE COURT: -- Jim Motter, Aristotelis Mpougas, John Reed, John Anderson.

MR. LEVIN: If we could just have a minute to confer.

THE COURT: Sure.

04:26PM (Brief pause.)

23983

MS. BARSELLA: Judge, I don't think that there is an agreement between the parties.

What we would like to do, though, is if we could patch in Mr. Collins; because he is sort of standing by.

04:30PM THE COURT: Sure. Do you have a number for him?

MR. LEVIN: Yes, I have got a number.

MR. GENSON: Could we -- is there a way -- if I can call on my phone and get him here, I'd like to get Marc -- Marc is home sick. Can I call Mr. Martin from here and --

04:30PM THE COURT: Sure.

MR. GENSON: -- tell him what's going on?

THE COURT: Sure.

MR. WEBB: I have no one that will talk to me.

THE COURT: Now, that's not true.

04:30PM MR. LEVIN: Was it John Anderson?

THE COURT: John Anderson. I can show you the note.

(Document tendered.)

MR. GENSON: Your Honor, our position will be as

04:32PM follows. My position is this: As to three of the four witnesses, there were witnesses who impeached them. As a matter of fact -- I mean, our position is -- I am not making an argument, but our position is that Motter was impeached by Murphy, that Whitlow impeached Mpougas as to the mailings,

04:33PM that -- so there were a number of these witnesses, I think,

23984

that have impeachment that didn't come until four or five months later.

My position is, if they want the whole transcript and we excise the appropriate sidebars and whatever, I have

04:33PM no objection to it. I object to any piecemeal giving out of witnesses, because in a six-month trial where the government has five months of witnesses and we don't get to impeach until five months later, to give them just their portion of the case, which is their direct -- and cross, I suppose --

04:33PM without the completion of the case, I think is inappropriate.

Again, if they ask for the whole transcript, we will give it to them. I won't object at least. But I am not going to agree to piecemeal portions of the transcript.

I mean, obviously, they are going to get the whole

04:34PM transcript eventually because this is the way they are working. They are working on ADM, with the exception of John Anderson, which I think they are confused on. I think they mean Brice Anderson, who didn't testify. But they are working on ADM, and then we are going to get this for every

04:34PM transcript.

Well, if that's the case, then they should get the defense case, too. So I think -- it's, then, my opinion that -- at least our position, that they get all of it or none of it.

04:34PM MR. WEBB: I join in Mr. Genson's objection. I

23985

believe that this is selective production of certain transcripts, and I join. I don't need to elaborate. I join in Mr. Genson's position.

MR. LEVIN: Your Honor, it's our position that the

04:34PM jury should be given what they want. They are allowed to conduct deliberations in any way they want, to consider the evidence in any way they want. They have decided, for whatever reason, they want these transcripts. We think they are entitled to it. They should be given the transcripts.

04:35PM The Court has discretion to do it. They will be given both the direct and cross. Obviously, any sidebars should be redacted, any sustained objections should be redacted. But, for whatever reason, this is what they want.

If tomorrow they want defense witnesses, they

04:35PM should be given that.

But our position is whatever they want, whenever they want it, they should be given the transcripts.

MS. BARSELLA: And I also think, Judge, that we shouldn't be, you know, imposing our reasoning onto why they

04:35PM are asking for who they are asking for. I mean, they asked for John Anderson. They can see from the witness list that we gave them today, John Anderson appears very late in the game. Obviously, he's a defense witness. So I don't think that --

04:35PM MR. GENSON: John Anderson --

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,) No. 02 CR 506
)
Plaintiff,)
)
vs.) Chicago, Illinois
)
LAWRENCE E. WARNER and)
GEORGE H. RYAN, SR.,)
) March 16, 2006
Defendants.) 3:30 p.m.

VOLUME 98
TRANSCRIPT OF PROCEEDINGS - TRIAL
BEFORE THE HONORABLE REBECCA R. PALLMEYER

APPEARANCES:

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(Proceedings in open court. Jury out.)

THE CLERK: 02 CR 506, United States versus Warner and Ryan.

MR. LEVIN: Good afternoon, Your Honor. Joel Levin and Laurie Barsella for the United States.

MR. LERMAN: Brad Lerman for George Ryan, Your Honor.

MR. GENSON: Ed Genson and Marc Martin on the phone for Larry Warner.

THE COURT: All right. A brief update on the transcripts. We have made substantially all the revisions, and we'll be able to give those to the jurors first thing Monday morning when they get here. But what that involves is, as you know, I had lined through some things, and we got notes from the Government that I think defense basically agreed with, some additional changes. I've made those changes, and I want to proof the changes. What I've done then is had them reproduced with the lines completely missing as opposed to having lines through them and so forth.

Now, more recently, the jurors left at about 3:00 today, and they left us two notes that I'd like to review with you.

MR. GENSON: They do that on purpose, you know.

THE COURT: As a matter of fact --

MR. GENSON: They do that on purpose so that I can miss -- so that I get stuck out in the rush hour every day.

THE COURT: Well, especially today when there's going to be snow, this is perfect. Actually, you know, for all I know, that's one of their concerns.

MR. LERMAN: That's probably the reason they went home.

THE COURT: Here's what they have for us, and I'm thinking unless you have some immediate responses right now, we might want to think about these and determine how we're going to respond.

"Dear Judge:

"On Count 14, is the only exhibits we should be reviewing is Exhibit 02-045 and testimony for again Count 14? Jurors need clarification."

MR. GENSON: What's Count 14? Does anyone know?

MR. LERMAN: That's the extortion.

MR. GENSON: Oh, they're still on that.

THE COURT: That's the first question. Here's the second question, who knows which order.

"Dear Judge:

"Please provide further instruction on Count 1. Remaining 2 through 10 counts, I" -- and it looks as though this was originally "we," and it was erased and changed to "I" -- "I want to avoid any perceptions as to the meaning of" -- parentheses -- "and/or slash 10" -- closed parentheses -- "meaning do we skip 2 through 9 and just go to 10? Should all

be accounted for? Instruction are ambiguous" -- closed quote -- "Sonja Chambers." I'll let you see these notes.

MS. BARSELLA: Yes.

MR. GENSON: Can we Xerox them, Judge?

MR. LEVIN: Yes, can we Xerox them?

THE COURT: You know, that's a really good idea.

MR. GENSON: Then we'll try to figure out what they mean over the weekend, or by tomorrow.

MS. BARSELLA: Well, tomorrow.

THE COURT: Tomorrow.

MS. BARSELLA: Yeah.

MR. GENSON: Do you understand what they said?

MS. BARSELLA: Well, let's --

MR. GENSON: I just asked you if you understood. I didn't ask for your answer.

MR. LEVIN: I'd have to think about it.

MR. GENSON: I just can't -- I just didn't understand it. If you can Xerox it, we can try to figure it out, look at the indictment and figure it out.

(Discussion off the record.)

THE COURT: You know, there's one thing we can address while we're waiting here. The press has contacted us to ask who will be their contact person on the part of the defendants at the time there's a verdict.

MR. GENSON: I'm sorry. Who?

APPEARANCES (Continued):

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(Pages 24073 to 24083 are under seal and filed separately.)

(The following proceedings were had in chambers under seal:)

THE COURT: You can have a seat.

MR. WEBB: Should I close the door, your Honor?

11:23AM THE COURT: Sure.

The record will show we are having an in-chambers conference. I think it's very clear the press is aware of your presence here and are likely to be asking us questions about this, but I wanted to at least initially share this

11:23AM with you before I make a determination about how to proceed.

Let me get your appearances and the waiver of defendants.

MR. GENSON: Ed Genson and Marc Martin on behalf of Mr. Warner, and we waive his presence.

11:23AM MR. WEBB: Julie Bauer and Dan Webb on behalf of George Ryan, and we waive his presence.

MR. COLLINS: Patrick Collins, Joel Levin, and Laurie Barsella for the United States. We waive Zach Fardon's presence.

11:23AM THE COURT: All right. Here is the note. Let me begin by telling you it was written by Ms. Losacco, and it's signed by Ms. Losacco and by several other jurors, not all of them.

The persons who have signed include Denise

11:23AM Peterson, James Cwick, Karen James, RB -- I am not sure abo

this last juror's name -- Bob Pavlick, Kevin Rein, and Sonja Chambers. You will recall Ms. Chambers is the foreperson.

I wanted to point out further -- I will let you all see this note, but it appears to me that it was generated on

11:23AM a computer. We do have a typewriter in the jury room, but it was -- this note was not generated on that machine.

MR. COLLINS: Your Honor, I'm sorry. Could you just identify the jurors who apparently signed the note.

THE COURT: Leslie Losacco -- she is the person who

11:23AM prepared it, and hers is the first signature -- Denise Peterson, James Cwick, Karen James, RB -- I am going to have to look and see who that is -- Bob Pavlick, Kevin Rein, and Sonja Chambers. I can maybe figure out who it is. Oh, that might be Mr. Talbot, RB Talbot.

11:23AM All right. Here is what the letter says:

"Dear Judge Pallmeyer:

"I am writing to make you aware of the dire situation that has befallen the jurors. We are now in our second week of deliberations, and it has become more than

11:23AM apparent that one juror, Evelyn, is either intellectually incompetent to handle the task, or she has ulterior motives behind her actions.

"We have taken every instruction into account, and have made sure that every juror is comfortable in

11:23AM understanding them so that there is little confusion when

deliberating. Evelyn is either unable to understand the instructions or is blatantly refusing to adhere to them. She has even stated that she does not believe the court transcripts are factual.

11:23AM "When discussing the counts, every single person brings a rational, intelligent argument to the table, with the exception of Evelyn. She does not argue what her position is. She refuses to state why she feels the way she does. She only disagrees with whatever is presented to her, even when the information presented is a blatant truth (i.e., you can say it's sunny outside, and Evelyn will simply state she disagrees even though the sun is in plain view through the window).

"Putting this aside for a moment, there are other traits she is displaying that are not only concerning, but lead me to believe she is potentially a danger to the other jurors. She is intentionally antagonistic, goads others into verbal fights, and when all else fails, gets physically aggressive in a juvenile attempt to intimidate whomever she is arguing with.

"Having said all of this, I am asking that your Honor remove this juror from the trial and replace her with one of the alternates. In not doing so, you will be responsible for a great miscarriage of justice, as two men's lives are on the line, and only 11 of 12 jurors are taking

that fact into consideration.

"Respectfully, Leslie Losacco."

And, again, there are names of eight other jurors.

MR. GENSON: They didn't decide anything.

11:23AM (Brief pause.)

MR. WEBB: I guess, can we talk to each other a little bit here?

THE COURT: Sure.

MR. WEBB: I don't know whether this is something important. I'd have to -- maybe I should contact the governor.

THE COURT: Your client.

MR. WEBB: My client.

MR. MARTIN: Your Honor, I actually had a premonition that the note would be --

11:23AM MR. GENSON: He told me --

MR. MARTIN: -- along these lines this morning.

MR. GENSON: He told me what it was going to be on the way over here.

11:23AM MR. MARTIN: And I thought, "Should I research this issue?"

THE COURT: So you did?

MR. MARTIN: No. I thought we don't have a note. Why would I want to research the issue?

11:23AM MS. BARSELLA: I think we need to take a look at

the law to be comfortable with the standards because, I mean, this obviously does come up, and there are cases on it. I think that we all need a couple of hours to --

THE COURT: I think that makes sense. I have no

11:23AM desire to do anything quickly here. I certainly don't have any desire to do anything precipitous.

Let me tell you that after the conversation I had with several of you yesterday morning, I think I told you at that time that there had been what seemed to me a day's very

11:23AM peaceful progress in the case. Within a couple of hours after that the jury room became very loud. There was obviously a lot of shouting going on.

The court security officer who sits outside is monitoring the noise, obviously not what they say. You

11:23AM really can't hear what they are saying. You can hear the tone, but you can't hear the content of anything they say. I can assure you that even if you were to make an effort -- and I try not to -- but even if you were to make an effort, you can't really hear what they are saying.

11:23AM But the tone does become loud, and it sounds angry from time to time.

MR. WEBB: Was that just once, or did it happen throughout the day?

THE COURT: Occasionally.

11:23AM MR. WEBB: Occasionally throughout the day.

THE COURT: It's not constant. Right now there is no -- I mean, it sounds like --

MR. WEBB: You can hear it in here?

THE COURT: The jury room backs up to my study.

11:23AM MR. WEBB: Oh, I see. I misunderstood where they are. So you can hear --

THE COURT: They are in a room just beyond that wall (indicating).

MR. WEBB: Okay.

11:23AM THE COURT: And even so, if I sit in the study, I cannot hear what they are saying. I can sometimes hear the tone.

MR. WEBB: I have been around this building. In the old days the court security officers would tell us what's

11:23AM going on.

THE COURT: Would tell you what the verdict is.

MR. WEBB: Those are days long before.

THE COURT: And I will tell you what. Officer Augustine is rigid and would not do that. I mean, he would

11:23AM tell me --

MR. WEBB: I understand.

THE COURT: -- if he feels like they are getting along or not getting along. But in terms of if he thinks he knows which way the wind is blowing, he certainly doesn't

11:23AM share it with me.

THE FOREPERSON: Yes.

THE COURT: Ms. Chambers, can I ask you to hand your form of verdict to Officer Augustine.

(Document tendered.)

THE COURT: The jurors have returned verdict forms as follows:

The verdict form for Lawrence E. Warner reads as follows: We, the jury, find the Defendant Lawrence E. Warner guilty as charged in the indictment.

Second page of the verdict form reads as follows: If you find the Defendant Lawence E. Warner guilty of Count 17, then you must make the following additional findings beyond a reasonable doubt:

A. We find the Defendant Lawrence E. Warner did commit the offense charged in Count 17 while violating other laws of the United States.

B. We find the Defendant Lawrence E. Warner did commit the offense charged in Count 17 as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period.

And with respect to Mr. Ryan, the jurors have returned a verdict as follows:

We, the jury, find the Defendant George H. Ryan, Sr. guilty as charged in the indictment.

With respect to Count 22 of the indictment, in

which the Defendant George H. Ryan is charged with willfully filing a joint individual tax return, Form 1040 with schedules and attachments, which understated his adjusted gross income for the calendar year 1998, we, the jury, find the Defendant George H. Ryan, Sr. guilty.

And the verdict forms -- those two verdict forms that I have just read are signed -- or four verdict forms I just read are signed by each of the jurors. Those are the only forms that the jurors have returned to us.

Does anybody want the jury polled?

MR. GENSON: We request they be polled, your Honor.

MR. WEBB: I join that, your Honor.

THE COURT: Ladies and gentlemen, by polling the jurors what I mean to do is ask each of you whether this verdict that I have just read in court represents your verdict.

I will begin with Ms. James.

Ms. James, was this and is this now your verdict?

JUROR JAMES: Yes.

THE COURT: Mr. Cwick, was this and is this now your verdict?

JUROR CWICK: Yes.

THE COURT: Mr. Davis, was this and is this now your verdict?

JUROR DAVIS: Yes.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,) Docket No. 02 CR 506
)
Plaintiff,)
)
vs.)
)
LAWRENCE E. WARNER and)
GEORGE H. RYAN, SR.,) Chicago, Illinois
) September 6, 2006
Defendants.) 1:13 p.m.

TRANSCRIPT OF PROCEEDINGS - Sentencing
BEFORE THE HONORABLE REBECCA R. PALLMEYER

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Ms. Sue Roderick, IRS
Ms. E.J. Tolle, U.S. Probation
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THE CLERK: 502 CR 506, United States versus Lawrence Warner and George Ryan for sentencing.

THE COURT: Good afternoon.

We will begin with your appearances.

MR. COLLINS: Your Honor, for the United States, Patrick Collins, Laurie Barsella, Joel Levin, and Zach Fardon.

THE COURT: Good afternoon.

MR. WEBB: Should I go around the table?

THE COURT: Sure.

MR. WEBB: Dan Webb on behalf of George Ryan.

Let's go around.

MR. LERMAN: Brad Lerman, your Honor.

MS. LYON: Andrea Lyon.

MR. MIARECKI: Greg Miarecki.

MS. BAUER: Julie Bauer.

MR. ROONEY: Tim Rooney, your Honor.

MR. WEBB: All on behalf of George Ryan.

THE COURT: Good afternoon.

MR. MARTIN: Good afternoon, your Honor.

Marc Martin for Lawrence Warner along with Edward Genson, Jackie Rankin, and Carolyn Gurland.

THE COURT: Good afternoon.

We talked briefly about the agenda for today, yesterday. I understand that we have a couple of preliminary matters.

First, let me begin with the posttrial motions. I promised you a ruling on those. In fact, I do have it completed. I want to proofread it one more time, but let me tell you the outcome, because I don't think it's fair to keep people in suspense much longer.

The motions for a judgment of acquittal, for a new trial, for severance, et cetera, are substantially denied. But the Court has concluded that it should grant the motions to dismiss with respect to Count 9 involving Mr. Warner, and with respect to Counts 9 and 10 with regard to Mr. Ryan.

You will recall those counts relate to the Grayville matter in Count 10. And with respect to Count 9, that's the matter of the lease at 17 North State. As to those two counts, the Court concluded that the evidence was insufficient and granted the defendants' motions in that regard.

Mr. Warner's numerous motions for severance are denied. And the remainder of the motions are also denied.

We also have – again, the ruling is complete. You will see it's hefty here. I do want to read it one more time, but I expect it will be issued today. It will be at least on the electronic docket sometime later today.

The other matter that I have is a motion I just received, and I understand that's an agreed motion with

LEXSEE 2005 US DIST LEXIS 21367

UNITED STATES OF AMERICA, Plaintiff, v. LAWRENCE E. WARNER and GEORGE H. RYAN, SR., Defendants.

No. 02 CR 506

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2005 U.S. Dist. LEXIS 21367

September 23, 2005, Decided
September 23, 2005, Filed

SUBSEQUENT HISTORY: Motion denied by *United States v. Warner, 2005 U.S. Dist. LEXIS 24825 (N.D. Ill., Oct. 21, 2005)*

PRIOR HISTORY: *United States v. Warner, 396 F. Supp. 2d 924, 2005 U.S. Dist. LEXIS 17446 (N.D. Ill., 2005)*

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant politician and contributor were charged with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1962(d)*, and the federal mail fraud statute, *18 U.S.C.S. §§ 1341, 1346*. The politician was also charged with violating *18 U.S.C.S. § 1001(a)(2)*, *26 U.S.C.S. §§ 7206(1)*, *7212(a)*. The politician and the government filed several motions in limine.

OVERVIEW: The court concluded that the government was not required to identify a specific contract, perquisite, or other government benefit given in exchange for each particular gift, so long as the evidence established that the politician accepted gifts or other consideration with the understanding that he would perform or not perform acts in his official capacity in return. The court expressed doubts whether evidence was admissible under *Fed. R. Evid. 404(b)* that the politician, when Secretary of State of Illinois, directed his staff to arrange for expedited handling of payment vouchers to his brother's company. Nevertheless, in the absence of some evidentiary context, the court was unable to conclude from the politician's arguments that there would be no circumstances under which the evidence could be admissible at trial. The court also held that evidence that the politician generally began carrying large amounts of cash once he became Secretary of State and Governor of Illinois could be probative of his involvement in a cash-intensive scheme to defraud, particularly in the absence of any evidence that he regularly utilized standard methods of withdrawing cash.

OUTCOME: The government's motion for pretrial ruling on jury instructions related to mail fraud allegations and the politician's motion in limine to preclude evidence related to official actions benefiting campaign contributions absent a quid pro quo were both granted in part and denied in part. The court reserved ruling on the government's specific mail fraud jury instructions as well as several other issues.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses >

Fraud > Mail Fraud > Elements
Criminal Law & Procedure > Sentencing > Costs
Governments > Local Governments > Finance
[HN1] The United States Court of Appeals for the Seventh Circuit has confirmed that so long as there is some gain from the wrongdoing, the government need not establish that a defendant himself received it. A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants. The court has explained that in the case of a successful scheme, the public is deprived of its servant's honest services no matter who receives the proceeds. Thus, the government may establish a claim for honest services mail fraud without demonstrating that the defendant himself received any personal benefit.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Abuse of Public Office > General Overview
[HN2] But courts have made clear that criminal inducement of a legislator to take particular action cannot be inferred from the legislator's acceptance of campaign contributions from interests urging the action or from his acceptance of lobbyists' hospitality.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > General Overview
[HN3] Where there is no evidence of a benefit in exchange for the gift or contribution, there may be no intent to defraud.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > General Overview
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Abuse of Public Office > General Overview
Estate, Gift & Trust Law > Personal Gifts > Elements of Valid Gifts > General Overview
[HN4] The law does not require the government to identify a specific contract, perquisite, or other government benefit given in exchange for each particular gift, so long as the evidence establishes that the official accepted gifts or other consideration with the understanding that he would perform or not perform acts in his official capacity in return.

Evidence > Testimony > Experts > General Overview
Evidence > Testimony > Lay Witnesses > General Overview
[HN5] *Fed. R. Evid. 701* provides that the opinions of non-expert witnesses are admissible if they are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of *Fed. R. Evid. 702*.

Criminal Law & Procedure > Criminal Offenses > Fraud > Fraud Against the Government > Conspiracy to Defraud > Elements
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
Criminal Law & Procedure > Scienter > Willfulness
[HN6] The United States Court of Appeals for the Seventh Circuit has held that when a witness is asked whether the conduct in issue was "unlawful" or "wilful" or whether the defendants "conspired," terms that demand an understanding of the nature and scope of the criminal law, the trial court may properly conclude that any response would not be helpful to the trier of fact. The court has explained that the witness, unfamiliar with the contours of the criminal law, may feel that the legal standard is either higher or lower than it really is. If either event is true the jury may accord too much weight to such a legal conclusion.

Criminal Law & Procedure > Witnesses > Credibility
Evidence > Testimony > Credibility > Impeachment > Prior Inconsistent Statements
Evidence > Testimony > Lay Witnesses > Opinion Testimony > General Overview
[HN7] General assertions by a lay witness that he or she did or did not violate the law likely will not be helpful to the trier of fact. At the same time, a witness's beliefs in that regard may be probative of intent. In addition, parties are entitled to cross-examine witnesses regarding their prior inconsistent statements and other issues relating to credibility.

Evidence > Testimony > Lay Witnesses > Personal Knowledge
[HN8] See *Fed. R. Evid. 602*.

Evidence > Testimony > Lay Witnesses > Personal

Knowledge

[HN9] Where a participant in a conversation understands words or expressions that may be unclear to the jury, the participant may testify as to his or her understanding of the statements made by another participant.

Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor

Evidence > Relevance > Prior Acts, Crimes & Wrongs

[HN10] Fed. R. Civ. P. 404(b) generally prohibits district courts from admitting evidence concerning a defendant's other uncharged bad acts. Evidence concerning the chronological unfolding of events that led to an indictment, or other circumstances surrounding the crime, is not evidence of other acts within the meaning of Rule 404(b). Acts satisfy the "inextricably intertwined" doctrine if they complete the story of the crime on trial; their absence would create a chronological or conceptual void in the story of the crime, or they are so blended or connected that they incidentally involve, explain the circumstances surrounding, or tend to prove any element of the charged crime.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Fraud (IRC secs. 6662-6664, 6674, 6690, 7204-7207, 7268, 7434, 7454, 7623) > General Overview

Tax Law > Federal Tax Administration & Procedure > Criminal Procedure & Penalties (IRC secs. 7201-7217, 7231-7232, 7261-7262, 7268-7273, 7375) > General Overview

[HN11] The cash method of proof compares cash expenditures with known cash sources. The method first requires that all cash expenditures be determined and added together. Then, taxable and nontaxable cash sources are added together. These sources would include any cash accumulated and on hand at the beginning of the tax period in question that the taxpayer spends during the tax period (often called a "cash hoard"). If cash expenditures exceed cash sources during the period in question, it is inferred that the excess amount is unreported income. To establish a "cash case," the government must show with reasonable certainty: (1) the defendant's opening net worth and cash on hand at the beginning of the period for which he was indicted and (2) defendant's expenditures during the period in question.

Evidence > Relevance > Relevant Evidence

[HN12] The United States Court of Appeals for the Seventh Circuit has noted that evidence of wealth may be admissible to establish that a person engaged in a cash-intensive criminal enterprise, even if there is another explanation for the extra money.

Evidence > Relevance > Relevant Evidence

[HN13] Evidence of wealth may be admissible to establish that a person engaged in a cash-intensive criminal enterprise, even if there is another explanation for the extra money. The fact that a defendant may have had other cash sources goes to the weight, as opposed to the admissibility, of the evidence.

Evidence > Testimony > Sequestration

[HN14] See *Fed. R. Evid. 615.*

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects > Scope

Criminal Law & Procedure > Discovery & Inspection > Discovery by Government > Physical Evidence

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview

[HN15] Having availed himself of discovery, a defendant's *Fifth Amendment* right does not permit him to withhold relevant documents under *Fed. R. Crim. P. 16(b)(1)(A)* until such time as he affirmatively takes the stand in his own defense. Indeed, a defendant's obligation to provide reciprocal discovery under *Rule 16* arises only at the defendant's request.

COUNSEL: [*1] For Lawrence E Warner (1), Defendant: Edward Marvin Genson, Terence Patrick Gillespie, Genson and Gillespie, Chicago, IL; Marvin Ira Bloom, Attorney at Law, Chicago, IL.

For Donald Udstuen (2), Defendant: David J. Stetler, Corey B. Rubenstein, Stetler & Duffy, Ltd., Chicago, IL.

For Alan A Drazek (3), Defendant: Dennis Alan Berkson, Dennis A. Berkson & Associates, Ltd., Chicago, IL.

For George H Ryan, Sr. (4), Defendant: Dan K. Webb, Adrienne Banks Pitts, Bradley E. Lerman, Julie Anne Bauer, Winston & Strawn, Chicago, IL; George Carter Lombardi, Timothy John Rooney, Winston & Strawn LLP, Chicago, IL.

For Chicago Tribune Company, Intervenor: Kenneth Emanuel Kraus, Jason M. Rosenthal, Schopf & Weiss, Chicago, IL; Eric Stephen Mattson, Marta I Carreira-Slabe, Sidley Austin Brown & Wood LLP, Chicago, IL.

For United States of America, Plaintiff: Joel R. Levin, Laurie J Barsella, United States Attorney's Office, Chicago, IL.

JUDGES: Judge Rebecca R. Pallmeyer.

OPINION BY: Rebecca R. Pallmeyer

OPINION

MEMORANDUM OPINION AND ORDER

Defendants Lawrence E. Warner and George H. Ryan, Sr. are charged in a 22-count second superseding indictment with (1) conspiring to use the [*2] resources of the State of Illinois for their personal and financial benefit and for the benefit of Ryan's family members, the Citizens For Ryan political campaign committee, and various political and business associates, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO'), *18 U.S.C. §§ 1962(d)*; and (2) devising a scheme to defraud the people of the State of Illinois and the State of Illinois of money, property, and the right to the honest services of Ryan and other State of Illinois officials, in violation of the federal mail fraud statute, *18 U.S.C. §§ 1341, 1346*. Ryan is separately charged with making materially false, fictitious, and fraudulent statements during several FBI interviews in violation of *18 U.S.C. § 1001(a)(2)*; obstructing and endeavoring to obstruct the Internal Revenue Service in the correct reporting of income and the collection of taxes in violation of *26 U.S.C. § 7212(a)*; and filing materially false tax returns in violation of *26 U.S.C. § 7206(1)*. Warner is separately charged with extortion under the Hobbs Act, *18 U.S.C. § 1951*; [*3] money laundering, *18 U.S.C. § 1956 (a)(1)(B)(i)*; and structuring currency transactions in violation of *31 U.S.C. §§ 5324(a)(3)* and *(d)(2)*.

On August 17, 2005, the court addressed several of the parties' motions in limine, as well as Defendants' objections to the government's *Santiago* proffer. Ryan and the government have since filed some 17 additional motions in Imnine. In today's ruling, the court grants certain of these motions and denies others. With respect to still others, the court has reviewed the parties' arguments but is unable to make final rulings without some evidentiary context, To the extent that any motion not disposed of here was filed with an eye toward opening statements, the court directs counsel to make no mention of the challenged evidence during openings.

DISCUSSION [1]

1 The factual allegations are set forth in detail in this court's August 11, 2004 Memorandum Opinion and Order and will not be repeated here. *United States v. Warner, 2004 U.S. Dist. LEXIS 15727, No. 02 CR 506, 2004 WL 1794476, at *1-12 (N.D. Ill. Aug. 11, 2004)*. This opinion assumes the reader's familiarity with that earlier decision.

[*4] **I. Motions in Limine Related to Mail Fraud Allegations**

The indictment charges Ryan with performing and authorizing official acts for the financial benefit of himself, Warner, and others. The indictment further charges Ryan with receiving personal and financial benefits from Warner and others knowing that such benefits were intended to influence and reward him in the performance of official acts. (Indictment, Count 2 PP 4,5.) The parties appear to agree on the general standard for establishing "honest services" mail fraud: "Misuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty. . . from federal crime." *United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998). Sea also United States v. Hausmann, 345 F.3d 952 (7th Cir, 2003)* ("under the intangible-rights theory of federal mail or wire fraud liability, a valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his fiduciary relationship for gain at the expense of the party [*5] to whom the fiduciary duty was owed.") *But see United States v. Panarella, 277 F.3d 678, 694 (3d Cir.)* ("A public official who conceals a financial interest in violation of state criminal law while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud."), *cert denied, 537 U.S. 819, 154 L. Ed. 2d 25, 123 S. Ct. 95 (2002)*. The parties disagree, however, as to the evidence required to support an honest services mail fraud

conviction.

Ryan urges that "corrupt dollars" in return for contracts or other "quid pro quo" evidence is a prerequisite to a finding of guilt on the "honest services" mail fraud charges. In Ryan's view, "if a public official misuses his office but in no way personally benefits from that abuse of position, there is no mail fraud." (Ryan Fraud Resp., at 1 (emphasis in original). [2] Ryan cites *United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997)*, where the First Circuit reversed the conviction of an IRS official who made numerous unauthorized searches of confidential taxpayer records but did not otherwise use or profit from the confidential data. *Id. at 1071-72.* The [*6] court concluded that the defendant's conviction for honest services mail fraud could not stand because he "did not receive, nor can it be found that he intended to receive, any tangible benefit" from his wrongdoing. *Id. at 1077.* As the government notes, however, [HN1] the Seventh Circuit recently confirmed that so long as there is some gain from the wrongdoing, the government need not establish that the defendant himself received it: "A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants." *United States v. Spano, 421 F.3d 599, 2005 U.S. App. LEXIS 18974, 2005 WL 2100391, at *1 (7th Cir. 2005).* The court explained that "in the case of a successful scheme, the public is deprived of its servants' honest services no matter who receives the proceeds." *2005 U.S. App. LEXIS 18974, [WL] at *2* (affirming mall fraud conviction of town's mayor who received, as a result of the fraud, only reimbursement of medical expenses-reimbursement to which she was entitled as a matter of preexisting practice). Thus, the government may establish a claim for honest services mail fraud without demonstrating that Ryan himself received any [*7] personal benefit.

2 Ryan's Corrected Response to United States' Motion for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations is cited as "Ryan Fraud Resp., at ."

To avoid this result, Ryan maintains that such quid pro quo evidence is nonetheless required where mail fraud charges are predicated on the receipt of campaign contributions. In support of this argument, Ryan cites *United States v. Martin, 195 F.3d 961 (7th Cir. 1999)*, in which a contractor with the Department of Public Aid "fairly showered" a Department employee (Ronald Lowder) with gifts in exchange for contract work and "other favoritism." *Id. at 963-64.* Lowder was charged with mail fraud, in part based on his recommendation that the Department adopt a contract that was very favorable to the contractor but that "would cost the Department hundreds of thousands of dollars for no additional benefit." *Id. at 964.* In affirming Lowder's conviction, the Seventh Circuit found [*8] "evidence from which [the jury] could infer with the requisite certitude that the government employee had been bribed . . . to engage in acts within the scope of his employment to assist the person who had bribed him to commit those acts, and as a result deprived his employer of the latter's right to the employee's honest services." *Id. at 966.*

In Ryan's view, this language confirms that in any "honest services" mail fraud prosecution, the prosecution must identify a specific government benefit given in exchange for the gift or contribution to a charged public official. Ryan notes that the Supreme Court reached a similar conclusion with respect to the Hobbs Act, finding that an elected official may commit extortion in the course of financing an election campaign if political contributions are "induced by the use of force, violence, or fear," or "if the payments are made In return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States, 500 U.S. 257, 273, 114 L. Ed. 2d 307, 111 S. Ct. 1807 (1991). Compare Evans v. United States, 504 U.S. 255, 268, 119 L. Ed. 2d 57, 112 S. Ct. 1881 (1992)* (affirming conviction of a county board member [*9] who accepted a cash gift from a real estate developer seeking rezoning, the Court observed, "the offense [of extortion] is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts .... The Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.")

Ryan emphasizes that "the quid pro quo requirement should apply with equal force to an intangible rights prosecution based on campaign contributions for the same reason it applies to bribery and extortion: without such a requirement, any campaign contribution might constitute a violation of federal criminal law." (Ryan Fraud Resp., at 11.) *Cf. United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993)* ("Accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to

perform or not perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe.") Ryan contends, further, that there is no evidence of a quid pro quo here, and that [*10] the issuance of low-digit license plates is not sufficient: "Evidence suggesting that Ryan authorized the issuance of low-digit plates to individuals, *some* of whom were campaign contributors, is no more relevant than evidence that Ryan, for example, championed legislation in favor of educational spending, assuming that pro-education groups supported Ryan's campaign . ..." (Ryan Quid Pro Quo Mem., at 9 [3] (emphasis in original).)

> 3 Ryan's Motion in Limine to Preclude Evidence Related to Official Actions Benefiting Campaign Contributors Absent a Quid Pro Quo and to Strike the Allegations Regarding the Same from the Indictment is cited as "Ryan Quid Pro Quo Mem., at ."

For reasons not obvious to the court, low-digit license plates appear to have a cachet in Illinois. In the court's view, awarding such items of value to specific campaign contributors is not comparable to generally supporting legislation favored by them. The government, in any event, has stressed that evidence concerning low-digit plates [*11] will comprise only a small portion of its case, and has not argued that a jury may infer mail fraud solely because legislative decisions end up benefiting campaign donors. As the *Martin* court cautioned:

> It is easy to see how the next step in "intangible rights" thinking would be to argue that an elected official who receives a donation to his campaign fund and afterward fails to prevent the donor from obtaining favorable treatment in dealing with the government is defrauding the government of its right to his loyalty. . . . We are speaking not of a case in which there is either an explicit quid pro quo or even some positive act by the official to assist the donor, but merely of a case in which it can be proved (though this will often be impossible to do with the certitude required in a criminal case) that the official, had he not received the donation, would have taken positive steps to try to prevent the donor from receiving favorable treatment. . . . [HN2] But the courts have made clear that criminal inducement of a legislator to take particular action cannot be inferred from the legislator's acceptance of campaign contributions from interests urging the action . . . or from [*12] his acceptance of lobbyists' hospitality.

195 F.3d at 965-66.

Nor does the government dispute that Ryan is free to argue lack of specific quid pro quo evidence with respect to mail fraud allegations that are not tied to the receipt of campaign contributions (for example, allegations that state contracts were awarded in exchange for gifts or favors). The court recognizes, as well, that [HN3] where there is no evidence of a benefit in exchange for the gift or contribution, there may be no intent to defraud. *See, e.g., United States v. Sawyer, 85 F.3d 713, 741 (1st Cir. 1996)* ("The practice of using hospitality, including lavish hospitality, to cultivate business or political relationships is longstanding and pervasive . . . . It may well be that all such hospitality should be flatly prohibited by law, but if [the defendant] had this limited intent--to cultivate friendship rather than to influence an official act--the federal statutes here involved [bribery and honest services fraud] would not be violated.") The court concludes, however, that [HN4] the law does not require the government to Identify a specific contract, perquisite, or other government benefit [*13] given in exchange for each particular gift, so long as the evidence establishes that Ryan accepted gifts or other consideration with the understanding that he would perform or not perform acts in his official capacity in return. *See, e.g. McCormick, 500 U.S. at 268-69* (limiting its holding to extortion involving campaign contributions); *United States v. Urban, 404 F.3d 754, (3d Cir. 2005)* (to establish extortion "under color of official right" in a non-campaign-contribution case, "the government need not prove that the public official induced the making of the payment, or that the public official acted or refrained from acting as a result of payments made."); *United States v. Antico, 275 F.3d 245,257-58 (3d Cir. 2001)* (finding an "Implicit quid pro quo" sufficient to establish extortion outside the campaign contribution context), *cert denied, 537 U.S. 821, 154 L. Ed. 2d 30, 123 S. Ct. 100 (2002); United States v. Brumley, 116 F.3d 728, 735 (5th Cir. 1997)* (upholding the defendant's conviction for

"deprivation of honest services" mail fraud where the government had stipulated that it would not try to prove that the defendant had caused [*14] others a monetary loss, but rather had taken the position that "the quid pro quo was intangible, such as favoritism or other types of intangible matters.")

The government's motion for pretrial ruling on jury instructions related to mail fraud allegations, and Ryan's motion in limine to preclude evidence related to official actions benefiting campaign contributions absent a quid pro quo are both granted in part and denied in part, Of the 12 mail fraud jury instructions proposed by the government, Ryan specifically objects to five(Nos. 6,7, 9, 11, and 12) on the grounds that they "would permit a defendant to be convicted of honest [services] mail fraud predicated on the receipt of a gift in the absence of an explicit quid pro quo" and "in the absence of proof of personal gain." (Ryan Mail Fraud Resp., at 15, 16.) As noted, the government need not prove personal gain to establish honest services mail fraud. Nor must the government prove an explicit quid pro quo outside the campaign contribution context.

Aside from these observations, the court reserves ruling on the government's proposed mail fraud jury instructions.

II. Motions to Exclude Opinion and Belief Testimony

[*15] The government moves to preclude Defendants from questioning lay witnesses as to whether they believed their actions or those of Defendants were illegal, improper, wrong, or in violation of any federal statutes. In a related motion. Ryan seeks to exclude testimony by witnesses regarding their speculation as to the beliefs, knowledge, motivations, or understanding of others. The court reviews these issues below, but reserves ruling on both motions.

A. Lay Witness Opinions

[HN5] *FED. R. EVID. 701* provides that the opinions of non-expert witnesses are admissible if they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of *Rule 702*." The government argues that lay witnesses do not have the legal training required to express opinions as to the legality or illegality of conduct, and that such opinions would thus not be helpful to the trier of fact. (Gov't Witness Mem., at 3-4 [4] (citing *United States v. Baskes, 649 F.2d 471 (7th Cir. 1980)*.) [*16]

> 4 The government's Motion in Limine to Preclude Opinion Testimony by Lay Witnesses Regarding Charged Conduct is cited as "Gov't Witness Mem., at ."

In *Baskes,* the Seventh Circuit held that a trial court acted within its discretion in prohibiting defense counsel from cross-examining a key prosecution witness as to whether he "unlawfully, knowingly and willfully conspired to defraud the United States." *649 F.2d at 478.*[HN6]

> When, as here, a witness Is asked whether the conduct in issue was "unlawful" or "wilful" or whether the defendants "conspired," terms that demand an understanding of the nature and scope of the criminal law, the trial court may properly conclude that any response would not be helpful to the trier of fact.

Id. The court explained that the witness, unfamiliar with the contours of the criminal law, may feel that the legal standard is either higher or tower than it really is. If either event is true the jury may accord too much weight to such a legal conclusion. [*17] " *Id.*

In *United States v. Fawell,* this court itself recognized that there are limits to a lay witness's ability to offer opinions as to whether his or her conduct violated the law:

> I do think it's okay to ask questions like: Did you always meet your job responsibilities? Did you during an eight-hour day always devote. . . eight hours of work to your Secretary of State responsibilities? Did you, to the extent that you had political work to do, do that at a time that you understood your regular work was done? or words to that effect. I think all that would be completely admissible and not objectionable. I think questions that ask in effect: Were you

> breaking the law? or Were you, in fact, defrauding the State of Illinois does call -- do call for legal conclusions.

(Tr. of 2/4/03, at 2321, Ex. A to Gov't Witness Mem.) The court further noted:

> .... It's fine to ask [the witness] Did you get all your work done? Did you intend to get all your work done? Did you ever put aside your responsibilities for the Secretary of State and instead spend time that you should otherwise have been working on political activity? That sets up this argument . . . without asking [*18] them questions like: Did you intend to commit mail fraud? or Did you commit mail fraud? Did you defraud anybody?

(*Id.* at 2326-27.)

Defendants characterize the government's motion as an attempt to unfairly shield the government's "star" witness, Scott Fawell, from effective cross-examination. (Ryan Witness Resp., at 1; Warner Witness Resp., at 1.) [5] Defendants argue that "appreciation for the wrongfulness of alleged conduct can go a long way to establishing the requisite intent in a specific intent crime," (*Id.* at 2.) They also note the importance of cross-examination in testing a witness's credibility. indeed, prior to his conviction, Fawell entered a plea of "not guilty" and asserted that he and Ryan were both innocent of any wrongdoing; now, Fawell is being called as a principal witness against Ryan and Warner. (Warner Witness Resp., at 2.)

> 5 Ryan's Response to the Government's Motion in Limine to Preclude Opinion Testimony by Lay Witnesses Regarding Charged Conduct is cited as "Ryan Witness Resp., at ." Warner's Response to Government's Motion in Limine to Preclude Opinion Testimony by Lay Witnesses Regarding Charged Conduct is cited as "Warner Witness Resp., at ."

[*19] The court agrees that [HN7] general assertions by a lay witness that he or she did or did not violate the law likely will not be helpful to the trier of fact. At the same time, a witness's beliefs in that regard may be probative of intent. (*See, e.g.*, Tr. of 1/22/03 ("I think it's fair for the jury to consider, look, you knew what you were doing was wrong. You went on blithely doing it.").) In addition, Defendants are entitled to cross-examine witnesses regarding their prior inconsistent statements and other issues relating to credibility. In particular, Defendants are entitled to probe Fawell regarding any inconsistent statements he may have made about the propriety of his own and others' conduct. Further resolution of this issue requires some evidentiary context and is appropriately left for trial.

B. Beliefs of Others

FED. R. EvID. 602 provides that [HN8] "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Ryan identifies 17 opinions or statements he believes rest on speculation as opposed to any personal knowledge. For example, Ryan objects [*20] to anticipated testimony from Donald Udstuen that Warner and Arthur "Ron" Swanson, a lobbyist for Wisconsin Energy, both told him that they would "take care" of Ryan, (Ryan Belief Mem., at 2.) [6] In addition, Ryan believes Scott Fawell will testify regarding his unfounded opinions on such matters as the propriety of the SOS Office decision to lease space at the Lincoln Towers office building in Springfield, Illinois; Ryan's role in including the "metallic security mark" specification in the SOS Office's bid for vehicle stickers; the SOS Office decision to move certain departments to 17 North State Street in Chicago, Illinois; distribution of low-digit license plates; Ryan's desire to keep friends "happy"; and other individuals' perceptions of Warner's role in Ryan's administration, (*Id.* at 3-4.)

> 6 Ryan's Motion in Limine to Exclude Testimony Constituting Speculation as to the Alleged Beliefs, Knowledge, Motivations or Understanding of Others is cited as "Ryan Belief Mem., at ."

Ryan acknowledges [*21] that personal knowledge can include inferences and opinions, but insists that the identified statements are "based not on the facts or on the witness's personal observation, but rather on the witness's *interpretation* of various ambiguous, cryptic statements made by another individual." (*Id.* at 7 (emphasis in original).) *See also Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 659 (7th Cir. 1991)* ("The inferences and opinions must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.") For its part,

the government "does not quarrel with the proposition that rampant speculation is not admissible." (Gov't Belief Resp., at 1.) [7] The government urges, however, that the admissibility of particular statements and opinions is "a fact-driven question that rests on the facts and circumstances surrounding the opinion as measured by the standard of *Rule 701*." (*Id.* at 1-2.)

7 The Government's Response to Defendant's Motion in Limine to Exclude Testimony Constituting Speculation as to the Alleged Beliefs, Knowledge, Motivations or Understanding of Others is cited as "Gov't Belief Resp., at ."

[*22] The court agrees that the opinions of Udstuen, Fawell, Warner, and others may be admissible under certain circumstances. For example, [HN9] where a participant in a conversation understands words or expressions that may be unclear to the jury, the participant may testify as to his or her understanding of the statements made by another participant. *See, e.g., United States v. Kozinski, 16 F.3d 795, 809 (7th Cir. 1994)* (trial court properly admitted statements by a participant in a conversation who "was testifying about his understanding of the thoughts that were being communicated to him.") Absent some context for the particular statements, the court declines to exclude them prior to trial and therefore reserves ruling on this issue.

III. Ryan's Motions

A. Motion to Bar Admission of "Other Acts" Evidence

Ryan seeks to preclude the government from presenting evidence relating to two state contracts during Ryan's tenure as governor: (1) the state's lease of a warehouse in Pana, Illinois for use by the Illinois Department of Corrections ("IDOC"); and (2) the state's contract with Comguard, a home detention monitoring company owned in part by Ryan's brother. [*23] The government no longer intends to offer any evidence regarding the Pana warehouse and that portion of Ryan's motion is denied as moot. (Gov't Other Acts Resp., at 3.) [8] The government has also decided not to offer evidence that shortly after Ryan became Governor, he allegedly asked IDOC Director Donald Snyder why Comguard was not receiving as much business as other more expensive vendors, (*Id.* at 4.)

8 The Government's Response to Defendant Ryan's Motion to Bar Admission of "Other Acts" Evidence is cited as "Gov't Other Acts Resp., at ."

That leaves the government's evidence that when Ryan was Secretary of State, he directed SOS staff to contact the Illinois Comptroller's Office to arrange for expedited handling of Comguard payment vouchers by the State of Illinois. (*Santiago* Proffer, at 69.) Ryan argues that this evidence is extrinsic to, and not inextricably intertwined with, the allegations in the indictment, and is therefore inadmissible propensity evidence under *FED. R. EVID. 404(b)* [*24] . [HN10] *Rule 404(b)* generally prohibits district courts from admitting evidence concerning a defendant's other uncharged bad acts. *United States v. Thomas, 321 F.3d 627,633-34 (7th Cir. 2003)*. Evidence "concerning the chronological unfolding of events that led to an indictment, or other circumstances surrounding the crime, is not evidence of 'other acts' within the meaning of *[Rule] 404(b)*." *United States v. Ojomo, 332 F.3d 485, 489 (7th Cir. 2003)* (quoting *United States v. Ramirez, 45 F.3d 1096, 1102 (7th Cir. 1995))*. Acts satisfy this "inextricably intertwined" doctrine" if they "complete the story of the crime on trial; their absence would create a chronological or conceptual void in the story of the crime, or they are so blended or connected that they incidentally involve, explain the circumstances surrounding, or tend to prove any element of the charged crime." *Id.* (quoting *United States v. Senffner, 280 F.3d 755, 764 (7th Cir. 2002))*.

The government contends that Ryan's efforts to help expedite payments to Comguard directly relates to the allegation in the indictment that Ryan "supported [Comguard] in its efforts [*25] to obtain State of Illinois contracts for electronic monitoring of prisoners." (Indictment, Count 2 P 5(F).) As Ryan notes, however, it is not clear that "arranging for the expedited handling of *payment* vouchers supports the allegation that Ryan helped Comguard *obtain* state contracts." (Ryan Other Acts Reply, at 3 [9] (emphasis in original).) The government argues that the evidence is nonetheless inextricably intertwined with the allegations in the indictment because it shows "the extent to which Ryan was willing to use his governmental office to assist Comguard's cash flow." (Gov't Other Acts Resp., at 5.) Without the evidence, the government urges, "the jury would not have a complete picture of Ryan's concern and

knowledge about Comguard's financial situation and they, therefore, would be lacking a key component in the evidence that shows that Warner's financial assistance to Comguard [in the form of $ 145,000 in loans] was a meaningful benefit to Ryan." (*Id.* at 6.)

9 Ryan's Reply in Support of his Motion to Bar Admission of "Other Acts" Evidence is cited as "Ryan Other Acts Reply, at ."

[*26] Ryan insists that evidence regarding expedited payment vouchers does nothing to fill a conceptual void in the allegations relating to Warner's loans to Comguard, or to Ryan's efforts to help Comguard obtain state contracts. (Ryan Other Acts Reply, at 3.) According to Ryan, the complete story of Warner's investment in Comguard "requires only two pieces of evidence -- that Ryan was related to the owner of Comguard and that Warner invested in the company." (*Id.* at 4.) "Just as simple," Ryan says, "is the allegation that Ryan supported Comguard in obtaining state contracts." (*Id.*)

The court is dubious as to whether the Comguard voucher evidence is inextricably intertwined with the allegations in the indictment. Ryan's efforts to expedite voucher payments on behalf of Comguard do not require the conclusion that he knew of the company's financial situation, or of Warner's role in providing the company with financial assistance. For similar reasons, the court has doubts as to whether the Comguard voucher evidence is otherwise admissible under *Rule 404(b)* as proof of Ryan's knowledge or intent to defraud the State of Illinois. (Gov't Other Acts Resp., at 6-7.) Nevertheless, in the [*27] absence of some evidentiary context, the court is unable to conclude from Ryan's arguments that there are no circumstances under which the evidence may be admissible at trial. For this reason, except as stated here, the court reserves ruling on Ryan's motion to bar admission of "other acts" evidence.

B. Motion to Bar "Cash Method" of Proof

Ryan seeks to bar the government from presenting evidence of his cash generation and cash expenditures pursuant to the "cash method" of proving unreported income. [HN11] The cash method of proof "compares cash expenditures with known cash sources" as follows:

> The method first requires that all cash expenditures be determined and added together. Then, taxable and nontaxable cash sources are added together. These sources would include any cash accumulated and on hand at the beginning of the tax period in question that the taxpayer spends during the tax period (often called a "cash hoard"). If cash expenditures exceed cash sources during the period in question, it is inferred that the excess amount is unreported income.

United States v. Toushin, 899 F.2d 617, 619-20 (7th Cir. 1990). To establish a "cash case;" the government [*28] must show with "'reasonable certainty' (1) the defendant's opening net worth and cash on hand at the beginning of the period for which he was indicted and (2) defendant's expenditures during the period in question." *United States v. Hogan, 886 F.2d 1497, 1509 (7th Cir. 1989)* (quoting *United States v. Caswell, 825 F.2d 1228 (8th Cir. 1987)).*

Ryan argues that the government cannot establish either of these two requirements. He claims that the government's cash flow analysis does not account for all of his sources of cash, such as cash he received for campaign travel expenses from Citizens for Ryan; cash back from checks to grocery stores and other vendors; and cash from cashing third-party checks such as Social Security checks. (Ryan Cash Mem., at 9.) [10] Ryan also contends that the government has no "hard evidence or quantification of Ryan's actual cash expenditures" during his tenure as Secretary of State and Governor. (*Id.* at 10.)

10 Ryan's Motion in Limine to Bar the Government's Attempt to Introduce Evidence Relating to Ryan's Cash Generation and Expenditures Via the "Cash Method" of Proof is cited as "Ryan Cash Mem., at ."

[*29] The government insists that it will use the "specific item method," and not the cash method, to show that Ryan underreported his income. "That is, the government will present direct evidence that Ryan failed to report on his tax return specific items of income that were taxable to him, such as CFR funds that he converted for his personal use when he gave the funds to family members and friends as personal gifts." (Gov't Cash Resp., at 2.) [11] By way of example, the government notes that Ryan gave his son-in-law, Michael Fairman, who was having financial difficulties, a total of $ 55,000 in CFR funds. Ryan allegedly "caused these payments to be

mischaracterized as compensation for campaign consulting work, even though Fairman never consulted on Ryan's campaign, or on any other campaign, in his life." (*Id.*)

> 11 The Government's Response to Defendant Ryan's Motion in Limine to Bar Evidence Relating to Ryan's Cash Generation is cited as "Gov't Cash Resp., at ."

The government contends the evidence [*30] at issue is admissible in spite of the fact that it will not pursue the "cash method" of proof. According to the government, Ryan's possession and use of cash is independently relevant to the racketeering conspiracy, fraud, and IRS obstruction claims. In *United States v. Kwitek, 467 F.2d 1222 (7th Cir. 1972)*, for example, a bank robbery defendant argued that the trial court improperly admitted prejudicial and irrelevant evidence as to his possession of money after the robbery. *Id. at 1225.* The government presented testimony that, after the robbery, the defendant gave a nightclub dancer $ 70 to buy clothing for a trip to Las Vegas, paid cash for her airfare, and gave her some $ 200 in cash for gambling. Another dancer on the Las Vegas trip received a $ 50 tip from a co-defendant and testified that she saw a suitcase containing a firearm and stacks of $ 20 and $ 50 bills in one of the hotel rooms. *Id.* The Seventh Circuit found that the trial court acted within its discretion in admitting the evidence, stating that "expensive trips, gambling and other instances of Tree spending and high living may be pertinent in crimes involving a motive of enrichment. [*31] Proof of prior impecunity is not necessary." *Id. at 1225.*

The fact that there may be other legitimate sources for the cash, the government contends, goes to the weight, and not the admissibility, of the evidence. (Gov't Cash Resp., at 2 (citing *United States v. Hogan.*) The defendant in *Hogan,* an appointed state judge, was convicted of accepting bribes from lawyers who appeared in his courtroom; failing to report $ 20,000 in related income on his tax returns; and racketeering. *886 F.2d at 1500-01.* In appealing his conviction, the defendant argued, among other things, that the trial court improperly admitted evidence regarding the $ 20,000 in underreported income for purposes of establishing the bribery charges. *Id. at 1506.* [HN12] The Seventh Circuit found no error, noting that "evidence of wealth may be admissible to establish that a person engaged in a cash-intensive criminal enterprise, even if there is another explanation for the extra money." *Id. at 1507.* More recently in *United States v. Duran, 407 F.3d 828 (7th Cir. 2005)*, the Seventh Circuit upheld a trial court's decision to allow testimony that [*32] the defendant's co-defendant was arrested with $ 20,000 in cash. *Id. at 837.* The court explained:

> Even assuming, as Mr. Duran argues, that there is a possibility that the cash was attributable to some activities of [the co-defendant] that were outside the conspiracy with Mr. Duran, we further have explained that the fact that one or both of the co-conspirators "were involved in other criminal activity that may have contributed to the amount of cash goes only to the weight, not the admissibility, of the evidence."

Id. at 837-38 (quoting *United States v. Davis, 838 F.2d 909, 931 (7th Cir. 1988)).*

The government argues that as in *Kwitsk* and *Hogan,* Ryan's possession of cash figures prominently in the racketeering and fraud charges in this case. For example, Ryan allegedly "received from Harry Klein (to whom Ryan gave governmental benefits) annual free vacations at a posh Jamaican villa, which Ryan tried to hide through a sham paper trail." (Gov't Cash Resp., at 5.) Specifically, Ryan would write Klein a check for $ 1,000 or $ 2,000, depending on the length of the vacation, and Klein would give Ryan the same amount in cash. In addition, [*33] Ryan allegedly approved an arrangement whereby Warner would share the proceeds of some of his extortions with Donald Udstuen, a long-time Ryan advisor, with Warner "taking care of" Ryan in return. (*Id.*)

While Ryan was engaging in these activities, the government maintains, he"routinely carried wads of cash of considerable thickness and dispensed large amounts of cash (often hundreds of dollars at a time) . . . ." (*Id.* at 6.) Ryan purportedly "placed bets of several hundred dollars during his frequent visits to casinos; he made frequent cash gifts to his children and cash gifts to others: he gave generous tips to wait staff; [and] he made cash purchases." (*Id.*) Notably, however, Ryan and his wife "never once used an automated teller machine, and they withdrew cash from their bank accounts seven times for a

total of about $ 6,700" between 1993 and 2002. (*Id.* at 7.) Co-conspirators Warner and Ron Swanson, in contrast, withdrew "hundreds of thousands of dollars of cash" from their accounts. (Gov't Cash Reply, at 2.) [12] In addition, Ryan reportedly did not carry around much cash prior to becoming Secretary of State and Governor, and was occasionally even short of cash. [*34] (*Id.* at 6.)

12 The Government's Sur-Reply to Defendant Ryan's Motion in limine to Bar Evidence Relating to Ryan's Cash Generation is cited as "Gov't Cash Reply, at ."

Ryan first objects that the government "does not account for the possibility that Ryan's cash expenditures stemmed from the legitimate sources of income offered by Ryan." (Ryan Cash Reply, at 6.) [13] Ryan is correct that the government's evidence does not rule out innocent explanations, but as the *Hogan* court concluded,[HN13] "evidence of wealth may be admissible to establish that a person engaged in a cash-intensive criminal enterprise, even if there is another explanation for the extra money." *886 F.2d at 1507.* The fact that Ryan may have had other cash sources goes to the weight, as opposed to the admissibility, of the evidence. Ryan also argues that the government's wealth evidence is too speculative, consisting of nothing more than general assertions regarding "wads' of cash and "generous" tips. (Ryan Cash Reply, at [*35] 6.) The court agrees that possession of unspecified "wads" of cash and payment of "generous" tips, without more, is not sufficient to suggest that a person engaged in lucrative criminal activity. Nevertheless, evidence that Ryan generally began carrying large amounts of cash once he became Secretary of State and Governor may be probative of his involvement in a cash-intensive scheme to defraud, particularly in the absence of any evidence that he regularly utilized standard methods of withdrawing cash such as ATM machines or personal bank withdrawals.

13 Ryan's Reply in Support of His Motion to Bar the Government's Attempt to Introduce Evidence Relating to Ryan's Cash Generation and Expenditures Via the "Cash Method" of Proof is cited as "Ryan Cash Reply, at ."

Ryan next insists that evidence of wealth is relevant only where it "tend[s] to bolster direct evidence regarding the criminal enterprise itself." (*Id.* at 9 (citing *United States v. Duran).*) He notes that in *Duran,* for example, [*36] the government produced recorded telephone conversations, witness testimony, and physical evidence supporting the drug conspiracy charges. *407 F.3d at 832.* The court did not cite these factors as a basis for admitting evidence that Duran's co-defendant was arrested with $ 20,000 in cash, however, and the court is not prepared to conclude that such circumstances are required as a foundation for admission of the cash evidence.

Nor is the court moved by Ryan's demand for certain other foundation evidence. Specifically, he asserts that wealth evidence is only admissible "as long as other evidence, mainly tHat the wealth was not derived from legitimate sources, is presented to support the charge." (Ryan Cash Reply, at 7 (quoting *United States v. Penny, 60 F.3d 1257, 1263 (7th Cir. 1995).*) In *Penny,* the defendant was convicted of distributing and conspiring to distribute narcotics as part of a "broad-reaching drug distribution scheme." *60 F.3d at 1259.* At the trial, the court admitted evidence of the defendant's unexplained wealth, including large cash payments to a housing contractor for extensive remodeling work and cash payments in the amount [*37] of $ 25.000 per year for automobile restoration and racing. *Id. at 1259-60.* On appeal, the defendant objected to the wealth evidence, arguing that it related to assets he had acquired prior to 1997, the date when he began distributing narcotics. *Id. at 1263-64.* The Seventh Circuit agreed that wealth evidence "must relate to wealth acquired during the period in which the narcotics trafficking occurred." *Id. at 1263.* The court found that this requirement was amply met by evidence that the defendant had purchased and sold drugs as early as 1984. Specifically, in 1983 and 1964, the defendant told a colleague and a cell mate that he made a great deal of money selling cocaine and heroin. *Id. at 1264.*

In this case, the government insists that it has evidence to support the fraud and racketeering charges notwithstanding Ryan's assertion that he obtained large sums of cash from legitimate sources. The court declines to preclude all wealth evidence; such evidence does support these charges to the extent it demonstrates Ryan's involvement in lucrative activities. In so ruling, the court recognizes that the government does not [*38] have a sufficient basis for utilizing the cash method of proving that Ryan underreported his income, and understands that it does not intend to do so. Ryan's motion to preclude the cash method of proving unreported income is granted in part and denied in part.

C. Motion to Dismiss or Suppress

Asserting his attorney-client privilege, Ryan moves to dismiss the indictment or, in the alternative, to suppress the grand jury testimony of Roger Bickel, who was employed as General Counsel of the Secretary of State's Office during Ryan's tenure. Ryan concedes that the Seventh Circuit has expressly determined that these communications are not privileged. (Ryan Bickel Mem. PP 1, 5.) *See also In re Witness Before Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002)* ("none of the conversations between Bickel and Ryan made in their official capacities as General Counsel and Secretary of State are privileged in the face of a federal grand jury subpoena.") Ryan nonetheless urges the court to disregard this ruling in favor of a recent, conflicting Second Circuit decision, *In re Grand Jury investigation, 399 F.3d 527 (2d Cir. 2005)* (finding communications [*39] between a government attorney and a public official privileged even in the face of a grand jury investigation). The court is unwilling to reject binding precedent or otherwise revisit this issue. Ryan's motion is denied.

D. Motion to Exclude Witnesses

The parties generally agree that potential witnesses should be excluded from the courtroom during the trial, with the exception of the government's case agent and expert or summary witnesses. *FED. R. EVID. 615*. The government requests that it be allowed two case agents rather than the customary one. characterizing both as persons whose presence is essential to the presentation of the government's case. *Id.* The court grants this request, in return, Ryan asks that his wife, Lura Lynn Ryan, and his six children be allowed to attend court proceedings even if they may be called as witnesses in this case. Defendant Warner joins the request and asks that his own wife of many years be permitted to remain in the courtroom. The government objects. Neither of the Defendants' wives appear on the government's witness list, but Defendants have not ruled out the possibility that they will be called in Defendants' [*40] own case.

Rule 615 requires that [HN14] "at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ." The court is sensitive to the fact that this is anticipated to be a lengthy trial and that Defendants, both of whom have been married for many years, would like the support of their wives and families. Nevertheless, the government has invoked *Rule 615*, which mandates the exclusion of potential witnesses. The court suspects that the scope of these witnesses' testimony will be limited and is willing to consider allowing them in the courtroom except during those portions of the proceedings that may bear on their testimony in the case. The court also urges the parties to craft stipulations that would render their testimony unnecessary. Absent such precautions, however, family members who may be called as witnesses will be excluded from the courtroom.

E. Miscellaneous Motions in Limine

Ryan seeks to bar the government from referring to a variety of additional matters during trial, including: (1) Winston & Strawn LLP and its current or former attorneys; (2) documents allegedly written and/or signed by Clyde Wilson; [*41] (3) evidence of the conviction of Citizens for Ryan; and (4) Edward Genson's prior representation of Scott Fawell. The government does not intend to refer to any of these matters in its opening statement, and has agreed to provide defense counsel with advance notice prior to presenting evidence on, or making references to, such issues during the trial. (Gov't Consolidated Response to Ryan's Motions in Limine, at 1-2.) These motions are therefore denied as moot or premature.

With respect to Ryan's remaining motions in limine-to preclude admission of or reference to a memorandum written by Honeywell Corporation lobbyist Robert E. Cook, and to preclude evidence related to the automobile accident that claimed the lives of six of Scott and Janet Willis's children-the government stated at a September 13, 2005 status hearing before this court that it does not intend to make reference to either of these matters in its opening statement, and would file written responses before raising the issues during the trial. (Tr. 9/13/05, at 19-20.) The motions will be entered and continued at the government's request.

IV. Government's Motion to Compel Reciprocal Discovery

During the course [*42] of these proceedings, Defendants requested disclosure of documents pursuant to *FED. R. CRIM. P. 16(a)(1)(E)*. The government complied with that request, triggering Defendants' reciprocal obligation to "permit the government, upon request, to inspect and to copy or photograph . . . papers . . . [and] documents . . . if: (i) the item is within the

defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial." *FED. R. CRIM. P. 16(b)(1)(A)*. The government has requested that Ryan produce "any and all documents that reflect or substantiate a legitimate source of cash to defendant Ryan during the course of the time period alleged in the indictment." (Gov't Discovery Mem., at 1 and Ex. 3.) [14] Ryan has declined to produce responsive documents until he makes a final decision to testify, arguing that earlier production would violate his *Fifth Amendment* right against self-incrimination.

14 The Government's Motion to Compel Compliance with Reciprocal Discovery Orders is cited as "Gov't Discovery Mem., at ."

[*43] More than once, Ryan has publicly announced his intention to testify in this case. Despite these announcements, he remains free to exercise his *Fifth Amendment* right to remain silent. [HN15] Having availed himself of discovery, however, his *Fifth Amendment* right does not permit him to withhold relevant documents under *Rule 16(b)(1)(A)* until such time as he affirmatively takes the stand in his own defense. Indeed, a defendant's obligation to provide reciprocal discovery under *Rule 16* arises only at the defendant's request. *See, e.g., United States v. Ryan, 448 F. Supp. 810, 811 (S.D.N.Y.)* ("While the refusal to testify is constitutionally protected, the trial strategy determination is not so protected. Since the defendant had availed himself of the strategy to obtain discovery of the government, he must comply with the requirement for reciprocal discovery."), *aff'd, 594 F.2d 853 (2d Cir. 1978)*. Contrary to Ryan's suggestion, moreover, the government cannot use any documents admissible solely through Ryan's own testimony unless he takes the stand.

Accordingly, the government' s motion to compel is granted, Ryan has asserted he has already produced all of [*44] the documents he will use in his case in chief. The court directs that he confirm that representation, or produce any additional documents he intends to use in his case in chief by September 26, 2005. If Ryan chooses not to produce these documents, he will not be permitted to introduce them at trial. *FED. R. CRIM. P. 16(d)(2)*; *United States v. De La Rosa, 196 F.3d 712, 715 (7th Cir. 1999)*.

CONCLUSION

For the reasons stated above, the government's motion for pretrial ruling on jury instructions related to mail fraud allegations (Docket No. 280), and Ryan's motion in limine to preclude evidence related to official actions benefiting campaign contributions absent a quid pro quo (Docket No. 291) are both granted in part and denied in part. The court reserves ruling on the government's specific mail fraud jury instructions. Except as stated in this opinion, the government's motion to preclude opinion testimony by lay witnesses (Docket No. 282). Ryan's motion to exclude testimony constituting speculation as to the alleged beliefs, knowledge, motivations or understanding of others (Docket No. 294), and Ryan's motion to [*45] bar admission of "other acts" evidence (Docket No. 262) are reserved for trial.

Ryan's motion to bar the "cash method" of proof (Docket No. 295) is granted in part and denied in part. Ryan's motion to dismiss or suppress based on the attorney-client privilege (Docket No. 301) is denied. Ryan's motion to exclude witnesses from the courtroom during trial (Docket No. 297) is granted as stated in this opinion. Ryan's motions to bar references to Winston & Strawn LLP and its current or former attorneys (Docket No. 293), to bar reference to documents allegedly written and/or signed by Clyde Wilson (Docket No. 300), to bar evidence of the conviction of Citizens for Ryan (Docket No. 292), and to bar reference of Edward Genson's prior representation of Scott Fawell (Docket No. 299) are all denied as moot. Ryan's motions to predude admission of or reference to the memorandum written by Robert E. Cook (Docket No. 303), and to preclude evidence related to the Willis accident (Docket No. 296) are both entered and continued.

The government's motion to compel compliance with reciprocal discovery orders (Docket No. 307) is granted. In addition, for the reasons stated in open court, the government's [*46] motion to compel compliance with *Rule 17* subpoena duces tecum (Docket No. 288) is entered and continued pending an *in camera* review of the pertinent documents. Ryan's motion to preclude evidence of Secretary of State employees' bribes (Docket No. 298) is entered and continued pending a response from the government.

ENTER:

Dated: September 23, 2005

REBECCA R. PALL MEYER

United States District Judge

LEXSEE 2006 U.S. DIST. LEXIS 64085

UNITED STATES OF AMERICA, Plaintiff, v. LAWRENCE E. WARNER and GEORGE H. RYAN, SR., Defendants.

No. 02 CR 506-1,4

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2006 U.S. Dist. LEXIS 64085*; *98 A.F.T.R.2d (RIA) 7074

September 7, 2006, Decided
September 7, 2006, Filed

SUBSEQUENT HISTORY: Motion denied by *United States v. Warner, 2006 U.S. Dist. LEXIS 77228 (N.D. Ill., 2006)*
Affirmed by *United States v. Warner, 2007 U.S. App. LEXIS 19829 (7th Cir. Ill., Aug. 21, 2007)*

PRIOR HISTORY: *United States v. Warner, 2005 U.S. Dist. LEXIS 24825 (N.D. Ill., 2005)*

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant and co-defendant were convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1962(d)*, and the federal mail fraud statute, *18 U.S.C.S. §§ 1341, 1346*. Co-defendant was also convicted of violating *18 U.S.C.S. § 1001(a)(2)* and *26 U.S.C.S. §§ 7206(1), 7212(a)*. Defendant and co-defendant moved for a judgment of acquittal or, in the alternative, for a new trial.

OVERVIEW: Defendant and co-defendant argued that the evidence was insufficient to convict them on several of the charges, that the RICO charges were improper for several reasons, and that jury problems so infected their convictions as to violate due process. Defendant argued, in addition, that he was prejudiced by being tried together with co-defendant. The court first found that, based upon the evidence that co-defendant personally steered contracts and leases to his friends and associates, the jury could reasonably conclude that co-defendant knowingly embraced the conspiracy's common purpose, even if he did not participate in every aspect of the conspiracy. Next, the court found that the evidence was insufficient to support the jury's verdict on Count 9 (mail fraud in connection with a commission contract that defendant executed relating to property at 17 North State Street) and Count 10 (mail fraud in connection with the Governor's Office's selection of Grayville, Illinois for a maximum security prison). Finally, the court was not persuaded that defendant was prejudiced by the abundance of evidence that was admitted solely against co-defendant.

OUTCOME: Co-defendant's motion for judgment of acquittal was granted with respect to Counts Nine and Ten and otherwise denied. Co-defendant's motions to dismiss, for new trial, and for arrest of judgment were denied. Defendant's motion for acquittal was granted with respect to Count Nine and otherwise denied. Defendant's motions for severance were denied. Defendant's motions to dismiss, for new trial, and arrest of judgment were denied.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Deferential Review > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Deferential Review > Credibility & Demeanor Determinations
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
Evidence > Procedural Considerations > Weight & Sufficiency
[HN1] A court's review of a jury's findings is extremely deferential. The court views the evidence in the light most favorable to the government and defers to the jury's credibility determinations. Only if there is no evidence in the record from which the jury could find guilt beyond a reasonable doubt will the court overturn the jury's verdict.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN2] To prove a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, the government must show (1) an agreement to conduct or participate in the affairs (2) of an enterprise (3) through a pattern of racketeering activity. Consistent with general conspiracy law, direct evidence of an agreement is not required to prove a RICO conspiracy; rather, an agreement can be inferred from the circumstances.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
[HN3] Multiple conspiracies exist when there are separate agreements to effectuate distinct purposes. By contrast, a single conspiracy exists when the evidence, viewed in the light most favorable to the government, establishes that the co-conspirators joined to effectuate a common design or purpose. If the government demonstrates that the co-conspirators embraced a common criminal objective, a single conspiracy exists, even if the parties do not participate in every aspect of the scheme.

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
Evidence > Procedural Considerations > Weight & Sufficiency
[HN4] In considering the sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution, and as long as any rational jury could have returned a guilty verdict, the verdict must stand.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN5] The mail fraud statute prohibits devising a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, and executing that scheme by use of the mails. *18 U.S.C.S. § 1341.* A conviction must satisfy three elements: (1) the defendant's participation in a scheme to defraud; (2) the defendant's intent to defraud; and (3) the defendant's use of the mails in furtherance of the fraudulent scheme.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN6] Under the mail fraud statute, a scheme or artifice to defraud includes a scheme to deprive a person or persons of their intangible right to honest services. *18 U.S.C.S. § 1346.* As direct evidence of a defendant's fraudulent intent is typically unavailable, specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself that demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN7] A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants. In the case of a successful scheme, the public is deprived of its servants' honest services no matter who receives the proceeds.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN8] A mailing is considered in furtherance of a scheme to defraud even where it is incidental to an essential part of the scheme.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
[HN9] Where the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
Evidence > Procedural Considerations > Weight & Sufficiency
[HN10] A conspiracy variance claim amounts to a challenge to the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the same conspiracy. Where a defendant asserts a variance claim, a reviewing court reviews the evidence in the light most favorable to the government. The fact that the evidence introduced at trial might also be consistent with an alternate theory is irrelevant. Thus, even if the evidence arguably establishes multiple conspiracies, there is no material variance from an indictment charging a single conspiracy if a reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment. Furthermore, a defendant must show prejudice from the variance.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
[HN11] Courts have found that many of the principles governing variance in conspiracy cases apply to multi-defendant mail fraud prosecutions as well.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN12] Although the term "intangible right to honest services" may not be defined by statute, the term has been addressed by the courts, both before and after *18 U.S.C.S. § 1346* was enacted in 1988.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN13] Pursuant to *18 U.S.C.S. § 1346*, a "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Money Laundering > Elements
[HN14] The federal money laundering statute on its face allows conviction based on a defendant's violation of state law. *18 U.S.C.S. § 1956(a)(1)(B)(ii)*

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN15] In the context of the Racketeer Influenced and Corrupt Organizations Act, a defendant's violation of state law can constitute a predicate act of racketeering activity. *18 U.S.C.S. § 1961(1).*

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN16] A defendant's breach of fiduciary duty, standing alone and absent misuse of a public position, is insufficient to support an honest services mail fraud charge; rather, the test is whether a public official breaches that duty by misusing his position for personal gain.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN17] In the context of mail fraud, the United States Court of Appeals for the Seventh Circuit does not mandate that a fiduciary duty of honest services be defined only by reference to state law; however, the Seventh Circuit does not appear to prohibit any consideration of state law in determining the nature of that duty.

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Fraud (IRC secs. 6662-6664, 6674, 6690, 7204-7207, 7268, 7434, 7454, 7623) > Fraudulent Returns & Other Documents
Tax Law > Federal Tax Administration & Procedure > Criminal Procedure & Penalties (IRC secs. 7201-7217, 7231-7232, 7261-7262, 7268-7273, 7375) > Aid & Assistance in Preparation of False Returns
[HN18] In the context of willfully filing false tax returns, the government is required to prove that the law imposed a duty on the defendant, that defendant knew of this duty, and that he voluntarily and intentionally violated that duty. A defendant's good-faith belief that he is acting within the law, even if objectively unreasonable, negates the willfulness element. The defendant's intent to violate a known duty under the tax laws may be demonstrated by circumstantial evidence.

Tax Law > Federal Tax Administration & Procedure > Criminal Procedure & Penalties (IRC secs. 7201-7217, 7231-7232, 7261-7262, 7268-7273, 7375) > Aid & Assistance in Preparation of False Returns

[HN19] In the context of willfully filing false tax returns, evidence of a consistent pattern of under reporting large amounts of income will support the necessary inference of willfulness.

Tax Law > Federal Tax Administration & Procedure > Criminal Procedure & Penalties (IRC secs. 7201-7217, 7231-7232, 7261-7262, 7268-7273, 7375) > Attempted Tax Evasion > Elements

Tax Law > Federal Tax Administration & Procedure > Criminal Procedure & Penalties (IRC secs. 7201-7217, 7231-7232, 7261-7262, 7268-7273, 7375) > Concealment of Assets

[HN20] Tax evasion may be inferred from conduct such as concealment of assets or covering up sources of income and any conduct, the likely effect of which would be to mislead or to conceal.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Money Laundering > Elements

[HN21] See *18 U.S.C.S. § 1956(a)(1)(B)(i)*.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Money Laundering > Elements

[HN22] To convict a defendant under *18 U.S.C.S. § 1956(a)(1)(B)(i)*, the government is required to prove that defendant conducted a financial transaction knowing that the property involved in the transaction was illegally derived and knowing that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds. The United States Court of Appeals for the Seventh Circuit has articulated two broad principles governing *§ 1956* liability. First, the focus is on the transaction in proceeds, not the transaction that creates the proceeds. Second, the defendant must do more than simply transfer, then spend, the proceeds at issue. Rather, the defendant's transactions with the proceeds of unlawful activity must be specifically designed to hide the provenance of the funds involved.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Money Laundering > Elements

[HN23] In the context of *18 U.S.C.S. § 1956(a)(1)(B)(i)*, using sham companies to transact business using the proceeds of unlawful activity is one way the government may demonstrate an intent to conceal.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Money Laundering > Elements

[HN24] In the context of *18 U.S.C.S. § 1956(a)(1)(B)(i)*, intent to conceal may be shown by the use of third parties to conceal the real owner, or engaging in unusual financial moves culminating in a transaction.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Currency Smuggling > Elements

[HN25] The anti-structuring statute requires the government to prove that the defendant acted purposefully to evade the bank's CTR requirement, not that the defendant knew that such conduct was unlawful. Under the amended anti-structuring statute, the fact of structuring may well support the inference that the defendant acted purposefully to avoid the bank's CTR obligations.

Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Joinder of Defendants

[HN26] Defendants may be joined in a single indictment where they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. *Fed. R. Crim. P. 8(b)*. The propriety of joinder is assessed from the face of the indictment and not based on the evidence actually adduced at trial.

Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Joinder of Defendants

Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Severance of Defendants

[HN27] The Federal Rules of Criminal Procedure do authorize severance where the court determines that

joinder of defendants in an indictment or for trial appears to prejudice a defendant. *Fed. R. Crim. P. 14(a)*. When defendants properly have been joined under *Fed. R. Crim. P. 8(b)*, a district court should grant a severance under *Fed. R. Crim. P. 14* only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. Furthermore, because *Rule 14* assigns to the district court the task of balancing the cost of multiple trials against the possible prejudice inherent in a single trial in order to prevail on this issue, a defendant must demonstrate that the denial of severance caused him actual prejudice that deprived him of his right to a fair trial; it is insufficient that separate trials would have given a defendant a better opportunity for an acquittal.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
[HN28] In both mail fraud and conspiracy cases, evidence of one defendant's acts in furtherance of the scheme or conspiracy are admissible against any other participant in the scheme or conspiracy, even if such a participant did not specifically know what his co-defendant was doing.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
[HN29] Under the law of conspiracy, a defendant is in fact accountable for the acts of his associates.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation
[HN30] A defendant is deprived of his *Sixth Amendment* right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation
[HN31] The *Confrontation Clause* also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation
[HN32] Only the "testimonial statements" of a hearsay declarant implicate Crawford. The United States Supreme Court defined "testimonial" as statements made in response to a police interrogation, the primary purpose of which is to establish or prove past events potentially relevant to later criminal prosecution rather than assist police in dealing with an ongoing emergency.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview
[HN33] The Racketeer Influenced and Corrupt Organizations Act (RICO) statute does not preclude the use of Pinkerton instructions, and the United States Court of Appeals for the Seventh Circuit has stated that the use of such instructions in RICO cases is not "wrong or improper."

Criminal Law & Procedure > Jury Instructions > General Overview
[HN34] Courts presume that juries understand and follow jury instructions.

Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview
[HN35] An ostrich instruction is appropriate when a defendant claims a lack of guilty knowledge and where there are facts and evidence which support an inference of deliberate ignorance. The focus is on the defendant's state of mind, not on what an objectively reasonable person might do in the same context.

Criminal Law & Procedure > Verdicts > Special Verdicts
[HN36] Although permitted, special interrogatories or verdicts are generally not favored in criminal cases.

Criminal Law & Procedure > Jury Instructions > General Overview
[HN37] Jury instructions, when viewed as a whole, must treat the issues fairly and accurately.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN38] A conspiracy charge under *18 U.S.C.S. § 1962(d)* focuses on the act of a defendant's agreement to engage in racketeering activity, rather than on the racketeering acts themselves.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN39] The United States Court of Appeals for the Seventh Circuit has held that specific predicate acts need not be alleged nor proved for a *18 U.S.C.S. § 1962(d)* charge. Similarly, the United States Supreme Court has held that a defendant need not have actually committed nor even agreed to commit the two or more predicate racketeering acts required by *§ 1962(c)* in order to be punished under *§ 1962(d)*; rather, all that is required is that the defendant adopt the goal of furthering or facilitating the criminal endeavor. It would be anomalous to require jurors to unanimously agree on which predicate acts constituted the pattern of racketeering activity which was the object of the conspiracy, when the prosecution is not required to prove or even identify those predicate acts.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Unanimity

[HN40] The United States Court of Appeals for the Seventh Circuit has upheld the use of juror instructions that lack an instruction requiring the jurors to unanimously agree on and identify particular predicate acts for a *18 U.S.C.S. § 1962(d)* charge.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Unanimity

[HN41] The distinction between the substantive charge of *18 U.S.C.S. §1962(c)* and the conspiracy charge of *18 U.S.C.S. §1962(d)* obviates the need for an instruction of unanimous juror agreement as to particular predicate acts under the conspiracy charge, even where, as in the pattern instructions, it might be given for the substantive offense.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview

[HN42] A Racketeer Influenced and Corrupt Organizations Act conspiracy charge indictment need not identify specific predicate acts in which the defendant was involved.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview

[HN43] Where a defendant is charged with substantive offenses that are also alleged as the Racketeer Influenced and Corrupt Organizations Act (RICO) predicate racketeering acts, a finding of guilt on two or more of the substantive offenses is sufficient to support a RICO conviction.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN44] Pursuant to *18 U.S.C.S. § 1961(1)*, any violation of the federal statutes related to mail fraud amounts to a racketeering act under the Racketeer Influenced and Corrupt Organizations Act.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
Criminal Law & Procedure > Defenses > General Overview
Criminal Law & Procedure > Scienter > Specific Intent

[HN45] Mail fraud is a specific intent crime, for which the absence of an intent to defraud is a complete defense. A defendant is entitled to present evidence concerning his beliefs, motives, and intentions regarding the various transactions and mailings in the alleged scheme to defraud, but United States Court of Appeals for the Seventh Circuit does not require that any evidence, no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith.

Evidence > Relevance > Prior Acts, Crimes & Wrongs

[HN46] Evidence of other acts is not admissible to prove the character of a person in order to show action in conformity therewith.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Bias & Prejudice > Tests
Criminal Law & Procedure > Juries & Jurors > Voir Dire > General Overview
[HN47] The United States Supreme Court has articulated a two-part test to determine whether, after the jury has reached a verdict, a juror's response to voir dire questions requires a new trial: a party must first demonstrate that a juror failed to answer honestly a material question on voir dire and then further show that a correct response would have provided a valid basis for a challenge for cause. The focus of the inquiry is whether the juror's dishonest answer demonstrates actual or implied bias because whatever motivated the juror's misrepresentations, only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Judicial Discretion
[HN48] The trial court has considerable discretion in deciding how to handle a sleeping juror.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Judicial Discretion
[HN49] It is within the trial court's prerogative to substitute for reasonable cause any juror with an alternate, even without consent of either party to the case.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Outside Influences
Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial
Evidence > Inferences & Presumptions > Rebuttal of Presumptions
[HN50] A new trial is not automatically required whenever a jury is exposed to material not properly in evidence. The question is whether there is a "reasonable possibility" that extraneous documents may have affected the verdict. This inquiry is objective and fact-driven, and in making its determination this court may rely on its familiarity with the proceedings when deciding whether the verdict was affected by outside information. Prejudice to the defendants is presumed but is rebutted if there is no reasonable possibility that the verdict was affected by the contact.

Criminal Law & Procedure > Juries & Jurors > General Overview
[HN51] Jurors cannot fairly determine the outcome of a case if they believe they will face "trouble" for a conclusion they reach as jurors.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Alternate Jurors
[HN52] See *Fed. R. Crim. P. 24(c)(3)*.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Alternate Jurors
[HN53] The plain language of *Fed. R. Crim. P. 24(c)* and the United States Court of Appeals for the Seventh Circuit's discussion in United States v. Johnson refute the notion that substituted jurors are at an insurmountable disadvantage in deliberations.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Juries & Jurors > General Overview
[HN54] Due process does not require a new trial every time a juror has been placed in a potentially compromising situation.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Alternate Jurors
[HN55] The current version of *Fed. R. Crim. P. 24* presumes that post-submission substitution, when accompanied by instructions to begin deliberations anew, is not prejudicial. *Fed. R. Crim. P. 24(c)(3)*.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview
[HN56] Waiver is the intentional relinquishment or abandonment of a known right. Forfeiture is simply the

failure to make a timely assertion of a right. Waiver can be implied where an intention to relinquish the right, although not expressed, can be inferred, although "implied waiver" is often difficult to distinguish from "forfeiture."

Criminal Law & Procedure > Juries & Jurors > General Overview
Criminal Law & Procedure > Trials > Judicial Discretion
[HN57] A court has discretion under N.D. Ill. Crim. R. 31.1 to deny counsel's request to interview jurors. In exercising that discretion, the likelihood that juror interviews will yield admissible evidence is certainly a factor.

Criminal Law & Procedure > Verdicts > General Overview
Evidence > Inferences & Presumptions > Presumptions
[HN58] While it is true that a court can bolster its presumption that a jury has followed its instruction by reference to the fact the jury did acquit some of the defendants on some counts, a split verdict is not a necessary condition for the ordinary presumption that the court's instructions were effective.

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JUDGES: REBECCA R. PALLMEYER, United States District Judge.

OPINION BY: REBECCA R. PALLMEYER

OPINION

MEMORANDUM OPINION AND ORDER

Judge Rebecca R. Pallmeyer

Defendants Lawrence E. Warner and George H. Ryan, Sr. were charged in a 22-count second superseding indictment with (1) conspiring to use the resources of the State of Illinois for their personal and financial benefit and for the benefit of Ryan's family members, the Citizens For Ryan political campaign committee, and various political and business associates, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962(d)*; and (2) devising a scheme to defraud the people of the State of Illinois and the State of Illinois of money, property, and the right to the honest services of Ryan and other State of Illinois officials, in violation of the federal mail fraud statute, *18 U.S.C. §§ 1341, 1346*. In addition, Defendant Ryan was separately charged with making materially false, fictitious, and fraudulent statements during several FBI interviews in violation of *18 U.S.C. § 1001(a)(2)* [*3] ; obstructing and endeavoring to obstruct the Internal Revenue Service in the correct reporting of income and the collection of taxes in violation of *26 U.S.C. § 7212(a)*; and filing materially false tax returns in violation of *26 U.S.C. § 7206(1)*. Defendant Warner was separately charged with extortion under the Hobbs Act, *18 U.S.C. § 1951*; money laundering, *18 U.S.C. § 1956 (a)(1)(B)(i)*; and structuring currency transactions in violation of *31 U.S.C. §§ 5324(a)(3)* and *(d)(2)*. On April 17, 2006, following a six-month trial, a jury convicted both Defendants on all counts. Both have moved for a judgment of acquittal or, in the alternative, for a new

trial. They argue that the evidence was insufficient to convict them on several of the charges, that the RICO charges were improper for several reasons, and that jury problems so infected their convictions as to violate due process. Defendant Warner argues, in addition, that he was prejudiced by being tried together with Defendant Ryan and that the court erred by denying his numerous requests for severance. For the reasons [*4] set forth in this opinion, the motions are granted with respect to Counts Nine and Ten and otherwise denied.

I. The Evidence Supported Defendant Ryan's and Warner's Convictions under Count One

Defendants Ryan and Warner were each convicted of one count of conspiring to violate RICO in violation of *18 U.S.C. § 1962(d)*. Ryan contends that the evidence was insufficient to establish that Ryan knew of the alleged conspiracy and intended to join it. Ryan *Rule 29* Mot. at 3. In addition, both Defendants Ryan and Warner argue that the Government failed to prove that they knowingly agreed to the single conspiracy charged in the Indictment. *See* Ryan *Rule 29* Mot. at 2-4; Warner *Rule 29* Mot. at 2-3. Ryan further contends that the alleged conspirators pursued divergent, at times conflicting, goals, which are inconsistent with the single, unitary objective alleged in the Indictment. Ryan *Rule 29* Mot. at 3-4. Finally, Ryan argues that the Government failed to prove that the varied criminal conduct alleged in the Indictment was carried out by a single enterprise. Ryan *Rule 29* Mot. at 4. Before addressing the Defendants' arguments, the court notes that its [HN1] review [*5] of the jury's findings is extremely deferential. *United States v. Gougis, 432 F.3d 735, 743-44 (7th Cir. 2005)*. The court views the evidence in the light most favorable to the government, and defers to the jury's credibility determinations. *Id. at 743*. Only if there is no evidence in the record from which the jury could find guilt beyond a reasonable doubt will the court overturn the jury's verdict. *Id. at 743-44*.

A. The Circumstantial Evidence of an Agreement to Violate RICO was Sufficient

[HN2] "To prove a RICO conspiracy, the government must show (1) an agreement to conduct or participate in the affairs (2) of an enterprise (3) through a pattern of racketeering activity." *United States v. Olson, 450 F.3d 655, 664 (7th Cir. 2006)*. Consistent with general conspiracy law, direct evidence of an agreement is not required to prove a RICO conspiracy; rather, "an agreement can be inferred from the circumstances." *United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir. 1986)*; *see also United States v. Diaz, 876 F.2d 1344, 1352 (7th Cir. 1989)* ("Because conspiracies are carried out in [*6] secret, direct proof of agreement is rare.") (citation and quotations omitted).

1. The Evidence Supported the Jury's Conclusion that Ryan Knew of and Intended to Join the Conspiracy

Ryan argues that his conduct during his terms as Secretary of State and Governor was incompatible with that the government's position that he knowingly acted to further the interests of a RICO conspiracy, as he "often acted contrary to his own interests" in serving the interests of the State. Ryan *Rule 29* Mot. at 3. Several witnesses did testify that, generally, Ryan put policy considerations ahead of politics, *see, e.g.*, Tr. at 4010 (Fawell); Tr. at 13500 (Wright). There was, however, substantial evidence regarding specific transactions from which the jury could reasonably conclude that Ryan knowingly steered government benefits to his friends and associates. *See, e.g.*, Tr. at 10461-63 (Sherman) (testifying that Ryan intervened on Warner's behalf with respect to a lease in Joliet, Illinois); Tr. at 10162-65 (Nelson) (testifying that Ryan intervened on Warner's behalf with respect to a lease in Bellwood, Illinois); Tr. at 8143-46 (Covert) (testifying that Ryan insisted that the specifications [*7] for validation stickers include a requirement beneficial to Warner's client, American Decal); 6636, 6651 (Chamness) (Ryan asks an SOS employee to deal with Harry Klein with respect to a building in South Holland, and is later upset when he believes that the employee and not Ryan has told Klein that a deal has been struck.). Although the jury was not required to find that the State overpaid for the contracts and leases that were entered into, *United States v. Fernandez, 282 F.3d 500, 507 (7th Cir. 2002)*, the jury could reasonably have concluded that Ryan's intervention on his friends' behalf had a negative impact on the State. *See, e.g.*, Tr. at 11045-46 (Norusis) (testifying that the State overpaid for the Joliet and Bellwood leases); Tr. at 8635-37 (Covert) (testifying that the changes to contract specifications, which Ryan asked him to pull back quietly, would have fostered "open competition").

Ryan asserts that his alleged co-conspirators -- in particular, Fawell, Swanson, Juliano and Udstuen -- did not tell Ryan what they were doing, and suggests there is no basis for concluding that he joined a conspiracy with

them. Ryan *Rule 29* Mot. at 3. Based upon the evidence [*8] that Ryan personally steered contracts and leases to his friends and associates, the jury could reasonably conclude that Ryan knowingly embraced the conspiracy's common purpose, even if he did not "participate in every aspect of the conspiracy." *United States v. Magana, 118 F.3d 1173, 1186 (7th Cir. 1997)* (internal quotations and citation omitted); *cf.* Tr. at 5381-82 (Fawell) (testifying that Fawell, not Ryan, oversaw the use of state employees for political purposes). This evidence was bolstered by evidence that Ryan attempted to conceal the benefits he conferred upon, and received from, Warner and others. *See, e.g.*, Gov't Exs. 28-012, 28-024 (Ryan did not report gifts and benefits he received from Klein and others on his annual Statements of Economic Interest); Tr. at 8145 (Covert) (testifying that Ryan told him to withdraw changes to contract specifications disadvantageous to Warner "without drawing a lot of attention to it"); Tr. at 3551-52, 3580, 3584-85 (Fawell), 14546-49 (Sonneveld) (Ryan approves Fawell's recommendation to dismantle Inspector General's office). There was sufficient circumstantial evidence in the record for the jury to conclude that [*9] Ryan knew of and intended to join the conspiracy, even if his co-conspirators did not divulge everything they were doing to further the conspiracy's interests.

2. The Record Supports the Jury's Finding of a Single RICO Conspiracy

[HN3] "Multiple conspiracies exist when there are separate agreements to effectuate distinct purposes." *United States v. Ceballos, 302 F.3d 679, 688 (7th Cir. 2002)*. By contrast, a single conspiracy exists when "the evidence, viewed in the light most favorable to the government, establishes that the co-conspirators joined to effectuate a common design or purpose." *Id.* If the government demonstrates that the "co-conspirators embraced a common criminal objective, a single conspiracy exists, even if the parties do not participate in every aspect of the scheme." *United States v. Jones, 275 F.3d 648, 652 (7th Cir. 2001)*. Both Ryan and Warner contend that the evidence at trial was insufficient to prove a single RICO conspiracy.

As charged in the Indictment, the conspiracy's overall objective was to use state resources for the personal benefit of Ryan and his associates. See Indict. Count I, PP 9-17. In his *Rule 29* motion, Ryan [*10] divides the co-conspirators into two categories: (1) those who were concerned with political objectives (Fawell and Juliano); and (2) those who were concerned with their own financial interests (Warner, Udstuen, Swanson, Drazek and Tom Ryan). Ryan *Rule 29* Mot. at 3-4. Viewing the evidence in the light most favorable to the government, as the court is required to do, these purportedly competing goals do not, as Ryan contends, indicate multiple conspiracies. Rather, they were integral to the conspiracy's overall objective to use state resources for personal benefit. Fawell and Juliano furthered the interests of the conspiracy by helping to conceal the improper use of state resources. *See, e.g.*, Gov. Ex. 01-019 (December 1994 Fawell memo to Ryan regarding the Inspector General's office); Tr. at 7039-40 (Juliano). Their actions benefitted Ryan politically, certainly, but they also allowed the conspirators to continue perpetrating their schemes. Indeed, the two interests went hand-in-hand: without continued access to the offices of government, there were no contracts, leases, or other benefits to share. And while Fawell did testify that he reigned in Warner's influence early in Ryan's [*11] first term as Secretary of State's Office, he also testified that he (Fawell) advised Warner to "get a couple of clients -- a couple of clients for the office, which is normal, and, you know, don't get involved in a lot of smaller stuff." Tr. at 2768. Although Fawell believed that this was "normal" political behavior, it was a key component of the Indictment against Defendant Warner. See Indict. PP 4(B); 14-88.

Warner, for his part, contends that the "abundance of evidence" presented unrelated to Warner belies the Government's theory that Warner participated in a single conspiracy with his alleged co-conspirators. Warner *Rule 29* Mot. at 2. As discussed, the government was not required to prove that Warner participated in every aspect of the alleged scheme, so the fact that the government put on evidence that did not pertain to Warner does not mean, or even suggest, that there were multiple conspiracies. The court concludes that the evidence was sufficient to prove a single objective.

B. The Evidence Was Sufficient to Support the Jury's Finding of a Single RICO Enterprise

Defendant Ryan argues that the evidence at trial failed to show that Ryan conducted the affairs of the [*12] State of Illinois, the enterprise identified in the Indictment, through a pattern of racketeering activity. Instead, Ryan contends that he acted through two distinct

governmental offices, the Secretary of State and the Governor, which constitute distinct enterprises. Ryan *Rule 29* Mot. at 5. To the extent that this argument is directed to the viability of the State as an enterprise, generally, this court previously addressed this issue at some length and concluded that the State of Illinois may serve as a RICO enterprise. *See United States v. Warner, 2004 U.S. Dist. LEXIS 15727, No. 02 CR 506, 2004 WL 1794476, at *13-16 (N.D. Ill. Aug. 11, 2004)*. Nothing in the evidence at trial persuades the court to revisit that conclusion.

Nor is the court persuaded that the evidence necessitates finding multiple enterprises. Although the majority of the schemes alleged in the Indictment originated during Ryan's tenure as Secretary of State, the performance of several of those schemes spanned Ryan's terms as both Secretary of State and Governor. *See, e.g.*, Count II, PP 89-97 (allegations concerning benefits received by Ryan from Harry Klein from 1993 through 2002); Count II, PP 98-115 (allegations concerning [*13] benefits received by Ryan from Ron Swanson from the mid-1990s through 2002). Moreover, money continued to flow from leases and contracts that Ryan steered to Warner during his years as Secretary of State even after Ryan took office as Governor. *See* Count II, P 23 (stickers contract); P 82 (Bellwood lease); P 88 (Joliet lease). Likewise, the false statement Counts (Counts Eleven through Thirteen) pertain to false statements then-Governor Ryan made to federal investigators about conduct that occurred during his tenure as Secretary of State. Consequently, the substance of the allegations in the Indictment and the evidence presented at trial do not lend themselves to being parsed in the manner advanced by Defendant Ryan. The court reaffirms its previous conclusion that the State of Illinois may, as a matter of law, serve as a RICO enterprise, and concludes that the evidence presented at trial was sufficient to support the jury's finding that the government proved a single enterprise.

II. Mail Fraud Counts

At the heart of the government's case against Defendants Ryan and Warner is a massive, unitary scheme "to defraud the people of the State of Illinois, and the State of [*14] Illinois, of money, property and the intangible right to the honest services of defendant Ryan and other officials and employees of the State of Illinois." Indict., Count II, P 3. The Indictment sets out a scheme spanning from 1990 to 2002 that included the award of state contracts and leases, the provision of non-public information and participatory status in government decisionmaking, and the grant of low-digit license plates to Ryan's friends and supporters, including Warner, in exchange for monetary and non-monetary benefits to Ryan and those close to Ryan, all of which was concealed by various false statements, nondisclosures, and structured behavior. *Id.* at PP 4-6. Although the entirety of the scheme is set out in Count Two, mailings related to particular sequences appear as separate counts.

The jury convicted Ryan and Warner on each count alleged against them. Ryan and Warner challenge this verdict as insufficiently supported by the evidence. Namely, Ryan argues that "there has been *no showing* that Ryan took official action 'in return' for cash, gifts or some other compensation." Ryan's *Rule 29* Mot. at 8. Warner argues that the government never demonstrated his access [*15] to material nonpublic information or that he made material false statements. Warner's *Rule 29* Mot. at 3-5. Warner also argues that the mailing in Count Two was not in furtherance of the scheme. Warner's Post-Trial Mot. at 24-25. In addition, both Defendants argue that there was a prejudicial variance between the single scheme charged in the indictment and the multiple schemes proved at trial. Ryan's Post-trial Mot. at 66; Warner's *Rule 29* Mot. at 2. The defendants also challenge the verdict on strictly legal grounds. Ryan asserts that these counts were unconstitutionally vague. Ryan's *Rule 29* Mot. at 18. Warner asserts that the court erred in referencing state law in instructing the jury on these counts. Warner's Post-Trial Mot. at 22.

As noted, [HN4] in considering the sufficiency of the evidence, the court must view the evidence "'in the light most favorable to the prosecution, and as long as any rational jury could have returned a guilty verdict, the verdict must stand.'" *United States v. Hausmann, 345 F.3d 952, 955 (7th Cir. 2003)* (quoting *Jones, 222 F.3d 349, 352*)). In *United States v. Henningsen*, the Seventh Circuit stated:

> [HN5] The mail fraud [*16] statute prohibits devising a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," and executing that scheme by use of the mails. *18 U.S.C. § 1341*. A conviction

> must satisfy three elements: (1) the defendant's participation in a scheme to defraud; (2) the defendant's intent to defraud; and (3) the defendant's use of the mails in furtherance of the fraudulent scheme.

387 F.3d 585, 589 (7th Cir. 2004). [HN6] Under the mail fraud statute, a "scheme or artifice to defraud" includes a scheme to deprive a person or persons (in this case, the citizens of Illinois) of their intangible right to honest services. *18 U.S.C. § 1346*. "As direct evidence of a defendant's fraudulent intent is typically unavailable, 'specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself that demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *United States v. Owens, 301 F.3d 521, 528 (7th Cir. 2002)* (quoting *United States v. Paneras, 222 F.3d 406, 410 (7th Cir. 2000))*. [*17]

Ryan notes that no government witness ever testified that he saw Ryan take a "corrupt dollar" and no one ever testified that Ryan took an official action with regard to any of the contracts or leases at issue in return for a gift or some benefit. Ryan's *Rule 29* Mot. at 8-9. Without such testimony, Ryan argues, the evidence is not sufficient to support his conviction of mail fraud. To the extent that Ryan is arguing that he had to personally benefit from the scheme in order to be convicted, Ryan's *Rule 29* Mot. at 9, that argument was foreclosed, as this court held prior to trial, by the Seventh Circuit's decision in *United States v. Spano, 421 F.3d 599, 603 (7th Cir. 2005)*; *United States v. Warner, 2005 U.S. Dist. LEXIS 21367, No. 02 CR 506, 2005 WL 2367769, at *2 (N.D. Ill Sept. 23, 2005)*. The Spano court observed, [HN7] "A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants. . . . In the case of a successful scheme, the public is deprived of its servants' honest services no matter who receives the proceeds." *Spano, 421 F.3d at 603*. The series of checks mentioned above and introduced [*18] into evidence demonstrate that even if the government did not prove that Ryan benefitted from the charged scheme, Warner, Udstuen, Swanson, and Klein benefitted in the form of lobbying and rental fees. Similarly, the court is not persuaded to revisit its determination that the government was not required to prove a strict *quid pro quo* -- a particular payment or benefit for a specific official act. *Warner, 2005 U.S. Dist. LEXIS 21367, 2005 WL 2367769, at *4*. What the government was required to show, however, was that Ryan "accepted gifts or other consideration with the understanding that he would perform or not perform acts in his official capacity in return." *Id.*

The government introduced a great deal of evidence of Ryan's acceptance of gifts and benefits. Gov't Resp. at 10-11. For example, Warner provided favorable construction and insurance benefits to members of Ryan's family, Gov. Ex. 08-056, Tr. at 17090 (Fairman); invested in Ryan's son's business, Gov. Ex. 08-087, 08-088; and provided favorable financial treatment to Comguard, a company associated with Ryan's brother. Gov. Ex. 09-001, 09-002; *see* Gov't Resp. at 14-15. Ron Swanson paid for Disney World accommodations for Ryan's [*19] daughter, Gov. Ex. 28-009, and gave the Ryans numerous gifts, Gov. Ex. 16-040, 16-045, 16-029. While there was no evidence of Ryan directly accepting cash, there was evidence that Ryan gambled regularly and carried substantial amounts of cash, despite having withdrawn comparatively little from his bank accounts from 1993 to 2002. *See* Tr. at 15279 (McAvoy), Tr. at 7844, 7860 (Borisy); Tr. at 2979 (Fawell); Gov. Ex. 16-089, 33-501.

Ryan argues that the evidence was insufficient to prove that he had the requisite intent to violate the mail fraud statute. Specifically, Ryan contends that he was not aware of, or otherwise involved in, "many of the alleged suspect transactions." Ryan *Rule 29* Mot. at 9-16. The court will address each of the mail fraud counts in turn.

A. The Evidence Was Sufficient to Support the Jury's Verdict on Count Two

Count Two of the Indictment charged Ryan and Warner with mail fraud in connection with a contract awarded to ADM by the Secretary of State's office. The SOS office sometimes contracted with outside vendors for products and services. Tr. at 8032 (Covert). Vehicle registration stickers, which help law enforcement determine whether drivers are [*20] driving with valid license plates, are one such product. Id. at 8033. Each department within the SOS office was responsible for establishing contract specifications that vendors were required to meet in order to be awarded a contract to provide services to the State. *Id.* at 8034. James Covert, the director of the SOS Office's vehicle-services department during Ryan's tenure as SOS, testified that the

department had established procedures for determining contract specifications and awarding contracts. *Id.* at 8035-36. In early 1991, Covert had a meeting with Larry Warner in which Warner informed Covert that he had "authority to speak for Secretary Ryan." *Id.* at 8053. At this same meeting, Warner told Covert that the SOS Office should "continue doing business with American Decal," a company that produced validation stickers and was one of Warner's lobbying clients. *Id.* Warner further asked Covert not to do business with an American Decal competitor, 3-M. *Id.* at 8054. Thereafter, Warner and Covert had weekly meetings, and, Covert testified, he generally did what Warner asked him to do. *Id.* at 8056, 8060.

As American Decal already had the vehicle services contract, [*21] it necessarily satisfied the existing contract specifications. Other companies, however, had difficulty satisfying those requirements. *Id.* at 8064. The issue came to a head in 1993, when Mr. Covert learned that a number of companies claimed to be capable of manufacturing superior products that did not comply with contract specifications at that time. *Id.* at 8119. Covert and another SOS employee convened a committee to review the specifications, and the committee recommended changing the specifications in a way that would have opened the contract for other bidders. *Id.* at 8120, 8126, 8135-36. Mr. Covert agreed to implement the changes, but soon afterwards, he received an angry call from Warner, in which Warner claimed that Covert was going to put him out of business and that Warner would "take care of it." *Id.* at 8140, 8144. The next day, Covert received a stern call from then-Secretary Ryan in which Ryan told Covert to withdraw the changed specifications "without drawing a lot of attention to it." *Id.* at 8145. Covert complied with this direction despite his belief that the changes to the specifications were in the State's best interests. *Id.* at 8146.

At trial, [*22] Ryan pointed that ADM's contract with the SOS Office was entered into before Ryan became SOS, and that there were sound law-enforcement rationales for keeping the contract specifications as they were. As the government contended, however, though the contract did not originate during Ryan's tenure as SOS, his actions ensured that the contract would remain in place, to Warner's benefit. Moreover, the jury was entitled to reject the defense's theory that Ryan was motivated by law-enforcement interests and not his own interests and those of his friends in making his decision regarding the sticker contract specifications. Ryan's direct intervention on Warner's behalf, and his attempt to conceal his intervention by directing Covert to withdraw the specifications quietly, amply support the jury's verdict with respect to Count Two.

Warner also challenges Count Two on the grounds that the mailing identified in the indictment and introduced at trial was not in furtherance of the license plate registration sticker/ADM lobbying contract scheme. Warner Post-Trial Mot. at 24-25. Warner notes that this mailing occurred in 2000, but that the evidence at trial demonstrated that his association with [*23] ADM had ended several years prior. [HN8] A mailing is considered in furtherance of a scheme to defraud even where it is incidental to an essential part of the scheme. *United States v. Fernandez, 282 F.3d 500, 508 (7th Cir. 2002)*; *see also United States v. Koen, 982 F.2d 1101, 1107 (7th Cir. 1992)* (reading "in furtherance" broadly). Aristoteles Mpougas testified that the 2000 payment related to a one-year 1998 contract for license plate registration stickers with the Secretary of State's Office entered into while Ryan still held that office. A dispute arose concerning payments on that contract and the State of Illinois only paid American Decal for the shipment of stickers related to this contract when the dispute was resolved in 2000. As the government notes, the indictment specifically refers to payments from the Secretary of State's Office to ADM from 1991 until 2000. (Indict., Count II, P 23). Payment on a contract Warner originally used his influence and access to Ryan to help secure was an essential part of the scheme. Gov't Resp. at 32. The 2000 mailing was thus in furtherance of the scheme.

B. The Evidence Was Sufficient to Support the Jury's Verdict [*24] on Count Three

Count Three of the Indictment charged Ryan and Warner with mail fraud in connection with the lease of an SOS facility in Joliet. In late 1994, SOS considered finding a new location for driver and administration facilities it leased in Hinsdale. Tr. at 2802-03 (Fawell); Tr. at 10462 (Sherman). At that time, Leonard Sherman was director of the department of administrative hearings for SOS. Tr. at 10452 (Sherman). Scott Fawell testified that in the course of multiple conversations about finding an alternative location to the Hinsdale site, Defendant Ryan told Fawell he (Ryan) had "hooked up" Sherman with Defendant Warner. Tr. at 2804-05 (Fawell). For his

part, Sherman testified that Ryan called him and said he had heard that Sherman was looking for a new site, and that Sherman should contact Warner for help finding a site. Tr. at 10463 (Sherman). Todd Borisy, a member of Ryan's security detail, overheard Ryan and Warner talking about Warner buying property in Joliet. Tr. at 7822-24 (Borisy). After Sherman and Warner inspected a building in Joliet, SOS leased and moved into that building in January 1995. Tr. at 10471,10479 (Sherman). The owner of record on the lease [*25] was an LLC, Tr. at 10484 (Sherman), but Warner was the true owner, having bought the property in October 1994. In short, the government alleged, Warner bought the Joliet building and concealed his ownership interest, while Ryan steered Sherman into locating the SOS offices there.

Defendant Ryan asks for a judgment of acquittal on all the mail fraud courts, but he has not specifically addressed the sufficiency of the government's evidence as to the Joliet lease; rather, Ryan generally argues that "with regard to many of the alleged suspect transactions, Ryan had no involvement." Ryan *Rule 29* Mot. at 9. If this is the extent of his attack on the sufficiency of the evidence on Count Three, it necessarily fails. As noted above, Fawell, Sherman, and Borisy all testified as to Ryan's (and Warner's) direct involvement. Ryan put Sherman in contact with Warner to look for a new site, and the jury could reasonably infer from Borisy's testimony that Ryan knew Warner owned the Joliet building at the time. The evidence supports the jury's verdict on Count Three.

C. The Evidence Was Sufficient to Support the Jury's Verdict on Count Four

Count Four of the Indictment charged Ryan and Warner [*26] with mail fraud in connection with contracts awarded to IBM, another Warner lobbying client, by the SOS Office. As of early 1991, Honeywell/Bull ("Honeywell") held the existing mainframe computer system contract with the SOS Office. Tr. at 11665 (Udstuen); Tr. at 12532 (Cavallaro). The SOS Office was, however, seeking to upgrade its computer system, Tr. at 11665 (Udstuen), and both Honeywell and IBM were interested in obtaining the contract for that upgrade. Tr. at 5850 (Cook). Warner and Udstuen learned about the SOS Office's intentions, Tr. at 122245-46, and attempted to profit from that knowledge, and from their relationship with Ryan, by arranging a deal with Honeywell: in exchange for a large sum of money (the precise amount was disputed) or a percentage of the contract, Warner and Udstuen would see to it that Honeywell received the prospective mainframe upgrade contract. Tr. at 5548-49, 5552-53 (Wuttke); Tr. at 5876-77 (Cook). Warner and Udstuen later retracted their offer, saying that it would be a conflict of interest, but suggested that Honeywell retain Ron Swanson. Tr. at 5557 (Wuttke). Swanson offered to secure the contract for Honeywell in exchange for $ 750,000, an offer [*27] that Honeywell rejected. Tr. at 5561.

Robert Cook, Honeywell's lobbyist at that time, told Ryan about the episode with Warner and Udstuen in a meeting on September 24, 1991. Tr. at 5875-5890 at (Cook); Gov. Ex. 04-003. Although Cook's account differed in some respects from Wuttke's recollection, in both accounts Warner and Udstuen promised to deliver Honeywell the mainframe upgrade contract. Ryan acknowledged that Warner and Udstuen were his advisors, stated that he did not approve of what they had done, and assured Cook he would "get to the bottom of it." *Id.* at 5886. When Ryan contacted Cook the next day, however, he simply told Cook that Udstuen had a different recollection of the meeting with Honeywell and that, as far Ryan was concerned, the matter was "settled." *Id.* at 5889.

Despite being aware of Warner's and Udstuen's scheme to shakedown Honeywell, Ryan authorized Warner and Udstuen to assist in the process of hiring a new Director of the Information Services Department in late 1991. Tr. at 12526 (Cavallaro). Among the Director's responsibilities was assisting in the selection of the mainframe computer upgrade contract. *Id.* at 12532. Warner and Udstuen interviewed [*28] a candidate for the Director position, Frank Cavallaro, and ascertained that Cavallaro would be supportive of selecting IBM for the mainframe computer upgrade contract. Tr. at 12528-29 (Cavallaro). Warner and Udstuen recommended Cavallaro to Ryan, who then hired Cavallaro as Director of Information Services. Over time, Cavallaro, believing that Warner was acting with Ryan's authority, performed official actions that benefitted Warner. *Id.* at 12557 (testifying that he temporarily "held up" IBM projects at Warner's request because Warner was Secretary Ryan's "[g]ood friend."). Around this same time in early 1991, an IBM representative approached Udstuen for a lobbyist referral, as IBM was interested in doing business with the SOS Office. Tr. at 11642-45. Udstuen referred IBM to Warner. *Id.*

In approximately March 1993, Warner entered into a written contract with IBM, retroactive for services beginning in July 1, 1992, and under which IBM agreed to pay Warner a percentage of all revenues, up to $ 1 million, that were received in connection with SOS contracts. Although this deal was very lucrative for Warner, Mr. Cavallaro testified that he was not aware that Warner did anything [*29] to lobby the SOS Office. Indeed, the government put into evidence a letter from Warner to IBM from August 1993 in which Warner discusses the mainframe contract as if it had been a foregone conclusion, and the basis for lobbying payments under the contract, two years before Ryan formally awarded the mainframe computer upgrade contract to IBM. Tr. at 11666 (Udstuen); Gov. Ex. 04-021.

At trial, Ryan argued that IBM was the most suitable company to replace the mainframe computer, and that Ryan acted according to what his advisors recommended. The government did not dispute IBM's merits, or its suitability for the mainframe project. The issue, according to the government, was whether Warner was permitted to profit from IBM with Ryan's tacit approval. The jury could have reasonably concluded that Warner's IBM proceeds were a direct result of the access that to the SOS Office that Ryan gave Warner. When Ryan learned that Udstuen and Warner had attempted to shakedown Honeywell, Ryan excused their conduct and then gave them even greater access to the SOS Office. Ryan authorized Udstuen and Warner to select Cavallaro as the Director of the Information Services Department after ascertaining [*30] Cavallaro's preference for IBM. Having affixed a pro-IBM employee in a key SOS position, Warner parlayed his knowledge of the SOS Office's intentions into a profitable deal with IBM. Udstuen, in turn, benefitted through an arrangement with Warner whereby Udstuen received a portion of the money that Warner received from ADM and IBM. According to Udstuen, Ryan blessed this arrangement. The evidence supports Count Four.

D. The Evidence Was Sufficient to Support the Jury's Verdict on Count Five

Count Five of the Indictment charged Ryan and Warner with mail fraud in connection with Warner's money-laundering arrangement with Udstuen and co-schemer Alan Drazek. As discussed in more detail *infra*, Warner arranged, with Ryan's blessing, for Udstuen to receive one third of the proceeds arising from Warner's lobbying arrangements with ADM and IBM. These same contracts, as previously discussed, were attributable to Warner's relationship with Ryan and the access to the SOS Office that this relationship afforded. As charged in this count, Warner caused a check to be written on an account controlled by his company, Omega Consulting Group. Warner deposited the proceeds of his IBM lobbying [*31] arrangement into Omega's account. The Omega check was then made out to American Management Resources ("AMR"), a company controlled by co-schemer Alan Drazek. Warner caused the Omega/AMR checks to be sent to Udstuen, who would, in turn, send the checks to Drazek. Drazek cashed the checks, keeping a portion for his troubles and delivering the balance, in cash, to Udstuen. This arrangement served no purpose other than to disguise the provenance of the proceeds. Viewing the evidence in the light most favorable to the government, the court concludes that the jury could have reasonably concluded that the flow of State benefits to Ryan's associates, and the effort to conceal that flow, support the conclusion that the Defendants acted with the requisite fraudulent intent.

E. The Evidence Was Sufficient to Support the Jury's Verdict on Count Six

Count Six of the Indictment charged Ryan and Warner with mail fraud in connection with the lease of a building in South Holland, Illinois. In early 1997, Ryan proposed leasing from his friend Harry Klein a building that Klein owned in South Holland, Illinois. Tr. at 9475 (Klein). Klein expressed interest, and Ryan told Mike Chamness, Director [*32] of Drivers' Services, to contact Klein. Tr. at 6636 (Chamness). During his phone conversation with Chamness, Ryan told Chamness that he (Ryan) wanted to tell Klein personally when there was a deal. *Id.* at 6636. An SOS employee, James Esslinger, was dispatched to inspect the property and determine whether it was suitable as a commercial-drivers-license ("CDL") facility. Tr. at 6266 (Esslinger). Esslinger, the head of the SOS's property management division, in fact concluded that the building was not ideally suited for a CDL facility, but it was the only site that the property-management division considered because, he testified, it was the only property that were told to consider. Id. at 6263, 6266-67. Esslinger further testified that he was directed by his superior, Mr. Chamness, to prepare an inaccurately favorable assessment of the property. The contract was executed with little negotiation, and on terms that were very favorable to

Klein. Tr. at 9488 (Klein); Tr. at 6280-82 (Esslinger). Indeed, Chamness, who had already received an angry phone call from Ryan after he mistakenly concluded that Chamness had told Klein that the deal was done, decided that the best course was to [*33] defer to his superiors on any remaining deal points. Tr. at 6654-65. With respect to two such issues, the contract's termination clause and the timing of "build-out" payments to Klein, Ryan told Chamness to do what Klein wanted. Tr. at 6660-64 (Chamness). The lease was not signed by "autopen," as was often the case with such contracts, but instead by Ryan in his own hand. Tr. at 6289-91 (Esslinger).

There was ample evidence in the record to support the government's position that this lease was foisted on SOS staff because Ryan wanted to do his friend a favor. Ryan's personal intervention on Klein's behalf initiated the transaction, and Ryan remained involved thereafter. Ryan maintains that Chamness and Esslinger "recommended" the lease, Ryan Post-Trial Mot. at 14, but it is clear from their testimony that they were doing nothing more than acquiescing in the decision made by Ryan. In the end, the State was saddled with a property that was, in the estimation of at least two SOS employees, suboptimal from the standpoint of price and suitability.

F. The Evidence Was Sufficient to Support the Jury's Verdict on Count Seven

In Count Seven, the government charged both Defendants with [*34] mail fraud in connection with a $ 18,902.79 from Viisage Technologies to National Consulting Company, a firm controlled by Warner. Viisage was the successful bidder on a contract to provide technology that would enable the SOS to switch from drivers' licenses produced with film to digital drivers' licenses, which use digital images capable of being stored in the SOS computer system. In fact, Viisage was originally the only bidder in response to the request for proposal ("RFP") issued by SOS; the office declined to accept that bid and instead reissued the RFP in an effort to generate more competition. Viisage bid again on the project; its proposal to provide the technology for $ 1.113 per card was significantly lower than the proposal made by the only other bidder, Unisys. Michael Chamness, the Director of Driver's Services, testified that Viisage was the best choice for the contract, and the government has not argued that the choice of Viisage was inappropriate. *See* Tr. At 6813-14 (Chamness).

Instead, the evidence establishes that Defendant Warner, who attended an SOS meeting in 1995 where the concept of digital licensing was first proposed, was able to use his access to that [*35] information for personal gain. He initially solicited the vendor that provided film licenses, but that vendor declined to pay Warner, who was not at time a registered lobbyist, his requested "lobbying" fee. Soon after an August 1, 1996 meeting at which Viisage and Unisys made presentations to SOS officials, including Ryan and Fawell, Warner telephoned Chamness and learned that Chamness viewed Viisage as the likely vendor. Three weeks later, Warner met with a Viisage vice president and offered to help Viisage win the contract in exchange for a 5% commission on Viisage's revenues. A few weeks after that, Viisage signed a lobbying agreement that made no mention of Warner himself, and Warner never registered as a lobbyist for Viisage.

Fawell testified that he discussed Warner's role as Viisage's lobbyist with Ryan. In addition, the government presented evidence that, some time in 1996, Ryan met with a Unisys lobbyist and communicated to Unisys through him that Unisys was "on the wrong horse" in working with its co-venturer, NBS, on the digital licensing proposal. At Ryan's suggestion, a Unisys official spoke to Warner; Warner arranged a conference call with the Unisys official and a Viisage [*36] representative in an unsuccessful effort to establish a joint venture between Unisys and Viisage.

Even before the contract was awarded, Warner was confident enough that Viisage would win it that he guaranteed Ryan friend Ron Swanson a $ 36,000 share of the lobbying fee. Warner and his friend Larry Stern purchased shares of Viisage prior to the announcement that Viisage had won the state contract. After the contract award was publicly announced, Viisage's registered lobbyist signed an agreement assigning its rights under the lobbying contract to National Consulting Company, a firm controlled by Warner.

From this evidence, the jury could reasonably have found that, by virtue of his relationship with Ryan, Warner obtained access to information about the digital licensing contract and secured a share of the profits for himself, and that Warner attempted to conceal his role. The fact that Warner's call to Chamness occurred soon after the August 1, 1996 Viisage presentation; Fawell's testimony that he discussed Warner's role with Ryan; and

Ryan's communications with Unisys, all support the finding that Ryan knew of and blessed the arrangement. The evidence supports the jury's verdict on [*37] Count Seven.

G. The Evidence Was Sufficient to Support the Jury's Verdict on Count Eight

Count Eight of the Indictment charged Ryan and Warner with mail fraud in connection with a building that Warner leased to the SOS Office in Bellwood, Illinois. In 1992, Warner learned that the SOS Office was seeking office space for the SOS Department of Police. Tr. at 2772 (Fawell). In discussing the possibility of leasing a building owned by Warner to the SOS Office, Fawell told Warner that he (Fawell) was concerned about possible political ramifications for Ryan if the press discovered Warner's interest in the property. Tr. at 2773 (Fawell). Warner assured Fawell, in Ryan's presence, that no one would discover his interest because he was "buried in the paperwork." *Id.* at 2774, 3010. Several days later, Ryan directed Fawell to put Warner in touch with Alex Nelson, the Director of Physical Services. *Id.* at 2777, 5106. Mr. Nelson testified that Warner told him that "[w]e found a place for the cops," and he gave Nelson the name and number of a real estate company to call. Tr. at 10163 (Nelson). Fifteen minutes later, Nelson received a call from Ryan informing him about a property [*38] in Bellwood and giving Nelson the name and number of the same real estate company. *Id.* at 10164. Nelson inspected the property, found it suitable, and a lease was executed. *Id.* at 10167. The executed lease does not disclose Warner's interest in the property, Tr. at 3010 (Fawell), nor was Nelson aware that Warner owned the property at that time. Tr. at 10167-68 (Nelson). When Ryan was interviewed by the FBI about this lease, he stated that he did not know that Warner had an interest in the Bellwood property. Tr. at 8157 (Ruebenson).

At trial, Ryan argued that the lease had been vetted by his subordinates and found suitable. But there was sufficient evidence from which the jury could have concluded that Ryan steered the lease to Warner, in a top-down fashion, and that the approval of his subordinate was a mere formality. Moreover, the layers of deception surrounding the transaction support the jury's finding that the Defendants acted with the requisite intent.

H. The Evidence Was Insufficient to Support the Jury's Verdict on Count Nine

Count Nine of the Indictment charged Ryan and Warner with mail fraud in connection with a commission contract that Warner executed relating [*39] to property at 17 North State Street. The Indictment describes an incident in mid-1991 in which Warner directs an SOS Official ("SOS Official F") to contact the owner of the building at 17 North State, in which Warner has a non-disclosed financial interest. Indict., P 73. Warner and Ryan then cause the SOS Office to execute a six-year lease of the building, and Warner profits handsomely. *Id.* But the evidence of this incident, which would have made this sequence analogous to South Holland and other schemes, did not materialize. In closing argument, the government argued that Warner, by virtue of his position as a member of Ryan's transition team, learned that the SOS Office was seeking to relocate certain facilities then located at 188 W. Randolph Street in Chicago. Tr. at 10151, 10154 (Nelson). What this evidence does not show is that Warner was privy to, and acted upon, information that was not publicly available. Warner did execute a leasing agency agreement with the property's owner pursuant to which he received a 6% commission when the SOS office executed a lease there. Gov. Ex. 05-005. But unlike South Holland and Joliet, there is no evidence that Ryan steered this contract [*40] to Warner. The government also asserted in closing argument that the lease was in the name of one of Warner's companies, National Consulting Company ("NCC"), and executed by an individual, Adolph Ottaviani, who was not affiliated with NCC. But absent evidence that Warner obtained the contract improperly, the court his hard-pressed to distinguish this contract from any other in which the real party in interest is acting through an agent. The court concludes that the evidence was insufficient for the jury to conclude beyond a reasonable doubt that either defendant acted with the requisite intent. The court therefore grants the Defendants' motions for a judgment of acquittal on Count Nine.

I. The Evidence Was Insufficient to Support the Jury's Verdict on Count Ten

Count Ten of the Indictment charged Ryan alone with mail fraud in connection with the Governor's Office's selection of Grayville, Illinois for a maximum security prison. Around January 2001, the Illinois Department of Corrections ("IDOC") announced that three locations had been selected as finalists for the site of the prison. Tr. at 13599-600 (Bettenhausen). At a meeting involving high-ranking officials from the

Governor's [*41] Office and the IDOC, Defendant Ryan selected Grayville as the prison site, though the participants at the meeting agreed that the decision would not be made public at that time. Tr. at 13602-04. Immediately after the meeting, however, Ryan did in fact leak this confidential information to his friend Ron Swanson in the presence of Matthew Bettenhausen, who was present at the meeting in his capacity as deputy governor for criminal justice and public safety. *Id.* at 13598, 13604. Mr. Bettenausen testified that after the meeting broke up, Ryan bumped into Swanson in the receiving area outside the then-Governor Ryan's office. *Id.* at 13604. Indeed, Swanson spent a lot of time in and around the Governor's office. *See, e.g., id.* at 13661-62; 13829-30, 13832 (Wright). According to Bettenhausen, when Ryan told Swanson that Grayville had been selected, Bettenhausen interjected that the information was confidential. Swanson stated that he understood, but asked to be present at the public announcement of Grayville's selection. Ryan directed Bettenhausen to see to it that he (Swanson) was notified. *Id.* at 13605-06.

Soon after the meeting at which Grayville was selected as the site [*42] for the new prison, Swanson marketed his services as a lobbyist to a business association affiliated with Grayville. The Grayville association entered into an agreement pursuant to which Swanson would lobby for the selection of Grayville as the site for the proposed prison in exchange for a lobbying fee of $ 50,000. Tr. at 14028 (Williams). (The $ 50,000 cashiers check that Swanson received from this business association is the mailing charged in Count Ten). After accepting the money, Swanson falsely assured his primary liaison with the business association, Dr. Clyde Wilson, and others affiliated with the group, that he was actively lobbying on their behalf. *Id.* at 14040. Of course, he was doing no such thing. On the morning that Ryan was to make the official announcement of the selection of Grayville, Bettenhausen again ran into Swanson in the Governor's offices, and Swanson asked Bettenhausen to deliver a message to Ryan. Tr. at 13615 (Bettenhausen). Swanson asked that, in his public announcement, Ryan thank Dr. Wilson particularly as a supporter of Grayville's efforts to obtain the prison. *Id.* At a public ceremony in Grayville on April 12, 2001, Ryan formally announced [*43] his selection of Grayville and did thank Dr. Wilson as Swanson had requested. *Id.* at 13616.

The government stipulated that the process by which Grayville was selected was not influenced by Swanson or anyone else, Tr. at 13646-47 (Bettenhausen), and the merits of the choice of Grayville as a prison site are undisputed. Ryan contends that in disclosing that choice to Swanson, he acted negligently at worst. Ryan *Rule 29* Mot. at 15. Bettenhausen testified that, from his perspective, Ryan bumped into Swanson by chance after the meeting about Grayville. Tr. at 13651 (Bettenhausen). The information was conveyed to Swanson in the presence of others, and Bettenhausen told Swanson, in Ryan's presence, that the information was to remain confidential. No witness testified that Ryan was aware that Swanson had entered into the sham lobbying contract, or put into evidence circumstances from which the jury could infer such awareness.

In support of Ryan's conviction on this count, the government relies chiefly on Ryan's disclosure of material, confidential information to his good friend within minutes of Grayville's selection. *Id.* at 13667. This, according to the government, proves that the [*44] disclosure was not inadvertent. The government also relies on the fact that Ryan acceded to Swanson's request, communicated to him by Bettenhausen on the trip down to Grayville, to thank Dr. Wilson. Even viewing this evidence in the light most favorable to the verdict, however, the court is not satisfied that these circumstances establish Ryan's guilt in connection with the Grayville lobbying contract. Although Ryan should not have disclosed confidential information to his friend, he heard Matthew Bettenhausen warn Swanson that the selection of Grayville was confidential. Perhaps Ryan could infer from Swanson's request that he publicly acknowledge Dr. Wilson that Swanson had pretended to have influenced the Grayville choice; but the court is unwilling to sustain a conviction by "piling inference upon inference." *United States v. Harris, 942 F.2d 1125, 1129 (7th Cir. 1991)* (citation and internal quotation marks omitted). The fact that a short time elapsed between the end of the meeting and Ryan's disclosing the information to Swanson is equally consistent with the inference that the disclosure was inadvertent as it is with the inference that it was purposeful. *Id. at 1129-30* [*45] [HN9] ("[W]here the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt.") (quoting *United States v. Delay, 440 F.2d 566, 568 (7th Cir. 1971)).* And while Swanson's request to thank Dr. Wilson might appear unusual, Ryan was not in a position to

clarify the matter on his way down to the Grayville ceremony with Bettenhausen. The court concludes that the evidence was insufficient to support Defendant Ryan's conviction on Count Ten.

J. The Evidence at Trial Demonstrated a Single Scheme to Defraud

Ryan and Warner challenge their mail fraud convictions on the ground that while the Indictment set out a single scheme to defraud, the government's evidence at trial established disconnected schemes, and this variance prejudiced the defense. Ryan points to three aspects of the purported scheme: (1) the Secretary of State's Office's leases of Warner's property; (2) the termination of the Inspector General's investigation; and (3) Ryan's leak of confidential information about the placement of the prison in Grayville. According to Ryan, "[t]hese [*46] allegations alone concern schemes of three very different natures. The evidence showed *different* participants, acting at *different* times, on different matters. The government failed to prove the interrelationship between these separate schemes necessary to prove a unitary scheme to defraud." Ryan's Post-Trial Mot. at 66. Warner sets out a laundry list of evidence admitted against Ryan alone in his renewed motion for severance as evidence of a prejudicial variance. Warner's *Rule 29* Mot. at 2-4. The government characterizes the Defendants' challenge as an argument that the concept of a single scheme is irreconcilable with the notion that Ryan held two separate offices, that of the Secretary of State and Governor. Gov't. Resp. at 28.

Defendants' "variance" argument, too, is a challenge to the sufficiency of the evidence. *See United States v. Townsend, 924 F.2d 1385, 1389 (7th Cir.1991)* ([HN10] "a conspiracy variance claim amounts to a challenge to the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the same conspiracy.") Where a defendant asserts a variance claim, a reviewing court reviews the evidence in the light most [*47] favorable to the government. *United States v. Wilson, 134 F.3d 855, 865 (7th Cir. 1998)*. The fact that the evidence introduced at trial might also be consistent with an alternate theory is irrelevant. *Townsend, 924 F.2d at 1389*. Thus, "[e]ven if the evidence arguably establishe[s] multiple conspiracies, there is no material variance from an indictment charging a single conspiracy if a reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment." *United States v. Williams, 272 F.3d 845, 862 (7th Cir. 2001)* (citations omitted). [1] Furthermore, a defendant must show prejudice from the variance. *United States v. Hewlett, 453 F.3d 876, 879 (7th Cir. 2006)*.

1 [HN11] Courts have found that many of the principles governing variance in conspiracy cases apply to multi-defendant mail fraud prosecutions as well. *See United States v. Horton, 847 F.2d 313, 317 (6th Cir. 1988)*; *United States v. Camiel, 689 F.2d 31, 35 (3d Cir. 1982)*.

[*48] Ryan argues that the government offered "no proof of a unitary agreement to act through a single enterprise pursuant to an overall objective," in part because the alleged conspiracies at the SOS and the governor's office were "wholly distinct." Ryan Post-Trial Mot. at 65. As discussed, the court is not persuaded by Ryan's characterization of the two Illinois offices as such separate and distinct enterprises that no conspiracy could carry over from one to the other; indeed, several of the schemes alleged in the indictment spanned Ryan's occupancy in both positions. See supra I.B. Moreover, Ryan's assertion that the government must show proof of a "unitary agreement" is incorrect, for the element of agreement, while necessary for a conspiracy offense, is not a prerequisite to a conviction for mail fraud. *See United States v. Adeniji, 221 F.3d 1020, 1026 (7th Cir. 2000)*. Ryan's variance claim will thus be defeated if the jury could reasonably have found the existence of a scheme with a common unifying objective. In *United States v. Polichemi*, for example, the Seventh Circuit rejected the defendants' variance argument in finding a single wire fraud scheme in a plan [*49] to market phony financial instruments to investors. *219 F.3d 698, 706 (7th Cir. 2000)*. The defendants defrauded about 30 different investors, in factually different transactions, and the same people did not participate in every "subscheme." *Id.* Nonetheless, the court, noting the defendants' "common design and purpose to defraud investors," concluded that the jury could have found a single scheme despite the fact that each defendant's role varied somewhat from transaction to transaction. *Id.*; *cf. United States v. Camiel, 689 F.2d 31, 36-37 (3d Cir. 1982)* (holding that the jury could not have found a single unified scheme where the indictment charged a single ghost payroll scheme among Democratic Party loyalists, but where the evidence showed at least two warring factions in the Party).

The government notes that the nature of the scheme was that Ryan would give his co-schemers access to nonpublic information and government decisionmaking from which the co-schemers could secure lucrative lobbying contracts and leases in exchange for benefits directed by the co-schemers to Ryan and third parties close to Ryan. Gov't Resp. at 29. The government also notes [*50] that sequences that do not immediately fit this pattern often played the role of protecting the aforementioned arrangements. *Id.* at 29. Thus, in order for Ryan and his cronies to continue turning confidential information into lucrative contracts and leases, the IG office had be dismantled, Ryan as Governor had to cover his misdeeds as Secretary of State with false statements to the FBI and IRS, and Warner had to avoid filing as a lobbyist for Viisage. Although Ryan is correct to say that these sequences took place at different times and often involved different people, the jury could have reasonably concluded all are directed toward the fraud scheme or toward efforts to conceal that scheme and prevent its discovery.

Finally, while Warner was not involved in every transaction -- he was not part of the South Holland lease, for example -- this fact alone does not establish a variance. Warner's lack of participation in any individual episode does not necessarily negate the existence of a single scheme. *United States v. Lanas, 324 F.3d 894, 899 (7th Cir. 2003)*; *Polichemi, 219 F.3d at 706* (finding a single scheme despite the fact that one defendant [*51] did not even meet the others until the scheme was well underway).

K. The Court is Not Persuaded by Defendants' Constitutional Challenges

Both Defendants raise constitutional arguments as well. Ryan argues somewhat summarily that the mail fraud charges are vague because the United States Code does not define the phrase "intangible right to honest services." Ryan *Rule 29* Mot. at 16-17. Thus, contends Ryan, there is "confusion" over what kind of conduct is prohibited. *Id.* at 17. Ryan cites this court's statement in *United States v. Fawell, 2003 U.S. Dist. LEXIS 11605, No. 02 CR 310, 2003 WL 21544239, at *3 (N.D. Ill. July 9, 2003)* that "'the line should have been clear to Mr. Fawell when he crossed it' by diverting state resources for personal and political use," arguing that the line was not clear for Ryan. Ryan *Rule 29* Mot. at 17. The court is not persuaded. First, [HN12] although the term "intangible right to honest services" may not be defined by statute, the term has been addressed by the courts, both before and after *section 1346* was enacted in 1988. *See, e.g., United States v. Bloom, 149 F.3d 649, 656-57 (7th Cir. 1998)* ("An employee deprives his employer of his honest [*52] services only if he misuses his position (or the information he obtained in it) for personal gain."); *United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir. 1974)* (upholding the conviction of an Illinois governor for defrauding the citizens of Illinois of his "honest and faithful services"). Second, the evidence at trial established that both Defendants [2] took great pains to conceal their activities. Ryan lied to the IRS and FBI. Warner structured his behavior, buried his name in leases, and omitted his name entirely from lobbying forms. These actions provide a strong inference that the Defendants were aware of the boundary between legal and illegal conduct.

2 Warner generally "assail[s] the application and constitutionality of the mail fraud statute to this case," and joins Ryan's arguments on the issue. Warner Post-Trial Mot. at 22.

More serious is Warner's argument that the court erred in citing state law while instructing the jury on mail fraud. Warner's Post-Trial Mot. at 22. The court [*53] instructed the jury that the "scheme to defraud" element of *section 1341* could be defined as a scheme to "deprive the people of the State of Illinois of their intangible right to the honest services of their public officials or employees." Final Jury Instr. at 76; see [HN13] *18 U.S.C. § 1346* ("'scheme or artifice to defraud'" includes a scheme or artifice to deprive another of the intangible right of honest services."). The court then referred to provisions of the Illinois Constitution and Illinois statutes that were applicable to state officials during the relevant time. Final Jury Instr. at 88. Both before and after these references to Illinois law, the court instructed the jury that "[n]ot every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation." *Id.* at 88, 93.

In his post-trial motion, Defendant Warner argues that the court's references to Illinois law were improper because they allowed the jury to convict on federal mail fraud, RICO, and money laundering charges based on the jury's determination that Defendants violated state law. [3] Warner Post-Trial Mot. at 22-23. This appears to [*54] be an extension of his argument at the close of the

government's case that state law cannot provide a foundation for an "honest services" mail fraud charge. Warner *Rule 29* Mot. at 6. The court declines to decide the extent to which a federal mail fraud conviction can be based on state law violations because, in the court's opinion, the jury instructions sufficiently precluded the possibility that the jury returned federal convictions based on violation of Illinois law.

3 Although Warner makes his argument as to all three offenses, his argument is clearly without merit as to the RICO and money laundering convictions. The court made no reference to Illinois law in its instructions for the money laundering count, and in any event,[HN14] the federal money laundering statute on its face allows conviction based on a defendant's violation of state law. *See 18 U.S.C. § 1956(a)(1)(B)(ii)* (proscribing the avoidance of a transaction reporting requirement under either state or federal law). [HN15] As for RICO, a defendant's violation of state law can constitute a predicate act of racketeering activity. See *18 U.S.C. § 1961(1)* (defining "racketeering activity" as certain crimes, including bribery, which are "chargeable under State law and punishable by imprisonment for more than one year."). Thus, the court only addresses Warner's argument as to the mail fraud offense.

Defendant Ryan does not raise this argument in his post-trial motion, but joined in the argument during the jury instructions conference. Tr. at 22088 (02/28/06). The government does not appear to have responded to this argument.

[*55] As a preliminary matter, the court acknowledges that Warner's argument applies to both defendants, even though Warner was not a public official. 4 The court instructed the jury that the government did not allege that Warner was a public official, and that only Ryan owed a duty of honest services to the people of Illinois. Final Jury Instr. at 82-83. But the court also instructed the jury that only one participant in a scheme need be a public official. *Id.* at 79. Thus, although the court referred to Illinois law in the context of Ryan's duty of honest services, Warner was implicated as an alleged participant in a scheme with Ryan.

4 In response to an earlier indictment of Defendant Warner, this court held that Warner was a private citizen who owed no fiduciary duties to the citizens of Illinois. *United States v. Warner, 292 F. Supp. 2d 1051, 1063 (N.D. Ill. 2003).*

Warner, citing *Bloom, 149 F.3d 649*, and *United States v. Martin, 195 F.3d 961 (7th Cir. 1999),* [*56] argues that "the Seventh Circuit has rejected the proposition that State law may provide a foundation for an 'honest services' mail fraud charge." Defendant Warner's Motion For Judgment Of Acquittal And Motion To Dismiss Or Strike, at 6. This is incorrect. *Bloom* held that [HN16] a defendant's breach of fiduciary duty, standing alone and absent misuse of a public position, is insufficient to support an honest services mail fraud charge; rather, the test is whether a public official breaches that duty by misusing his position for personal gain. *149 F.3d at 655-57; see also Hausmann, 345 F.3d at 956* (expressing doubt that an intangible rights theory of mail fraud applies to cases of breach of fiduciary duty "with nothing more," but nonetheless affirming defendant's conviction because he misused his fiduciary relationship, at the expense of the party to whom to the duty was owed, for personal gain). Indeed, the court in *Bloom* emphasized that the defendant was not charged as a public official, nor with violating state law. *149 F.3d at 654-55.* In *Martin,* the Seventh Circuit declined to address whether a fiduciary duty of honest services should [*57] be defined by state law or by federal common law because the parties did not properly develop the issue on appeal. *195 F.3d at 967.* But the court "for now" declined to impose a requirement that this fiduciary duty *must* be grounded in state law. *Id.* Thus,[HN17] the Seventh Circuit does not mandate that a fiduciary duty of honest services be defined only by reference to state law; however, the Seventh Circuit does not appear to prohibit any consideration of state law in determining the nature of that duty.

In any event, the court need not decide the issue because in instructing the jury in this case, the court did not tell the jury to determine whether Ryan breached his duty to provide honest services by determining whether Ryan violated Illinois law, or that any violation of an Illinois law related to public service resulted in a per se violation of the duty to provide honest services. The court merely instructed the jury that certain provisions of Illinois law were "applicable" during the relevant time period, and then described these provisions. Final Jury Instr. at 89-92. Before doing so, the court cautioned the

jury that not every violation of state law gave rise [*58] to a mail fraud violation. *Id.* at 88. The court reiterated this instruction afterwards. *Id.* at 93. Moreover, the court gave a general instruction as to the role of state law in this case: "[I]t is not enough to find that one or both of the defendants violated Illinois law, but instead you must consider Illinois law along with all of the elements of law that I instruct you on. Your job is to decide whether the government has proved, beyond a reasonable doubt, every element of each particular *federal* offense you are considering." *Id.* at 32 (emphasis added).

These references to Illinois law were designed to aid the jury in ascertaining the nature and scope of Ryan's duty to provide honest services as an Illinois public official. Indeed, given that Ryan was an Illinois official, with duties defined by Illinois statutes and the Illinois Constitution, it is difficult to imagine how one could conceive of Ryan's duty to provide honest services to the people of Illinois, without any reference to the standards of conduct prescribed by the people of Illinois. The court did not, however, require that the jury find a state law violation in order to find mail fraud. Indeed, after [*59] describing the applicable Illinois law, and (again) cautioning that not every state law violation constitutes mail fraud, the court reiterated the test the jury must use in determining whether a public official defrauded the public of honest services: whether the official "misuse[d] his position . . . for private gain for himself or another." Final Jury Instr. at 93. This instruction tracks the Seventh Circuit's holdings in *Bloom* and *Hausmann*, and in the court's opinion accurately states the law in this circuit.

In his post-trial motion, Warner cites Supreme Court cases holding that state law does not control the definition of federal criminal offenses. Warner Post-Trial Mot. at 23. *See, e.g., Taylor v. United States, 495 U.S. 575, 590-91, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990)* (holding that the definition of "burglary" in a federal gun law did not depend on state law definitions). The court finds this authority inapplicable here because the court never instructed the jury to adopt any state law definition when considering the mail fraud charges. Warner also argues that principles of federalism are violated when the mail fraud statute is used to criminalize, on a federal level, conduct [*60] traditionally dealt with by state law. Warner Post-Trial Mot. at 23-24. The court is mindful of these federalism concerns, but finds this contention inapplicable to this case as well. The jury did not convict Defendants of using the mails to violate state law; rather, the jury found that Ryan used the mails in breaching his federal duty, created by the mail fraud statute, to provide honest services. The references to Illinois law, as discussed above, merely assisted the jury in determining the nature of that federally-created duty. [5]

5 The cases Warner cites in support of his federalism argument, while containing sympathetic language, do not specifically address federalism concerns in the "honest services" mail fraud context and thus do not control here. *Cleveland v. United States, 531 U.S. 12, 20, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000)* was not an intangible rights case, and dealt only with whether a government-issued license is "property" under *section 1341. Kann v. United States, 323 U.S. 88, 95, 65 S. Ct. 148, 89 L. Ed. 88 (1944)*, held that mail fraud requires use of the mails as a part of the execution of the fraud, rather than "incidental and collateral" use of the mails. *McNally v. United States, 483 U.S. 350, 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987)* concluded that *section 1341* did not support "intangible rights" such as the right to honest services, but Congress reversed that holding by enacting *section 1346. See Bloom, 149 F.3d at 655.*

[*61] Of the remaining cases cited by Warner, the most relevant is *United States v. Sawyer, 85 F.3d 713, 728 (1st Cir. 1996)*, which noted that the mail fraud statute does not create a federal felony upon "every transgression of state governmental obligations." The court does not disagree, which is why the court reminded the jury (twice) of that very point. Final Jury Instr. at 88, 93. The court thus concludes that the references to Illinois law in the mail fraud jury instructions were not improper.

III. The Evidence Was Sufficient to Support the Jury's Verdict on the Tax Counts

Defendant Ryan was convicted of one count of corruptly endeavoring to obstruct the due administration of the federal tax laws in violation of *26 U.S.C. § 7212*, and four counts of willfully making false statements in connection with his income tax returns in violation of *26 U.S.C. § 7206(1)*. See Indict., Counts XVIII-XXII. Ryan contends that the evidence presented at trial was insufficient to support the jury's finding that he willfully filed false tax returns. Ryan *Rule 29* at 18. [6] [HN18] The government was required to prove that "the law imposed [*62] a duty on the defendant, that defendant knew of

this duty and that he voluntarily and intentionally violated that duty." *United States v. Hilgeford, 7 F.3d 1340, 1344 (7th Cir. 1993)* (quoting *Cheek v. United States, 498 U.S. 192, 201, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991))*. A defendant's good-faith belief that he is acting within the law, even if objectively unreasonable, negates the willfulness element. *Cheek, 498 U.S. at 203*; *see also United States v. Benson, 941 F.2d 598, 614 (7th Cir. 1991)* ("[T]he reasonableness of a belief is a factor for the jury to consider in determining whether a defendant actually believed and acted on it."). The defendant's intent to violate a known duty under the tax laws may be demonstrated by circumstantial evidence. *United States v. Ytem, 255 F.3d 394, 396 (7th Cir. 2001)*. [7]

6 Ryan does not specifically challenge the jury's verdict with respect to Count Eighteen (obstructing the IRS).

7 Accordingly, it is not dispositive that there was no evidence in the record that Ryan told his tax-preparers or other assistants to omit particular items from his tax returns. *See, e.g.*, Tr. at 17691 (Schindler).

[*63] Much of the tax evidence concerned Ryan's use of CFR funds to pay for personal expenses. At the time that Ryan served as Secretary of State, Illinois law permitted individuals to use campaign funds for personal expenses, but federal law required that the amount of such funds be reported as personal income. Tr. at 17396-97 (Schindler). Ryan relies on the testimony of Shari Schindler, the government's tax expert, for the proposition that the tax regulation governing the use of campaign funds for personal expenses is obscure, and that the distinction between "campaign" and "personal" is a "gray area." Ryan *Rule 29* Mot. at 19 (quoting Tr. at 17735 (Schindler)). There is evidence in the record, however, that Ryan received written memoranda from Roger Bickel, who served as General Counsel during Ryan's tenure as Secretary of State, which disclosed Ryan's obligation to pay income tax on CFR funds used to pay for personal expenses. *See* Tr. at 16287 (Montague). This evidence is sufficient to support the jury's conclusion that Ryan was aware of the obligation to report personal expenses paid with CFR money on his tax return.

In any event, although the distinction between campaign-related [*64] and personal expenses may be a "gray area," the distinction was rarely at issue with respect to the items that the government charged Ryan with deliberately omitting from his income tax returns. Among those items were charges for various "pleasure trips" taken by George Ryan during the years 1995 through 1998. Gov't Resp. at 40. With respect to the majority of those trips, Ryan reported some but not all of the charges that were incurred during those trips. *See, e.g.*, Tr. at 17690, 17692, 17696 (Schindler). The jury could, therefore, readily have concluded Ryan was never genuinely confused about whether those trips were personal rather than campaign-related. What this pattern of reporting may suggest, however, is that these charges were omitted inadvertently, particularly as the reported charges were often greater than the charges that Ryan failed to report. For example, in connection with a 1995 trip to Jamaica, Ryan reported as personal income $ 758 of CFR funds used to pay for airfare, but omitted $ 236 in charges for a one-night stay at an airport hotel prior to the trip. Tr. at 17678-79 (Schindler).

The government suggested that these items were omitted because the system [*65] that Ryan put into place for documenting personal and campaign expenses was flawed. A pattern of omitting some charges, but not other, larger charges relating to the same event, arguably undermines the government's theory that this system was deliberately put into place to avoid taxes and support Ryan's lifestyle. *Cf.* Tr. at 23118 (Gov't Closing). The fact that Ryan could or should have played a more active role in ensuring that all charges were properly identified, standing alone, might not be sufficient circumstantial evidence that he willfully omitted income from his tax returns. *Cf. United States v. Stokes, 998 F.2d 279, 281 (5th Cir. 1993)* [HN19] ("[E]vidence of a consistent pattern of under reporting large amounts of income will support the necessary inference of willfulness.").

There was, however, stronger circumstantial evidence of willfulness with respect to other unreported income for each of the tax years for which Ryan was charged with filing false returns (1995-98).

A. Gramm Campaign Funds (1995-96)

In 1995, Ryan agreed to endorse Phil Gramm in his bid for the Republican nomination for president and to serve as Gramm's campaign chairman in Illinois. [*66] Tr. at 8914-15 (Gramm). Included in the campaign's Illinois budget was a line item for "consulting" services to be paid by the campaign to American Management

Resources ("AMR"). Tr. at 8762-63 (Weaver). Unbeknownst to Gramm or to his national field director, *see* Tr. at 8922-24 (Gramm) and Tr. at 8773-74 (Weaver), Ryan, Fawell and Juliano were the beneficiaries of those consulting payments. Ryan directed that his portion of the Gramm money be paid to his daughters, even though they did not perform any significant work on the campaign. *See* Tr. at 10857 (Meyer). The jury could have reasonably concluded that by using AMR as a conduit for the Gramm money (an arrangement that Ryan at least acquiesced in), and then funneling that money to his daughters, Ryan was attempting to preclude discovery of this arrangement by anyone -- including the IRS. *See Spies v. United States, 317 U.S. 492, 499, 63 S. Ct. 364, 87 L. Ed. 418, 1943 C.B. 1038 (1943)* [HN20] (Tax evasion "may be inferred from conduct such as . . . concealment of assets or covering up sources of income . . . and any conduct, the likely effect of which would be to mislead or to conceal.").

After a tax investigation was launched, Tr. at 17811 (Schindler), Ryan [*67] amended his 1995 and 1996 tax returns to include income connected with the work he performed for the Gramm campaign. Tr. at 10853-54 (Meyer). In a statement attached to his amended returns, Ryan claimed that he had not expected payment for his work on the Gramm campaign, but was told by some unidentified person "that the national campaign did intend to pay me for my work." Gov. Exs. 25-003, 25-006 and 25-007. This statement was contradicted by Gramm's and Weaver's testimony that they did not intend to pay Ryan, and were unaware that Ryan was in fact receiving payments through AMR. Ryan further claimed in his statement to the IRS that he was not aware that he was required to pay income tax for his work because his daughters (and not Ryan) received the money. *Id.* The jury was entitled to disbelieve this statement, *see United States v. Agostino, 132 F.3d 1183, 1193 (7th Cir. 1997)*, and could have reasonably concluded that the pattern of deception surrounding these payments indicated that Ryan willfully chose not to report the payments for work that he performed. *See Spies, 317 U.S. at 499.*

B. CFR Payments to Michael Fairman (1996-97)

In 1996 [*68] and 1997, Ryan directed payments of CFR money totaling approximately $ 55,000 to his son-in-law, Michael Fairman. Tr. at 17070 (Fairman). At that time, the Fairmans were experiencing financial difficulties, and Ryan's daughter, Lynda Fairman, asked her father for assistance. Ryan responded by putting Michael Fairman on the CFR payroll as a consultant, Tr. at 16664 (L. Fairman Stip.), even though Mr. Fairman never performed any consulting services for Ryan or CFR and understood the money to be a gift. Tr. at 17076, 17079 1785-86 (Fairman). To comply with federal tax law, Ryan was required to pay taxes on this gift. He did not do so until amending his 1996 and 1997 tax returns in 2002, by which time an investigation into Ryan's tax returns had already been launched. *See* Tr. at 17811 (Schindler). As he had done with respect to the Gramm payments, Ryan included a statement with his amended returns claiming that he did not believe he was required to pay taxes on the payments so long as Fairman paid taxes on the amounts he received. Tr. at 10857 (Meyer). [8] As previously discussed, however, Mr. Bickel's memoranda explained that Ryan was obligated to report as income his personal use [*69] of campaign funds, Tr. at 16287 (Montague), and there can be no question that these payments to Mr. Fairman were personal expenses. And in contrast to the charges associated with personal trips that were omitted from Ryan's tax returns, Ryan was personally involved in the decision to label the large sums of money Mr. Fairman received as payments for "consulting." The jury could have reasonably concluded that Ryan deliberately chose to characterize the payments as "consulting" fees to avoid paying income taxes on those payments. There was sufficient evidence to support the jury's finding that Ryan did not believe his tax return for that year was "true and correct as to every material matter." *26 U.S.C. § 7206(1).*

8 This statement does not mention Ryan's decision to identify Fairman as a consultant when, in fact, he served no such role.

C. CFR Payments to Nancy Smith (1998)

In 1998, Ryan directed CFR payments totaling $ 6,000 to Nancy Smith, the care-taker of Ryan's mother-in-law. [*70] Tr. at 13575 (Smith). Ms. Smith testified that she did not work directly for the campaign in any respect, *id.*, and on that basis Agent Schindler concluded that this was a personal and not a campaign expense that should have been included on Ryan's income tax return. Tr. at 17430 (Schindler). At trial, Ryan argued that this was a campaign expense, on the theory (propounded by Mr. Fawell) that Ms. Smith's services enabled Lura Lynn, Ryan's wife, to assist him on the campaign trail. Tr. at 23460 (Ryan Closing); *see also* Tr.

at 4581 (Fawell). The jury was entitled to reject this explanation, and, moreover, could have found that Ryan contradicted this theory in statements he made to a reporter on February 14, 2001, in which he stated that Ms. Smith was paid for campaign work she performed. Tr. at 17865 (Olsen Stip.). Accordingly, the jury could have reasonably concluded both that the expense was personal and that Ryan believed it to be personal. Moreover, the expense was large enough and sufficiently outside the ordinary course that the jury could infer that Ryan was aware that the expense was not on the list of personal expenses that Bickel had prepared for that tax season. There [*71] was sufficient evidence, therefore, to support the jury's conclusion that the tax return Ryan filed for 1998 was willfully false.

IV. There Was Sufficient Evidence to Support Defendant Warner's Conviction for Money Laundering

Defendant Warner was convicted of two counts of money laundering in violation of *18 U.S.C. § 1956(a)(1)(B)(i)*. [9] The mail fraud and extortion charges in Count Two relating to the validation stickers contract and computer systems contract provided the predicate "unlawful activity" for the money laundering charges in Counts Fifteen and Sixteen. Warner contends that the evidence was insufficient to support the jury's conclusion that Warner concealed or attempted to conceal the proceeds of those activities. *See* Warner Post-Trial Mot. at 8. Warner also challenges the viability of the money laundering counts as charged, arguing, *inter alia*, that the sources of the allegedly laundered proceeds were not the alleged victims of the predicate acts. *Id.* at 9-10.

9 The statute provides in pertinent part as follows:

> [HN21] (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of the specified unlawful activity-
>
> (B) knowing that the transaction is deigned in whole or in part-
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity....
>
> shall be sentenced to a fine of not more than $ 500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

[*72] **A. Proceeds of Honest Services Fraud**

As a threshold matter, the court notes that the Seventh Circuit's recent decision in *United States v. Boscarino* refutes Warner's argument that honest-services mail fraud cannot constitute the predicate "unlawful activity" for a money-laundering conviction. *437 F.3d 634, 636 (7th Cir. 2006)*. The court must, therefore, decline Warner's invitation to rule otherwise. Warner Post-Trial Mot. at 25.

Boscarino likewise requires the court to reject Warner's argument that Counts Fifteen and Sixteen are defective because the "proceeds" of the mail fraud charge were derived from American Decal and IBM, not from the State of Illinois -- the alleged victim of the mail-fraud charges in Count Two. In *Boscarino*, a manager of an insurance brokerage firm, Aulenta, caused the firm to write a check to a corporation that the defendant, Boscarino, controlled -- ostensibly as a referral fee for Boscarino's efforts to persuade the City of Rosemont to do business with the firm. *437 F.3d at 635*. Boscarino endorsed the checks to Aulenta, who then split the proceeds with Boscarino and covered the firm's missing funds by overbilling [*73] Rosemont. *Id. at 635-36*. Boscarino was charged with mail fraud, and because Aulenta owed his employer a duty of loyalty, "one aspect of the scheme was to defraud ABI/Acordia of Aulenta's

honest services." *Id. at 636.* After rejecting the defendant's statutory argument that honest-services mail fraud cannot serve as the predicate offense for a money-laundering charge, the court addressed the defendant's contention that depriving an employer of "honest services" does not necessarily yield "proceeds." *Id.* The court concluded that this truism did not preclude application of the money-laundering statute in a case of to honest-services mail fraud that does create proceeds. *Id.* By way of example, the *Boscarino* court stated that a judge who accepted bribes and deprived the public of his honest services could be convicted of money-laundering: the bribes are the "proceeds" of the fraud, even if "he did not take the money from the public coffers." *Id.* (citing *United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985)).*

Warner was charged with laundering the proceeds of the alleged schemes involving the validation-stickers contract [*74] (Count Fifteen) and the computer-systems contract (Count Sixteen). Money that Warner received from American Decal in connection with the validation-stickers contract was deposited into the checking account of a company (National Consulting Company ("NCC")) that Warner controlled. Tr. at 16901 (Schindler); Gov. Ex. 02-500. Warner caused NCC to issue checks payable to AMR, a company controlled by alleged co-conspirator Alan Drazek, amounting to one third of the proceeds Warner received from American Decal. Tr. at 16910 (Schindler); Gov. Ex. 02-501. Warner sent these checks to Mr. Udstuen, who in turn sent them to AMR. Tr. at 11650-51 (Udstuen). Drazek would then cash the checks, keeping some money for himself and delivering the balance in cash to Udstuen. Tr. at 11663 (Udstuen).

Warner and Udstuen used a similar process for checks Warner received from IBM in connection with the computer-services contract. The IBM payments were placed in the bank account of another company that Warner controlled, Omega Consulting Group Ltd. ("Omega"); Warner caused Omega to issue checks payable to AMR; and Drazek cashed the checks, keeping some money for himself and delivering the rest to Udstuen. Tr. [*75] at 16916 (Schindler); Tr. at 11663 (Udstuen); Gov. Exs. 04-500, 04-501. The money that Warner received from American Decal and IBM constituted the "proceeds" of the alleged scheme to award public contracts to Warner's lobbying clients while Warner and others provided gifts and other benefits intended to influence Ryan in the performance of his official acts. *See* Indict. Count II. The jury could fairly conclude that disguising the origins of these proceeds amounted to money laundering. *See Boscarino, 437 F.3d at 636.*

Warner also contends that the government failed to establish that the payments to AMR were the net rather than the gross proceeds of Warner's misconduct, citing *United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002).* Warner *Rule 29* Mot. at 9. This court previously rejected this argument in response to Warner's motion to dismiss Counts Fifteen and Sixteen of the Indictment. *See United States v. Warner, 292 F. Supp. 2d 1051, 1066 (N.D. Ill. 2003).* As this court previously discussed, *Scialabba's* holding was predicated on the nature of the underlying crime, (gambling), which made it difficult to distinguish the crime [*76] itself from the proceeds of the crime. *Scialabba, 282 F.3d at 475* ("We conclude that, at least when the crime entails voluntary, business-like operations, 'proceeds' must be net income; otherwise the predicate crime merges into the money laundering. . . ."). In *Scialabba,* the government charged the defendants with violating *§ 1956(a)(1)* by using the money they received from video-poker machines to pay for the expenses of their business, such as "leasing the video poker machines and obtaining amusement licenses for them from the state." *Id. at 476.* The Seventh Circuit likened this argument "to saying that every drug dealer commits money laundering by using the receipts from the sales to purchase more stock in trade." *Id.* By contrast, the NCC and Omega payments to AMR were not the costs of doing business. According to the Indictment, Warner directed NCC and Omega to issue checks payable to AMR so that Udstuen would receive a portion of the money without being publicly linked to Warner. AMR served no discernable function in this series of transactions other than to disguise the provenance of the proceeds. Accordingly, there is no difficulty distinguishing [*77] the underlying crime from the subsequent transactions in the proceeds of the crime.

B. Sufficiency of the Evidence of Concealment

[HN22] To convict Warner under *18 U.S.C. § 1956(a)(1)(B)(i)*, the government was required to prove that Warner "conducted a financial transaction knowing that the property involved in the transaction was illegally derived and knowing that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the

proceeds." *United States v. Esterman, 324 F.3d 565, 569 (7th Cir. 2003)*. The Seventh Circuit has articulated two broad principles governing *§ 1956* liability. *Id. at 570*. First, the focus is on the "transaction in proceeds, not the transaction that creates the proceeds." *United States v. Mankarious, 151 F.3d 694, 705 (7th Cir. 1998)*; *see also Esterman, 324 F.3d at 573* ("[I]t is important, even if difficult at times, to ensure that the money laundering statute not turn into a money spending statute.") (citation and internal quotation marks omitted). Second, the defendant must do more [*78] than simply transfer, then spend, the proceeds at issue. *Esterman, 324 F.3d at 570*. Rather, the defendant's transactions with the proceeds of unlawful activity must be "specifically designed 'to hide the provenance of the funds involved.'" *Id.* (quoting *United States v. Jackson, 935 F.2d 832, 843 (7th Cir. 1991))*.

Warner argues that the AMR/Udstuen transactions do not demonstrate an intent to conceal the proceeds of unlawful activity, as the two companies transferring money to AMR (NCC and Omega) were legitimate companies with undisguised ties to Warner. Warner *Rule 29* Mot. at 8 [HN23] Using sham companies to transact business using the proceeds of unlawful activity is one way the government may demonstrate an intent to conceal. *See, e.g., Esterman, 324 F.3d at 573* (listing types of circumstantial evidence that may show an intent to conceal). But it is not the only way. Mr. Udstuen testified that Warner offered to give him a portion of the money that he (Warner) received from contracts with the Secretary of State's Office. Tr. at 11621-22 (Udstuen). Udstuen was concerned, however, that accepting money directly from Warner would jeopardize [*79] Udstuen's position at the Illinois State Medical Society. Tr. at 11628 (Udstuen). In order to conceal the fact that he was receiving money from Warner, Udsteun proposed using AMR as a conduit for Udstuen's portion of the American Decal and IBM money, and Warner agreed to this arrangement. Tr. at 11629, 11646 (Udstuen). AMR's only function in this series of transactions was to disguise the source of the money that Udstuen was receiving. *See Esterman, 324 F.3d at 573* [HN24] (intent to conceal may be shown by the "use of third parties to conceal the real owner, or engaging in unusual financial moves culminating in a transaction."). *Cf. United States v. Blankenship, 382 F.3d 1110, 1129 (11th Cir. 2004)* (defendant offered uncontradicted testimony that he used a separate, "dba" bank account to deposit proceeds because his bank would not permit him to deposit the checks into his personal account). This record stands in sharp contrast to the cases Warner cites where the defendant did little more than spend or transfer (more or less conspicuously) the proceeds of his or her unlawful behavior. [10] The court concludes that the evidence was sufficient to support Warner's [*80] money-laundering convictions.

10 *Cf. Esterman, 324 F.3d at 571*; *United States v. Corchado-Peralta, 318 F.3d 255, 259 (1st Cir. 2003)*; *United States v. Olaniyi-Oke, 199 F.3d 767, 770-71 (5th Cir. 1999)*; *United States v. Herron, 97 F.3d 234, 237 (8th Cir. 1996)*("[T]he money-laundering statute should not be used as a money-spending statute.") (citation and internal quotation omitted); *United States v. Rockelman, 49 F.3d 418, 422 (8th Cir. 1995)*; *United States v. Dimeck, 24 F.3d 1239, 1246 (10th Cir. 1994)*; *United States v. Sanders, 928 F.2d 940, 945 (10th Cir. 1991)*.

Warner makes one further, technical challenge to the Indictment: He contends that the reference in Count Fifteen to the extortion statute is inappropriate because there is no allegation that IBM was an extortion victim. Warner *Rule 29* Mot. at 10; *cf.* Indict. Count XIV (charging Warner with extortion in connection with the validation [*81] stickers contract). Assuming the reference in Count Fifteen to *§ 1951* was inappropriate, the error is harmless as the mail fraud charges referenced in the same Count formed a sufficient basis on which to conclude that the government satisfied the "unlawful activity" element of the money-laundering statute.

V. There Was Sufficient Evidence to Support Defendant Warner's Conviction for Illegal Structuring

Defendant Warner was convicted of one count of purposefully structuring transactions to avoid CTR requirements in violation of *31 U.S.C. § 5324(a)(3)*. On July 31, 1997, Warner caused two checks to be written -- one for $ 9,000 and one for $ 5,000 -- on Omega Consulting's bank account, the account into which Warner placed money he received from IBM. Tr. at 12495-96 (Karcazes); Gov. Ex. 08-039; Tr. at 16916 (Schindler). Warner later cashed these checks on August 4, 1997 and August 5, 1997 at two different North Community Bank branches. Tr. at 12495-96 (Karcazes); Gov. Ex. 08-039. Warner contends that the evidence was insufficient to support the jury's finding that he acted

purposefully to avoid CTR requirements. Warner *Rule 29* Mot. at 12; Post-Trial [*82] Mot. at 25-26. Specifically, Warner argues that the fact of structuring transactions cannot be used to infer an intent to violate the statute. Warner *Rule 29* Mot. at 12.

Warner relies exclusively on cases applying the "willfulness" requirement before Congress amended the anti-structuring statute in response to *Ratzlaf v. United States, 510 U.S. 135, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994). See, e.g., United States v. Vazquez, 53 F.3d 1216, 1222 (11th Cir. 1995).* In *Ratzlaf*, the Supreme Court held that Congress' use of the word "willfully" in *31 U.S.C. §§ 5322(a) & 5324(a)(3)* required the government to prove that the defendant knew that his conduct was unlawful, not simply that he acted to avoid the financial institution's reporting requirement. *510 U.S. 135, 146-48, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994); see also United States v. Obiechie, 38 F.3d 309, 313 (7th Cir. 1994).* Congress subsequently amended the statute to eliminate the reference to "willfulness." *United States v. Griffin, 84 F.3d 912, 923 n.7 (7th Cir. 1996).* [HN25] The statute now requires the government to prove that the defendant acted purposefully to evade the bank's CTR requirement, [*83] not that the defendant knew that such conduct was unlawful. *United States v. Pang, 362 F.3d 1187, 1193 (9th Cir. 2004).* Under the amended anti-structuring statute, the fact of structuring may well support the inference that the defendant acted purposefully to avoid the bank's CTR obligations. *See, e.g., United States v. Cassano, 372 F.3d 868, 879 (7th Cir. 2004) (vacated on other grounds by Cassano v. United States, 543 U.S. 1109, 125 S. Ct. 1018, 160 L. Ed. 2d 1037 (2005))* (inferring knowledge of an intent to avoid CTR obligations from, among other evidence, a large number of transactions under $ 10,000); *United States v. MacPherson, 424 F.3d 183, 192 (2d Cir. 2005).* [11]

> 11 *See also United States v. Ismail, 97 F.3d 50, 56 (4th Cir. 1996)* (Applying pre-amendment statute, but inferring knowledge of bank's reporting obligations and intent to avoid CTR's from circumstantial evidence that defendants knew of the obligation and multiple transactions "just under $ 10,000"); *United States v. Wynn, 314 U.S. App. D.C. 35, 61 F.3d 921, 927-28 (D.C. Cir. 1995)* (Applying pre-amendment statute, but noting that using multiple checks under $ 10,000 to satisfy a single debt "created an inference that [the defendant] was motivated to avoid the reporting requirement.").

[*84] Warner served on North Community Bank's Board of Directors from 1998 to 2002. Tr. at 12483 (Karcazes). Warner's co-member on the Board, George Karcazes, testified that North Community maintained and regularly updated a "Bank Secrecy Policy" which discussed the bank's obligation to file CTR's for transactions in excess of $ 10,000 cash. Tr. at 12488 (Karcazes). Policy updates were approved by the Board of Directors, including Warner. Tr. at 12490-93 (Karcazes). In light of his many years as a North Community Director, and the fact that the CTR requirement was discussed in the Bank Secrecy Policy that Warner approved, the jury could have reasonably concluded that Warner was aware of the bank's reporting obligation. Moreover, the nature of Warner's transactions support the inference that he intended to avoid the bank's disclosure obligation. Warner caused two checks to be written on the same day in amounts under the $ 10,000 threshold. [12] Warner subsequently cashed the checks on consecutive days at two separate North Community bank locations within one week of causing the checks to be written. The evidence further established that during 1997 Warner made numerous large withdrawals without [*85] ever exceeding the $ 10,000 threshold. Gov. Ex. 08-510; Tr. at 17232-33 (Schindler); *see MacPherson, 424 F.3d at 191-92.* Together with the circumstantial evidence that Warner was aware of the CTR requirement, the jury could have reasonably inferred from this pattern of behavior that Warner acted purposefully to avoid triggering the bank's disclosure obligation.

> 12 The government speculates that Warner may have used the cash withdrawals to "take care of Ryan." Gov't Resp. at 48. Neither the source of the proceeds nor the purpose for which they were withdrawn, however, is material to *§ 5324* liability. It is enough to sustain a conviction under the anti-structuring statute that defendant purposefully structured a transaction to avoid the reporting requirement, whatever ultimate purpose the defendant hoped to accomplish by not drawing unwanted attention to the transaction. *See United States v. Gabel, 85 F.3d 1217, 1223 (7th Cir. 1996)* ("The reporting requirement is central to this offense; it would make no difference to the Treasury if someone illegally structured a transaction to avoid reporting an exceptionally generous gift that fell above the $ 10,000

threshold, or if she wanted to avoid reporting the receipt of illegal proceeds."); *United States v. Gibbons, 968 F.2d 639, 645 (8th Cir. 1992)* ("The focus of the statute is on the structuring person's conduct, not on the reason why he did not want the transaction report filed.").

[*86] **VI. Defendant Warner's Trial Was Properly Joined with Defendant Ryan's**

Defendant Warner requests a new trial on the grounds that the court should have granted his request for severance. Warner Post-Trial Mot. at 1, 8. Warner made numerous motions for severance both before and during the trial, beginning in January 2004 when counsel for the newly-indicted and joined Ryan requested that Warner's original trial date of February 23, 2004, be reset, allowing the Ryan defense team time to prepare. *United States v. Warner, 2004 U.S. Dist. LEXIS 15727, No. 02 CR 506, 2004 WL 144125, at *1 (N.D. Ill. Jan. 16, 2004)*. This court denied Warner's implied request for a severance, finding at that time that Warner could show neither evidentiary or substantive prejudice from a delay and that trying Ryan and Warner separately would tax both the government's and the court's resources significantly. *2004 U.S. Dist. LEXIS 15727 at *5*.

Prior to trial in February 2004, Warner again moved for severance. *Warner, 2004 U.S. Dist. LEXIS 15727, 2004 WL 1794476, at *23*. He noted that Ryan was named as the sole defendant in nine of the indictment's twenty-two counts. *Id. at *24*. Of these, the court observed that Counts Six and Ten, related [*87] to the South Holland lease and Grayville prison mail-fraud sequences, were sufficiently similar to Counts Two, Three, Four, Five, Seven, Eight, and Nine -- mail-fraud sequences with which Warner was allegedly involved -- so as not to require severance. *Id.* Further, the court concluded that any prejudice to Warner arising from the court joining these counts could be addressed through limiting instructions to the jury. *Id.* With respect to the remaining seven false statement and tax counts levied against Ryan alone, the court noted that severance remained inappropriate so long as the evidence related to these counts was relatively brief and presented at the end of the government's case. *Id.* In the alternative, the court said it would consider bifurcating these counts and trying them to the same jury after it had returned a verdict on the mail fraud and RICO counts. *Id.* Such a procedure would alleviate Warner's confrontation concerns arising from the introduction of Ryan's purportedly false statements that he appointed Warner to the McPier Board on the recommendation of another member; that he never discussed the Joliet lease or SOS Office leases with Warner or had any [*88] personal knowledge that Warner profited from those leases; and that he had no personal financial relationship with Warner. *Id.* On the other hand, the court also noted that none of Ryan's statements pertaining to Warner were in fact inculpatory. *Id.* Finally, the court did not believe that a Warner-only trial would mean that his trial would be free of hardships, including extensive press coverage, attributable to co-defendant Ryan's notoriety. *Id.* & n.16.

Warner again requested severance or bifurcation of the Ryan-only counts in 2005. *United States v. Warner, 396 F. Supp. 2d 924, 933 (N.D. Ill. 2005)*. With respect to the court's ruling on Counts Six and Ten, Warner argued that the similarity between the Ryan-only mail fraud counts and the mail-fraud counts involving both Defendants exacerbated rather than alleviated the possibility of juror confusion. *Id.* The court stood by its earlier ruling, observing that there was no reason to believe that the jury would disregard an instruction to consider the evidence related to each count separately. *Id. at 935-36*. The court, however, reserved a ruling on Warner's request for bifurcation of the [*89] Ryan-only tax and false-statement counts, pending clarification from the government on how much evidence it intended to introduce to prove those charges. *Id. at 936*.

Warner renewed his motion to sever and re-raised these arguments several more times during the course of the trial. Def. Warner's Mot. to Bar Proof at the Joint Trial and Renewed Mot. for Severance, 01/9/06, at 1; Def. Warner's Renewed Motion for Severance at the Close of the Government's Case, 02/02/06, at 1; Def. Warner's Renewed Motion for Severance at the Close of the Defendant's Case, 02/23/06, at 1. Ultimately, this court did not grant Warner severance or bifurcation; however, the court addresses the arguments raised in these briefs to the extent that they remain relevant.

Warner argues that this court erred in denying his requests for severance or bifurcation. He contends, first, that joinder was impermissible because "[t]he indictment does not show, nor has the government established, the existence of a single overarching conspiracy involving both defendants." Def. Warner's Renewed Motion for Severance at the Close of the Government's Case,

02/2/06, at 5. Second, Warner argues that he was prejudiced [*90] by the abundance of evidence that was admitted solely against Ryan that would not have been admitted against him alone. *Id.* at 1. Third, Warner argues that the evidence the government introduced against Ryan on the false-claims counts violated Warner's constitutional right to confrontation. *Id.* at 5. [13]

> 13 Because Warner was tried with a public official, Warner also contends that, in addition to sorting out what evidence applied to which Defendant, the jury was also tasked with making the difficult determination of which legal duties applied to which Defendant. Def. Warner's Renewed Motion for Severance at the Close of the Government's Case, 02/2/06, at 4. Although the court did instruct the jury on these matters, Warner contends that these jurors proved themselves incapable of following such instructions. Warner Post-Trial Mot. at 9. The court will address this argument in the section on juror-related issues. *See infra* Part IX.G.

[HN26] Defendants may be joined in a single indictment where they are "alleged [*91] to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." *FED. R. CRIM. P. 8(b)*. The propriety of joinder is assessed from the face of the indictment and not based on the evidence actually adduced at trial. [14] *Lanas, 324 F.3d at 899*. Thus, Warner's first argument is without merit. The court determined that the Second Superseding Indictment charged Warner and Ryan with a single overarching conspiracy and a single scheme to defraud, *Warner, 2004 U.S. Dist. LEXIS 15727, 2004 WL 144125 at *1*, and stands by its original determination that joining Warner and Ryan accords with the Federal Rules.

> 14 It is possible that Warner's reference to the evidence adduced at trial is an invocation of a claim of "retroactive misjoinder," a circumstance in which the government alleges a link between charges or defendants in the indictment, but never actually introduces any evidence to substantiate that allegation, and the defendant is prejudiced as a result. *See United States v. Velasquez, 772 F.2d 1348, 1354-55 (7th Cir. 1985)*. The court's determination that the evidence adduced at trial provided a reasonable basis for jury to convict on Count One and discern a single scheme to defraud the State of Illinois defeats any such argument here.

[*92] [HN27] The Rules do authorize severance where the court determines that, nonetheless, "joinder . . . of defendants in an indictment . . . or . . . for trial appears to prejudice a defendant. . . ." *FED. R. CRIM. P. 14(a)*. The Supreme Court in *Zafiro v. United States* explained that "when defendants properly have been joined under *Rule 8(b)*, a district court should grant a severance under *Rule 14* only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993)*. Furthermore, "[b]ecause *Rule 14* assigns to the district court the task of balancing the cost of multiple trials against the possible prejudice inherent in a single trial . . . [i]n order to prevail on this issue, a defendant must demonstrate that the denial of severance caused him actual prejudice that deprived him of his right to a fair trial; it is insufficient that separate trials would have given a defendant a better opportunity for an acquittal." *United States v. Rollins, 301 F.3d 511, 518 (7th Cir. 2002)* [*93] (internal quotation marks and citations omitted).

Having presided over the lengthy trial in this case, the court is not persuaded that Defendant Warner was prejudiced by the "abundance of evidence that was admitted solely against Co-defendant Ryan." Def. Warner's Renewed Motion for Severance at the Close of the Government's Case, 02/2/06, at 1. Warner's brief includes a two-and-a-half page list of evidence he urges would not have been admissible had he been tried without Ryan. *Id.* at 2-4. The government responds by observing that this lengthy trial involved the testimony of more than 100 witnesses and the introduction of more than 1,000 exhibits, the majority of which pertained to both Defendants. Gov't Reply at 57. Even if this were not the case, that the evidence against Ryan was proportionally greater the evidence against Warner, standing alone, would not be a ground for severance. *Diaz, 876 F.2d at 1344, 1357*.

Moreover, Warner's list of Ryan-only evidence overstates the potential prejudice. [HN28] In both mail fraud and conspiracy cases, evidence of one defendant's acts in furtherance of the scheme or conspiracy are admissible against any other participant in the [*94]

scheme or conspiracy, even if such a participant did not specifically know what his co-defendant was doing. *Adeniji, 221 F.3d at 1027.* Thus, where evidence pertaining to counts in which Ryan alone was named also dealt with the single conspiracy set out in Count One or the overarching conspiracy laid out in Counts Two through Ten, that evidence would also have been admissible against Warner even in a separate trial. The government also correctly notes that Ryan's tax and false statement charges flowed from the overarching conspiracy and scheme to defraud and that the evidence introduced against Ryan only to support those counts was not inflammatory or otherwise obviously prejudicial to Warner. Gov't Resp. at 57. The court is sympathetic to Warner's position that he should not be found guilty by association. Warner Post-Trial Mot. at 12. [HN29] Under the law of conspiracy, Warner is in fact accountable for the acts of his associates.

Warner also suggests that the intense media coverage and notoriety attendant with sharing a courtroom with a prominent public official would not have developed, had the court granted Warner's request for severance. Warner Post-Trial Mot. at 13. [*95] Respectfully, the court suggests that recent experiences -- including the criminal prosecutions of Scott Fawell, a few years ago, and, more recently, Robert Sorich -- suggest otherwise, and dispel the notion that the absence of the prominent public official popularly associated with a particular defendant would dim the media spotlight or dull the public's interest.

Finally, Warner argues that the denial of severance compromised his right to confrontation. Warner Post-Trial Mot. at 11. Warner notes that the government proved its false statements charges against Ryan in part by introducing out-of-court statements Ryan made about Warner, and argues that the court's instructions to the jury not to consider those statements as evidence against Warner were inadequate under *Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)* ("holding that [HN30] a defendant is deprived of his *Sixth Amendment* right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant."). Warner further argues that the Supreme Court's recent decision in *Davis v. Washington, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)* [*96] controls because Ryan's statements to the FBI and the U.S. Attorney constitute "testimonial evidence" that should have been barred absent the opportunity to cross-examine. Warner Reply at 5; *see Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)* (holding that the *Sixth Amendment* bars the admission of testimonial statements of a nontestifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination).

In this case, the court carefully excluded all of Ryan's out-of-court statements referring to Warner except uncontested background statements and statements deemed noninculpatory. Tr. at 17903-05 (01/25/06). Because the statements that were admitted were not inculpatory, they do not raise *Confrontation Clause* issues. *See Richardson v. Marsh, 481 U.S. 200, 207-08, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)* (distinguishing *Bruton* as applying only when a codefendant's out-of-court statement is so expressly and powerfully incriminating on its face that an "overwhelming probability" exists that the jury cannot disregard the incriminating reference). Moreover, the statements were not introduced for the truth of the matter asserted; to the contrary, [*97] the government contended Ryan's statements were untruthful. Thus, as to Warner, the statements are not hearsay and do not implicate the *Confrontation Clause. See Crawford, 541 U.S. at 59 n.9* [HN31] ("The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.") (citing *Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)).*

Because Ryan's out-of-court statements admitted into evidence are neither inculpatory nor hearsay, the court need not reach Warner's argument that the statements should have been barred because they were "testimonial" under *Davis*. Warner Reply at 5. In *Davis*, the Court explained that [HN32] only the "testimonial statements" of a hearsay declarant implicate *Crawford. 126 S. Ct. at 2273* (quoting *Crawford, 541 U.S. at 53-54*). The Court defined "testimonial" as statements made in response to a police interrogation, the primary purpose of which "is to establish or prove past events potentially relevant to later criminal prosecution" rather than assist police in dealing with an ongoing emergency. *Id. at 2273-74; see United States v. Tolliver, 454 F.3d 660, 665 (7th Cir. 2006)* [*98] (defining "testimonial" statements as those a declarant makes "in anticipation of or with an eye toward a criminal prosecution."). Warner argues that Ryan's

statements to the FBI and the U.S. Attorney clearly fall within that definition. Warner Reply at 5. But whatever its merits, his argument is inapplicable here, where the statements were not offered for their truth. Neither *Davis* nor *Crawford* applies to bar non-hearsay evidence. *See Tolliver, 454 F.3d at 666* (discussing *Davis* and emphasizing that the testimonial versus nontestimonial issue was irrelevant, and *Crawford* not implicated, where out-of-court statements were offered for context and not for their truth; admission of such statements "does not offend the *Confrontation Clause* because the declarant is not a witness against the accused."). The court thus concludes that the *Confrontation Clause* is not implicated here.

VII. Jury Instruction Challenges

A. The Court Properly Gave the Jury a *Pinkerton* Instruction

Defendant Ryan argues that the court erred in giving the jurors, a so-called *Pinkerton* instruction. The disputed instruction stated, in part, as follows: [*99]

> A conspirator is a person who knowingly and intentionally agrees with one or more persons to accomplish an unlawful purpose. A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy.

Final Jury Instr. at 73. The instruction went on to direct the jurors, if they found Ryan guilty of the conspiracy charged in Count One, to find him guilty of each of the mail fraud counts applicable to Ryan, provided that the government also proved that the offense was committed: "(a) by his fellow conspirators in furtherance, and as a foreseeable consequence, of the conspiracy charged in Count 1, (b) while defendant Ryan was a member of the conspiracy charged in Count 1." *Id.* A separate paragraph gives the same instruction with respect to Warner. Ryan does not contend that this instruction misstates the law; rather, he argues that *Pinkerton* instructions are inappropriate in RICO cases and that the instruction in this case was confusing because neither the indictment nor the proof in the case [*100] was premised on vicarious conspiratorial liability. Ryan Post-Trial Mot. at 52-53.

[HN33] The RICO statute does not preclude the use of *Pinkerton* instructions, and the Seventh Circuit has stated that the use of such instructions in RICO cases is not "wrong or improper." *Neopolitan, 791 F.2d at 504 n.7*; *see also United States v. Campione, 942 F.2d 429, 437-38 (7th Cir. 1991)*. The *Pinkerton* instruction given to the jury in this case closely tracked the Seventh Circuit's pattern instruction, and accurately states the law with respect to co-conspirator liability. There is, therefore, no basis for requiring a new trial in the substance of the instruction itself, nor in the fact that it was given in the context of a case containing a RICO conspiracy charge.

Nevertheless, Ryan contends that the jury received mixed signals about whether the government was pursuing a direct or vicarious liability theory. As Ryan points out, the Indictment does not charge Ryan with conduct in which only Warner participated directly (e.g., extortion, money laundering and illegal structuring), and vice versa. Moreover, the court instructed the jury throughout the trial that [*101] particular evidence pertained only to Ryan, not Warner. *See, e.g.*, Tr. at 14564 (01/04/06). Ryan assumes that the jury took from the Indictment and the limiting instructions a broad rejection of vicarious liability, which the *Pinkerton* instruction confusingly contradicted.

The court believes that this argument is speculative and overstates the impact of the limiting instructions, which were necessarily narrow and fact-specific. There is no reason to conclude that the jury inferred from one or more of these instructions that vicarious liability did or did not apply to the case as a whole. Ryan's argument is further undercut by the fact that the *Pinkerton* instruction concerns a theory of liability, not a substantive crime or defense. So, while Ryan is correct that the government's arguments at trial tended to emphasize Ryan's personal participation in the alleged schemes, a vicarious-liability theory was not incompatible with the evidence presented at trial. *Cf. Humphrey v. Staszak, 148 F.3d 719, 723-24 (7th Cir. 1998)* (trial judge committed reversible error by instructing the jury regarding an entrapment defense that had not been pursued by the *§ 1983* plaintiff [*102] and for which there was no evidence in the record). Under the rule established in *Pinkerton*, the government could have

placed greater emphasis on Ryan's liability for the actions of his co-conspirators, but chose not to. The court does not believe that that decision confused the jury or prejudiced Ryan.

The jury did state at one point during deliberations that they found the *Pinkerton* instruction "ambiguous." Tr. at 24022-23 (03/16/06). The jury's confusion appears to have arisen from the language of the instruction itself, which, as previously discussed, closely tracks the Seventh Circuit's pattern instruction, and not with the concept of vicarious liability generally, or how that concept relates to the limiting instructions that the jury received regarding particular evidence. This court's response fully addressed the specific question that the jurors posed, that is, whether they could "skip" Counts Two through Nine. The answer was "no." [15] Ryan points out that the reconstituted jury did not pose this question again, and speculates that the jury must have either remained confused about the instruction or improperly discussed the court's response to the previous note. This [*103] is pure speculation, as the course of the reconstituted jury's deliberations could have proceeded in any number of directions such that the question never arose. As with the many other instructions that the reconstituted jury did not specifically inquire about, the court presumes that the jury understood the instruction. *See United States v. O'Neill, 116 F.3d 245, 249 (7th Cir. 1997)* ("[HN34] We presume that juries understand and follow jury instructions."). Certainly, the court has no basis to abandon that presumption in this case. The court concludes that the *Pinkerton* instruction was both an accurate statement of the law and appropriate under the circumstances of this case. [16]

15 This court's full response to the jurors' question was as follows:

> You are to consider the evidence as to each count separately and reach a verdict as to each count separately. Thus, whether you find a defendant guilty or not guilty of Count 1, you must still consider the evidence and reach a verdict as to each of Counts 2 through 10. I remind you to consider all of the instructions you have been given.

Letter from Court to Jurors of 3/20/06.

[*104]

16 Accordingly, the court does not reach the government's argument that Warner waived, and Ryan forfeited, their objections to the *Pinkerton* instruction. Gov't Resp. at 68.

B. The Court Properly Gave the Jury a Partial "Ostrich" Instruction

At the government's request, the court gave an "ostrich" instruction but limited the instruction to the charge relating to the diversion of state resources. With respect to that charge only, the jury was instructed that it could "infer knowledge from a combination of suspicion and indifference to truth." Final Jury Instr. at 27. Defendant Ryan argues that it was error to give any "ostrich" instruction at all, and further contends that the jury could not have performed the "mental gymnastics" required to apply the instruction to some matters but not others. Ryan Post-Trial Mot. at 55-58. [HN35] An ostrich instruction is appropriate "when a defendant claims a lack of guilty knowledge and where there are facts and evidence which support an inference of deliberate ignorance." *United States v. Lennartz, 948 F.2d 363, 369 (7th Cir. 1991)* (internal [*105] quotation marks omitted); *see also United States v. Carrillo, 435 F.3d 767, 780 (7th Cir. 2006)*. The focus is on the defendant's state of mind, not on what an objectively reasonable person might do in the same context. *Carrillo, 435 F.3d at 781* ("[T]he focus is on what the defendant knew and whether the defendant knew enough to support an inference that he or she remained deliberately ignorant of facts constituting criminal knowledge.").

While the government did present evidence and make arguments concerning Ryan's direct knowledge and participation in diverting state resources for personal and political ends, there was also evidence in the record Ryan deliberately avoided obtaining that knowledge. *See United States v. Carrillo, 269 F.3d 761, 769 (7th Cir. 2001)* ("The government is not precluded from presenting evidence of both an actual knowledge theory and a conscious avoidance theory."). In 1992, Mr. Fawell directed state employees to perform work on Bruce Clark's campaign for state representative. Tr. at 3167 (Fawell). One of those employees, Brad Roseberry, was summoned to a meeting with Fawell, Ryan and others. Tr. at 14273 [*106] (Roseberry). When another state employee, Scott Wiseman, suggested that Roseberry take a "leave of absence" from his state employment while

working on the Clark campaign, Roseberry testified that Fawell said "[n]o, we are not going to do that." Tr. at 14274 (Roseberry). Ryan said nothing. *Id.* at 14274. In each of the years 1994-1998, Fawell oversaw the diversion of state resources to various political campaigns. Tr. at 3180, 3184, 3190 (Fawell). Ryan's attorneys argued at trial that Mr. Fawell was responsible for diverting these state employees for political purposes, and that he acted without Ryan's knowledge and contrary to Ryan's 1993 directive to state employees prohibiting them from doing political work on state time. Tr. at 23403-04, 23408 (Ryan Closing). Yet there was evidence in the record that when these issues percolated up to Ryan, he chose to look the other way while Fawell -- the person who, in December 1994, proposed installing someone in the IG department who "won't ask about FR (fundraising) tickets" -- handled it. Gov. Ex. 01-019. So, for example, when Fawell told Ryan that he had arranged for some Secretary of State employees to be paid for work they did in [*107] connection with 1996 House campaigns, Ryan told Fawell that he "[did not] want to hear about it." Tr. at 3193 (Fawell). Fawell also testified that when a Secretary of State employee, Glen Bower, complained to Ryan in 1998 about state employees working for CFR, Ryan asked Fawell to "[j]ust work it out, will you?" Tr. at 3326 (Fawell). In response to Ryan's request, and after receiving complaints from other state employees about Bower, Fawell held a meeting with Bower and other state and campaign employees intended to make Bower stop nosing around with respect to the use of state employees for campaign work. Tr. at 3355 (Fawell). In light of these acts of deliberate avoidance, the court concludes that the ostrich instruction was appropriate.

Nor is the court persuaded that its decision to limit that instruction to the diversion of state resources prejudiced either Defendant. This court chose to limit the application of the ostrich instruction because it believed that, with respect to other factual sequences in this case (for example, tax issues), "the facts and evidence [did not] support an inference of deliberate ignorance." *Carrillo, 435 F.3d at 782.* As previously [*108] discussed, jurors are presumed to understand and to follow instructions, and there is no basis in the record to conclude that the jury did not do so in this instance. The Defendants were further protected from the possibility that the jury convicted them for mere negligence by the additional instruction that "[a] defendant's association with alleged conspirators or persons involved in a criminal enterprise is not itself sufficient to prove his participation or membership in a conspiracy or criminal enterprise." Final Jury Instr. at 31; *see Carrillo, 269 F.3d at 770* (concluding that any harm resulting from an ostrich instruction was lessened by a "mere association" instruction).

C. The Court Properly Denied Defendant Ryan's Requested Special Verdict Form

The jurors in this case returned a verdict form that asked the jurors whether each Defendant did or did not commit a particular offense, or whether each Defendant was guilty or not guilty of a particular count in the indictment. Defendant Ryan argues that this verdict form was inadequate to assure that the jury was unanimous with respect to each element of each offense. [17] Ryan Post-Trial Mot. at 58. Before [*109] closing arguments, Ryan submitted a proposed special verdict form that asked the jurors to make numerous specific factual findings for many counts. Ryan's Proposed Verdict Form. The court declined to use Ryan's proffered verdict form. 3/6/06 Order. Ryan contends that without the use of a specific verdict form, "there is no way of knowing" if the jury unanimously agreed as to which particular conduct gave rise to criminal liability. Ryan Post-Trial Mot. at 58.

17 Defendant Warner does not object to the verdict form.

[HN36] Although permitted, special interrogatories or verdicts are "generally not favored in criminal cases." *United States v. Smith, 938 F.2d 69, 70 (7th Cir. 1991).* Ryan argues that in "complex" criminal cases, special verdict forms are not disfavored and "may even be required." Ryan Reply at 25. He cites several cases-none from the Seventh Circuit-in which other courts of appeal found no error in the use of special verdict forms. *See United States v. Stonefish, 402 F.3d 691, 698 (6th Cir. 2005);* [*110] *United States v. Palmeri, 630 F.2d 192, 203 (3d Cir. 1980); United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979).* These courts did not, however, hold that a district court erred by *not* using a special verdict form; rather, there was no prejudice to criminal defendants where such forms were used. *See Stonefish, 402 F.3d at 698* (finding juror unanimity satisfied despite the special verdict form, not because of it); *Palmeri, 630 F.2d at 203* (holding that the trial court did not err in giving the jury special interrogatories because defendants were not prejudiced by their use); *Huber, 603 F.2d at 394* (noting in passing that the special verdict form helped

show that jurors were undivided). [18]

18 Other cases cited by Ryan are inapplicable. In *United States v. Beros, 833 F.2d 455, 460-63 (3d Cir. 1987)*, the court concluded that a particularly complex case "warranted more specific instructions regarding jury unanimity," but did not address whether a special rather than a general verdict form should have been used. In *United States v. Ham, 58 F.3d 78, 85 (4th Cir. 1985)*, the court expressed no opinion at all as to the district court's use of a special verdict form.

[*111] Contrary to Ryan's position, there is no requirement that a district court use a defendant's proffered special verdict form, even in complex cases. *See United States v. Sababu, 891 F.2d 1308, 1325 (7th Cir. 1989)*; *Smith, 938 F.2d at 70*; *see also United States v. Ogando, 968 F.2d 146, 149 (2d Cir. 1992)* (noting the benefits of special interrogatories in "particularly complex criminal cases," but finding their use within the "broad discretion of the district court" and affirming the district court's decision not to use special interrogatories submitted by the defendants). In *Sababu*, a conspiracy case, the Seventh Circuit rejected the defendants' argument that special verdict forms were needed to ensure juror unanimity as to which conduct constituted the defendants' conspiracy: "The defendants provide us with no cases or other authority-and we can find none on our own-that require a district court to provide a jury with proffered special verdict forms." *891 F.2d at 1325*. The court there found the unanimity requirement satisfied by an instruction that the jurors unanimously agree that the defendants were part of the conspiracy, [*112] and as to the objects of the conspiracy. *Id. at 1326*.

This court acknowledges that special verdict forms may be beneficial in certain complex criminal cases, and, as noted, the court was not opposed in principle to using such a form in this case. The court, however, found Ryan's proffered 68-page verdict form "cumbersome, overly detailed, and potentially confusing." 3/6/06 Order. Indeed, many of the factual findings that Ryan asked the jury to make had no apparent purpose. In light of the general disfavor of special verdict forms in this circuit, and given the lack of any requirement to use such forms, the court concluded that the potential for harm from Ryan's proffered form far outweighed any benefit from its use.

The court is satisfied that the general verdict forms returned by the jury adequately protected Ryan's right to a unanimous verdict. At the jury instructions conference, the court directed the government to modify its proposed general verdict form to include some factual detail as to each count of the indictment, to help the jurors identify the counts and to avoid confusion. The court accepted the government's revised version. In addition, as in *Sababu* [*113] , the court gave specific instructions on unanimity in addition to the customary instructions that the verdict be unanimous and that every element of every offense be proved beyond a reasonable doubt. For example, for Counts Eleven and Twelve, alleging false, fictitious or fraudulent statements by defendant Ryan, the court instructed the jury that it must unanimously agree on which statement was false, fictitious, fraudulent. Final Jury Instr. at 109. In light of the additional information on the general verdict forms and the instructions on unanimity, the general verdict forms were sufficient.

D. The Court Properly Instructed the Jury With Respect to the RICO Conspiracy Offense

Defendant Ryan also argues that he was deprived of his right to unanimous juror agreement on every element of every offense because the court did not instruct the jurors that they must unanimously agree on which conduct constituted the predicate racketeering acts implicated in the RICO conspiracy charge (Count 1). Ryan Post-Trial Mot. at 60-61. The court disagrees.

[HN37] Jury instructions, when viewed as a whole, must treat the issues fairly and accurately. *United States v. O'Malley, 796 F.2d 891, 897 (7th Cir. 1986)*. [*114] In this case, the court utilized the Seventh Circuit pattern jury instructions for the *section 1963(d)* RICO conspiracy charge, which do not include any direction that jurors unanimously agree on which predicate acts gave rise to a pattern of racketeering activity. Fed. Crim. Jury Instr. 7th Cir. *§ 1962(d)*. The pattern instructions include unanimity instructions only for a substantive RICO charge under *section 1963(c)*: "[Y]ou must unanimously agree as to which two or more racketeering acts the defendant committed [or caused to be committed] in order to find the defendant guilty of that count. . . . [Y]ou must unanimously agree upon which of the different offenses alleged within a racketeering act the defendant committed." Fed. Crim. Jury Instr. 7th Cir. *§ 1963(c)*. There is a reason for the difference: [HN38] a conspiracy charge under *section 1962(d)* focuses on the act of a defendant's agreement to engage in racketeering activity,

rather than on the racketeering acts themselves. *United States v. Geicer, 923 F.2d 496, 500 (7th Cir. 1991)* ("*Section 1962(d)*, like all conspiracy provisions, has as its target the act of agreement-here, the agreement to engage in activity [*115] that implicates *section 1962(c)*."). Thus, in *Geicer*, [HN39] the Seventh Circuit held that specific predicate acts need not be alleged nor proved for a *section 1962(d)* charge. *Id.* Similarly, the Supreme Court in *United States v. Salinas, 522 U.S. 52, 63-65, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997)* held that a defendant need not have actually committed nor even agreed to commit the two or more predicate racketeering acts required by *section 1962(c)* in order to be punished under *section 1962(d)*; rather, all that is required is that the defendant "adopt the goal of furthering or facilitating the criminal endeavor." It would be anomalous to require jurors to unanimously agree on which predicate acts constituted the pattern of racketeering activity which was the object of the conspiracy, when the prosecution is not required to prove or even identify those predicate acts.

Ryan acknowledges that there is no Seventh Circuit authority that requires a unanimity instruction for a *section 1962(d)* charge. Ryan Post-Trial Mot. at 60. On the other hand, the Seventh Circuit has not squarely held that such an instruction is *not* required. [HN40] The Seventh Circuit has, however, upheld the use of juror instructions that [*116] lack an instruction requiring the jurors to unanimously agree on and identify particular predicate acts for a *section 1962(d)* charge. *See United States v. Campione, 942 F.2d 429, 437 (7th Cir. 1991)* (finding an instruction sufficient that defined "pattern of racketeering" as "at least two of the acts alleged" in 30 other counts of the indictment). [19] Moreover, as discussed above, [HN41] the distinction between the substantive charge of *section 1962(c)* and the conspiracy charge of *section 1962(d)*, recognized by both the Seventh Circuit in *Geicer* and the Supreme Court in *Salinas*, obviates the need for an instruction of unanimous juror agreement as to particular predicate acts under the conspiracy charge, even where, as in the pattern instructions, it might be given for the substantive offense.

> 19 The government cites *Campione* for the proposition that requiring a unanimity instruction would be "contrary to the law of the Seventh Circuit." (Gov't Resp. at 74.) As this court reads that case, however, *Campione* does not reach so far; indeed, the decision does not specifically address juror unanimity. Rather, at issue in *Campione* was whether the judge should have instructed the jury that members of the *conspiracy*-not the jurors-had to agree on which predicate acts the defendants intended to commit. *942 F.2d at 436*. The case is thus relevant to the juror agreement issue not through a specific holding, but as precedent where the Seventh Circuit upheld jury instructions that lacked any direction that the jury identify and unanimously agree on specific racketeering acts.

[*117] Ryan relies on several cases from other circuits in which courts found no error when a unanimity instruction was given for a *section 1962(d)* charge. Ryan Post-Trial Mot. at 60-61. None of these cases, however, holds that such an instruction is required, and none holds that it should have been given when it was not. In *United States v. Shenberg, 89 F.3d 1461, 1472 (11th Cir. 1996)*, the court held that the district court did not abuse its discretion in declining defendants' request for a special verdict on a RICO conspiracy count. The court noted that the judge gave a unanimity instruction in addition to using a general verdict, but did not hold that such an instruction was required; moreover, nowhere did the court state that the use of a predicate unanimity instruction is a prerequisite when a general verdict form is used. *Id.* Similarly, the court in *United States v. Smith, 413 F.3d 1253, 1277 (10th Cir. 2005)* noted that the district court instructed the jurors to agree on two of the same racketeering acts, but again the precise issue was whether the judge should have used a special verdict form naming each predicate act. And in *United States v. Merlino, 310 F.3d 137, 139-140 (3d Cir. 2002)*, [*118] the district court gave a specific unanimity instruction, but the court never addressed the propriety of that instruction; rather, the issue was whether the jurors' failure to agree that a particular predicate act was proved constituted an "acquittal" that barred subsequent prosecution based on that act. Moreover, both *Shenburg* and *Merlino* contained a substantive *section 1962(c)* RICO charge in addition to the conspiracy charge. *See Shenburg, 89 F.3d at 1469*; *Merlino, 310 F.3d at 139*. In this case, of course, Defendants were not charged with the substantive offense. The court thus finds the cases cited by Ryan unpersuasive, especially in light of the Seventh Circuit and Supreme Court authority discussed above.

Ryan further argues that in declining to dismiss the RICO charge in 2004, this court "relied" on the

government's representation that it would seek a predicate unanimity instruction, and that the court was thus bound to give such an instruction. Ryan Reply at 26. The court did not, however, refuse to dismiss the RICO charge solely on the basis of the government's intent to seek a predicate unanimity instruction. The court rejected Defendant [*119] Warner's contention that the indictment failed to adequately identify specific predicate racketeering acts because the rule in the Seventh Circuit is that such specificity is not required. 8/11/04 Order at 32-33; *see Geicer, 923 F.2d at 501* (holding that [HN42] a RICO conspiracy charge indictment need not identify specific predicate acts in which the defendant was involved). Whether the government's decision not to later seek the instruction was "patently unfair," as Ryan claims, Ryan Reply at 26, is irrelevant to the sufficiency of the indictment. The indictment was either legally sufficient or it was not, and in concluding that it was sufficient, the court did not obligate itself to give any particular jury instruction. Just as the sufficiency of the indictment was evaluated on its merits, so too is the issue of whether a unanimity instruction is required; the two are not necessarily intertwined.

The court concludes that the jury instructions given for the RICO conspiracy charge fairly and accurately state the law. In any event, even if the law indeed requires a unanimity instruction for predicate racketeering acts under *section 1962(d)*, the lack of such an instruction [*120] in this case was harmless. [HN43] Where a defendant is charged with substantive offensives that are also alleged as RICO predicate racketeering acts, a finding of guilt on two or more of the substantive offenses is sufficient to support a RICO conviction. *United States v. Anderson, 809 F.2d 1281, 1284 (7th Cir. 1987)*. *Anderson*, cited by neither the government nor Defendants, appears directly on point. There, the alleged RICO predicate acts also formed the basis for three Hobbs Act counts and one mail fraud count, on all four of which the defendants were convicted. *Id. at 1283*. One defendant argued, as does Ryan, that the RICO conviction could not stand because it was impossible to tell which of the four offenses the jury viewed as predicate acts. *Id. at 1284*. Affirming the conviction, the court held that because the jury had unanimously found the defendants guilty of each of the four acts, it was irrelevant on which of the acts the jury relied: "[T]he jury could property rely on any two or more of the four substantively charged offenses as a matter of law." *Id. at 1284*.

Here, the jurors unanimously found Defendants [*121] Ryan and Warner guilty on multiple counts of mail fraud, each of which constitutes a distinct predicate racketeering act. *See* [HN44] *18 U.S.C. § 1961(1)* (any violation of the federal statutes related to mail fraud amounts to a racketeering act under RICO). Defendants' concern over juror unanimity is thus misplaced, as there is no question that the jury unanimously found that Defendants committed two or more racketeering acts that constitute the required pattern of racketeering activity under RICO.

VIII. THE COURT PROPERLY EXCLUDED CERTAIN EVIDENCE OF RYAN'S GOOD FAITH

Defendant Ryan argues that "[t]he [c]ourt excluded evidence directly relevant to Ryan's good-faith defense, but freely admitted the same type of evidence when the government offered it to prove Ryan's bad faith." Ryan Reply at 27. This evidence relates to the decisions of other secretaries of state to increase fees chargeable by currency exchanges, as well as the renewal of certain leases and contracts negotiated by Ryan. Ryan also objects to the exclusion of his policy decisions on such remote issues as the death penalty, gay rights, gun control, organ donation, and drunk driving. [*122] Ryan Post Trial Mot. at 61-64.

[HN45] Mail fraud is a specific intent crime, *United States v. Henningsen, 387 F.3d 585, 590-91 (7th Cir. 2004)*, for which the absence of an intent to defraud is a complete defense. *United States v. Ashman, 979 F.2d 469, 480 (7th Cir. 1992)*. As such, Ryan was most certainly entitled to introduce evidence of his good faith, *United States v. Martin-Trigona, 684 F.2d 485, 492 (7th Cir. 1982)* ("The defendant is entitled to present evidence concerning his beliefs, motives, and intentions regarding the various transactions and mailings in the alleged scheme to defraud."), but circuit precedent does "not require that any evidence, no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith." *United States v. Longfellow, 43 F.3d 318, 321-22 (7th Cir. 1994)*.

To begin, Ryan takes issue with this court's decision to allow the jury to hear evidence that Ryan approved a currency exchange rate increase in 1995, Tr. at 2852-53 (09/29/05), but to deny the introduction of evidence of larger and more frequent increases [*123] in that rate by previous and subsequent secretaries of state. Order of

10/31/05 at 8. The government notes that the court did allow Ryan to introduce evidence that Ryan *actually considered* his predecessor, then-Secretary of State Jim Edgar's 1982 and 1985 rate increases, in Ryan's own 1995 decision. *Id.* at 6. Moreover, Ryan availed himself of this decision, putting such evidence before the jury in the form of Georgia Marsh's 1992 memo to Ryan, for instance. That memo reflected that the last rate increase took place some seven years prior; that Edgar had approved, but never enacted, a subsequent increase; that the currency exchange industry was economically important; and that a rate increase prior to the 1994 election might be politically difficult. Tr. at 4762-65 (10/19/05). The government portrayed Ryan's single 1995 decision to raise rates during his eight years as Secretary of State as highly unusual and suspicious in spite of this evidence, Tr. at 23085 (03/07/06), but inviting the jurors to give greater weight to some evidence and lesser weight to other evidence is well within the bounds of a fair prosecution.

Ryan's intentions and beliefs with regard to the 1995 exchange [*124] rate increase are of course relevant because the Indictment alleges that Ryan approved the rate increase in exchange for resort packages in Jamaica as part of a scheme to defraud the State of Illinois. That said, the naked act of some other official, whether he preceded or followed Ryan in office, does not shed any light on what Ryan himself intended when he took that same act, absent evidence that Ryan actually considered the other official's act. The decisions of Ryan's successor, Secretary of State Jesse White, could not have influenced Ryan in 1995 as all White's acts necessarily post-date Ryan's tenure. [20]

> 20 Much the same can be said for Ryan's contention that the court improperly excluded evidence of Secretary White's renewal of the facilities Ryan leased during his tenure in that office. Tr. at 11062-67 (12/05/05). The decision to renew a lease is, moreover, one influenced by many factors other than the decision to enter into a lease in the first place.

Finally, this court excluded evidence regarding [*125] Ryan's moratorium on the death penalty among other policy positions. Tr. at 14197 (01/03/06); Tr. at 19396 (02/08/06). The court found Ryan's substantive political positions to be completely unrelated to the leases and contracts at issue in the Indictment. That Ryan occupied his day with political decisions other than those charged in the Indictment, making it less likely that he had time to participate in a conspiracy or scheme to defraud the state, is relevant to his defense in a manner that the underlying merits of those political decisions is not. Ryan wanted to introduce his policy decisions on other issues of the day in order to convey to the jury that the portrait painted by the indictment was inconsistent with a man who took such courageous positions, but [HN46] "'[e]vidence of other . . . acts is not admissible to prove the character of a person in order to show action in conformity therewith.'" *Warner, 396 F. Supp. 2d at 940* (citing *FED. R. EVID. 404(b)*).

IX. JUROR ISSUES

Defendants contend that significant juror misconduct before trial, during trial, and during deliberations deprived them of their right to an impartial [*126] jury. The court concludes that both Defendants significantly overstate the degree of juror misconduct in this case. This also undermines their contention that, taken together, individual incidents of juror misconduct or plain bad judgment lead to the conclusion that the twelve jurors who deliberated to verdict in this case were incapable of following this court's instructions. On the contrary, this court concludes that, in spite of the difficulties generated by this very lengthy, high-profile trial, these jurors were diligent and impartial. For the reasons discussed below, the court denies Defendants' motions for new trials based upon the conduct of the jurors in this case.

A. Alleged Juror Misconduct During *Voir Dire*

The parties in this case developed a written juror questionnaire containing 110 numbered questions. Under a section entitled "Criminal Justice Experience," prospective jurors were asked whether they, or their family members or close friends, had been involved in prior criminal proceedings. Question 82 asked whether the prospective juror or a close friend or relative had "ever been charged with or accused of a crime." Question 84 asked whether the prospective [*127] juror had ever "had to appear in court, or been involved in any lawsuit or court proceeding as a plaintiff, defendant, victim, or witness." After the case was submitted to the jury, the court discovered that a number of jurors had failed to disclose certain criminal matters on their juror questionnaires.

Background checks of Jurors Pavlick and Ezell,

ordered by this court after it became aware that a local newspaper was investigating these jurors, Tr. at 24223, 24237 (03/23/06), disclosed a number of troubling arrests and convictions. Juror Pavlick was convicted of multiple DUI offenses, culminating in a felony DUI conviction, and a misdemeanor weapons conviction. Tr. at 24288-89 (03/24/06). Mr. Pavlick's DUI conviction occurred while Defendant Ryan was Secretary of State, raising the specter of bias. *Id.* at 24290, 24293. Juror Ezell's background check revealed several criminal arrests, including arrests for assault, battery and possession with intent to deliver cocaine, and an outstanding warrant for driving on a suspended license. *Id.* at 24276-77, 24306. At least one of Ms. Ezell's arrests was under the name of an alias. *Id.* at 24303-05. The court also discovered that [*128] Ms. Ezell's daughter had a number of arrests and convictions. *Id.* at 24273. Neither juror disclosed these incidents on their juror questionnaires, and the court questioned both jurors about these omissions. Although neither juror admitted to deliberately omitting their criminal backgrounds from the questionnaire, the court concluded that their responses were not credible in certain respects, and that truthful answers to the questions would have supported excusing them for cause. *See* Tr. at 24296, 24479-80 (03/27/06). Both Mr. Pavlick and Ms. Ezell were excused from the jury.

The revelations concerning Jurors Pavlick and Ezell prompted defense counsel to request additional background checks of the remaining jurors and alternates. Tr. at 24286 (03/24/06). Warner argues that information revealed by these background checks indicated that Jurors Chambers, Svymbersky, Casino and Rein, all of whom deliberated to verdict, were biased. Warner Post-Trial Mot. at 16, 18. [21] Defendant Ryan contends that this court applied "arbitrary criteria" to determine which jurors to retain and which to dismiss when irregularities in their questionnaire responses came to light. Ryan Post-Trial Mot. [*129] at 22.

> 21 Juror Gomilla had neglected to disclose a bankruptcy proceeding, but her explanation was fully satisfying to the court. Because Juror Talbot had in fact disclosed certain additional information, not recorded in his questionnaire, during voir dire, the court found no colorable basis for questioning his qualifications to continue service on the jury. The court chose not to seat alternate Juror Masri on the reconstituted jury.

[HN47] The Supreme Court has articulated a two-part test to determine whether, after the jury has reached a verdict, a juror's response to *voirdire* questions requires a new trial: "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984).* [22] The focus of the inquiry is whether the juror's dishonest answer demonstrates actual or implied bias, *United States v. Polichemi, 219 F.3d 698 (7th Cir. 2000),* [*130] because whatever motivated the juror's misrepresentations, "only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough, 464 U.S. at 555-56.* The court believes that the circumstances surrounding each of the challenged jurors warranted different treatment than either Mr. Pavlick or Ms. Ezell. With respect to each of the retained jurors, the count concluded that they did not answer the juror questionnaire dishonestly, and even if they had, a "correct answer" to the questions at issue would not provide "a valid basis for a challenge for cause." *Id. at 556.*

> 22 Accordingly, Defendant Warner's argument that the jurors' "conceal[ment]" prevented him from intelligently exercising his peremptory challenges would not, even if it accurately characterized the jurors' conduct, warrant a new trial. Warner Post-Trial Mot. at 16; *see McDonough*

1. Juror Chambers

Question # 84, in the section of the questionnaire entitled "Criminal [*131] Justice Experience," asked whether the jurors had ever had to appear in court or been involved in any lawsuit or court proceeding "as a plaintiff, defendant, victim, or witness." Juror Chambers answered "no," although she and her husband initiated divorce proceedings in 2004 and both she and her husband had moved for orders of protection. Ryan points out that potential jurors "included an assortment of legal matters," including divorce, in their responses to Question # 84. *See* Ryan Group Exhibit C; Ryan Post-Trial Mot. at 41 n.20. But as the government points out, the question elicited a wide variety of answers indicating multiple interpretations. Gov't Resp. at 89. Juror questionnaires were completed by 301 prospective

jurors, and 46 disclosed that they were divorced. *See* Ex. 8 to Gov't Resp; *see also* Juror Questionnaire, Question # 7 (asking prospective jurors about their marital status). Of those 46 prospective jurors, only six listed their divorce proceedings in response to question # 84. *See* Ex. 9 to Gov't Resp. Juror Chambers was, it appears, in good company in believing that question # 84 was not asking about divorce actions. [23] When asked by the court prior [*132] to the jury returning its verdict why she did not disclose either her divorce proceedings or the orders of protection, she stated that she believed the question referred to experience in criminal proceedings only. Tr. at 25407-08 (04/17/06). This court credited her response, *id.* at 25418-19, and is not persuaded by the Defendants to revisit its credibility determination, particularly in light of the variety of responses that question # 84 elicited from other prospective jurors.

> 23 Defendant Ryan refers to the government's analysis as a "tortured exegesis of the juror questionnaire," but does not dispute the accuracy of the government's review. Ryan Reply at 20. Moreover, Ryan himself took the position that the responses of other jurors should be compared with those of Ms. Chambers to determine her credibility. Ryan Post-Trial Mot. at 41 n.20.

The government points out, further, that eight of those potential jurors who did not list their divorce actions in response to question # 84 were questioned by both [*133] parties during *voir dire*. Gov't Resp. at 90. Defense counsel did not investigate this purported discrepancy with any of those eight jurors, much less argue that it was a basis to remove those jurors for cause. Yet the aspersions that the Defendants cast on Juror Chambers and the other jurors who deliberated to verdict in this case -- that they were untruthful, that they were looking for their 15 minutes of fame -- would apply equally to these other potential jurors under Defendants' theory. More importantly, the court is not persuaded that a "correct answer" to question # 84, disclosing all of Juror Chambers' court experience stemming from her marital difficulties, would have been a sufficient basis for a cause challenge. Absent some nexus with the particular Defendants in this case, divorce proceedings do not rise to the level of presumed or actual bias. Again, this conclusion is borne out by the way that the Defendants conducted *voir dire*. Many potential jurors disclosed their divorced status, yet Defendants' counsel did not ask whether their experiences affected their impression of the justice system or otherwise investigate potential bias.

2. Juror Svymbersky

Juror [*134] Svymbersky failed to disclose a 23-year-old misdemeanor charge for purchasing a stolen bicycle, even though it was relevant to questions # 82 ("[h]ave you . . . ever been charged with or accused of a crime?") and # 84. When Mr. Svymbersky was brought into chambers to discuss the omission, he volunteered that the incident had occurred and described what had happened. Tr. at 24543 (03/27/2006). When asked why he had not listed the incident in response to question # 82, Juror Svymbersky at first stated that he thought the charges had been "dropped," and that they would "not show up on any records." Tr. at 24545, 24559 (03/27/2006). He later clarified that this was not a contemporaneous rationale for leaving it off his questionnaire: the incident had not occurred to him at all as he was completing the questionnaire. *Id.* at 24559-60. Only later, when he learned from someone at work that jurors were being investigated, did he recall the incident. *Id.* Defense counsel maintained at the time, and Warner continues to maintain, that Juror Svymbersky equivocated. *Id.* at 24568; Warner Post-Trial Mot. at 3. This court initially expressed some doubt about Juror Svymbersky's explanation, [*135] as well (*see* Tr. at 24572 (03/27/2006), but ultimately found his responses to be credible. *Id.* at 24759. The incident was minor and occurred when Juror Svymbersky was very young, only 18 or 19 years old. The court believed then, as it believes now, that Juror Svymbersky honestly did not think about the misdemeanor when confronted with question # 82, and did not deliberately omit the incident when he completed his questionnaire. Accordingly, the first prong of *McDonough* has not been met. *See McDonough, 464 U.S. at 555* ("To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give."). Even assuming that he had answered dishonestly, the court does not believe that a 23-year-old misdemeanor charge would have supported dismissing Mr. Svymbersky for cause. The notion, advanced by Defendant Ryan, that this charge is indistinguishable from Mr. Pavlick's felony DUI conviction (occurring, no less, during George Ryan's tenure as Secretary of State), or Ms. Ezell's numerous more-recent arrests for very serious crimes, [*136] is unpersuasive.

3. Juror Casino

Juror Casino was arrested three times in the early to mid-1960s for carrying a concealed weapon (1961), a DUI misdemeanor (1962), and misdemeanor assault (1965). Tr. at 24648 (03/28/2006). So far as the available records indicate, only the DUI misdemeanor resulted in a conviction. *Id.* When asked by this court why he did not disclose these arrests on his questionnaire, Mr. Casino stated that he had forgotten that they had ever occurred. *Id.* at 24649, 24743-44. This court concluded that Mr. Casino's explanation was credible, exceedingly so. *Id.* at 24745. Nothing in the Defendants' post-trial briefs persuades the court otherwise. Moreover, the court would be hard-pressed to conclude three misdemeanor arrests (and one conviction), each more than 40 years old, would bias Mr. Casino against the Defendants in any respect.

4. Juror Rein

In 1980, Mr. Rein was arrested for assaulting his sister, who, unbeknownst to Rein, was at that time three-months pregnant. Tr. at 24626, 24628 (03/27/2006). Mr. Rein did appear in court in connection with this incident, though he believed the matter had been expunged. *Id.* at 24630-31. [24] When asked [*137] why he did not disclose this incident on his questionnaire, Mr. Rein explained: "I really don't think I even thought of it. I wasn't even thinking about the fact that it was even supposed to be on the record." *Id.* at 24631. This court concluded that Mr. Rein's explanation was credible, *id.* at 24742, and is not now persuaded that he was dishonest. Nor is the court persuaded that a two-decades old assault arrest, standing alone, would support a challenge for cause. Ryan greatly, and, the court believes, irresponsibly, exaggerates the severity of the incident in his post-trial brief. Ryan Post-Trial Mot. at 23. Certainly, there is no indication that the domestic dispute Mr. Rein described in any way indicated that Rein could not deliberate impartially in this case.

> 24 Mr. Rein first stated that he did not "have to go to court" as a result of his assault arrest, stating that it "[n]ever got that far." Tr. at 24629-30. He later stated during the same *voir dire* that he met with a judge in the DuPage County courthouse while the judge was eating lunch. Tr. at 24630. Defendant Ryan seizes upon this apparent discrepancy, Ryan Post-Trial Mot. at 23, but it appears to the court that Mr. Rein distinguished "going to court," which may very well indicate a full trial or hearing to a layperson, from the informal meeting he recalls having with the judge. Defendant Ryan also points out that Rein acknowledged that his failure to include the assault arrest on his questionnaire was "untruthful." *Id.* It is clear to the court, however, that Rein meant that his questionnaire response was "inaccurate," not that he deliberately omitted an item he knew to be responsive.

[*138] **B. Alleged Juror Misconduct Prior to Deliberations**

1. Jurors did not prematurely discuss the evidence

Defendant Ryan contends that the jurors improperly discussed evidence during the pendency of the trial. On December 21, 2005, Juror Jones alerted the court that she overheard Juror Pavlick comment that Nancy Smith, Ryan's mother-in-law's caretaker and a government witness, "wasn't paid nearly enough for her service, she's a home caregiver and which those people are, you know, have a history of being underpaid." Tr. at 13988-89 (12/22/05). The court questioned some of the jurors in chambers and learned that Juror Pavlick's comment led to a discussion of "home health care workers" which Jurors DiMartino, Ezell and Svymbersky either participated in or overheard. Juror Jones and Juror DiMartino asked these jurors to stop talking as they believed the conversation was not appropriate and "could have led somewhere else." *Id.* at 13989 (12/22/05). Although their recollections of the discussion varied, all of the jurors questioned stated that the incident would not affect their ability to decide the case impartially. *Id.* at 13993-94, 14000, 14143, 14153. The amount Ms. Smith [*139] was paid, whether it was a lot or a little in proportion to the services that she rendered, was not an issue in this case. After thoroughly investigating the matter, this court again admonished the jurors not to discuss the evidence, Tr. at 4163-64 (12/22/05), and the court is not aware of any circumstances indicating that the jurors failed to follow that instruction thereafter. The court does not believe that this isolated and innocuous incident prejudiced the Defendants.

Defendant Ryan also asserts that Juror Rein must have engaged in premature deliberations, because "he had formed an opinion about another juror's views in comparison with his already-formed opinion and interpretation of the evidence." Ryan Post-Trial Mot. at 43. This argument is predicated on an untenable

interpretation of Juror Rein's statements to the court concerning another juror's attentiveness. The fact that Mr. Rein thought about the *process* of deliberations during the trial is no indication that he had prematurely reached conclusions about the evidence or formed opinions about how his fellow jurors might rule. The court is cognizant of the dangers of premature deliberation outlined by Defendant Ryan, [*140] Ryan Post-Trial Mot. at 44 (citing *United States v. Resko, 3 F.3d 684, 689 (3d Cir. 1993)*), but has no difficulty concluding that they were not implicated in this case.

2. The court properly dismissed Juror McFadden

Defendant Warner contends that this court improperly removed Juror McFadden. On numerous occasions over the course of the trial, individuals, including this court and counsel for both parties, observed Ms. McFadden nodding off or fully asleep. *See, e.g.*, Tr. at 15082, 15237 (01/09/06) (Two jurors report, consistent with the court's own observations, that Ms. McFadden is "nodding off a great deal;" they also report that "sometimes she actually snored"); Tr. at 17285 (01/23/06) (observed nodding off); Tr. at 19589 (02/09/06) (jurors request instruction about not sleeping; court notes observing Ms. McFadden "completely asleep"); Tr. at 20045-47 (02/14/06) (government and Ryan's defense team observe McFadden asleep); *id.* at 20047 (court observes McFadden asleep for five minutes). On February 21, 2006, the court, with counsel for both side present, spoke with Ms. McFadden about the problem, and discovered that in December 2005-months after the [*141] trial began-Ms. McFadden was diagnosed with diabetes. As of February 21, McFadden was not taking any medication for the condition (she explained that her doctor expected to address that possibility at a forthcoming appointment), and she acknowledged that fluctuations in her blood sugar rendered her drowsy from time to time. Tr. at 21009-10 (02/21/06). Ms. McFadden's inability to remain attentive during the trial, though no fault of her own, led this court to dismiss her from jury service.

Contrary to Warner's argument, the Seventh Circuit's decision in *United States v. Freitag, 230 F.3d 1019 (7th Cir. 2000)* did not obligate this court to retain Ms. McFadden. On the contrary, [HN48] the trial court "has considerable discretion in deciding how to handle a sleeping juror." *Id. at 1023*. Based in part on its own observations of Ms. McFadden, and based on her medical condition, this court concluded that it was impossible for her to perform her duties. *Id. Freitag* differs from the instant case in that, here, defense counsel wanted to retain this inattentive juror. *See, e.g.*, Tr. at 19877 (02/13/06). This court does not require defense counsel's consent [*142] to remove an inattentive or otherwise incompetent juror prior to deliberations. *See, e.g., United States v. Upshaw, 114 Fed. Appx. 692, 711 (6th Cir. 2004)* (*vacated on other grounds* by *United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)*) ([HN49] "It is within the trial court's prerogative to substitute for reasonable cause any juror with an alternate, even without consent of either party to the case."); *United States v. Mullins, 992 F.2d 1472,1478 (9th Cir. 1993)* ("So long as the substitution takes place prior to deliberations, it is within the prerogative of the trial court and does not require the consent of any party.") (citation and internal quotation marks omitted). The court concludes that it properly removed Ms. McFadden.

One other circumstance surrounding Ms. McFadden's dismissal requires comment. On January 23, 2006, Juror Rein notified the court that he and some of his fellow jurors observed Ms. McFadden reading a novel during testimony. Tr. at 17284 (01/23/06); *see also* Tr. at 9384 (11/22/05) (same juror observing Ms. McFadden doing a crossword puzzle during the trial). With counsel present in chambers, Mr. Rein reported his [*143] observation to the court, and made the following comment:

> I mean I would just think, knowing the times that she's nodded off and then just wondering how much she's been paying attention if -- and assuming we'd both be on the final jury and in deliberations, I know that I'm supposed to respect her opinion, but how can I, you know, it would be awfully hard to -- I mean I remember the interviews before the trial, you know, if it's 11 to 1, can you hold off?
>
> Well, if she was that one, I think I'd be so angry because we'd be, like, what are you basing your opinion on? You just get the feeling she hasn't really paid as much attention as the rest of the people.

Tr. at 17285-86 (01/23/06). Defendant Ryan contends that this statement, together with statements Juror Rein

made to the media after the trial, are evidence that he was unwilling to deliberate "with jurors of different, dissenting viewpoints." Ryan Post-Trial Mot. at 41. Mr. Rein's post-verdict statements to the media are not competent evidence, see *FED. R. EVID. 606(b)*, and the court is not persuaded by Ryan's strained interpretation of Rein's statement. Ryan contends that the [*144] phrase "11 to 1" somehow conveyed Mr. Rein's or Ms. McFadden's leanings prior to the close of evidence. The plain import of Mr. Rein's statement is that he believed that one of his fellow jurors was not paying close attention, and further believed that this was affecting the morale of the other jurors, himself included. Tr. at 17285 (01/23/06). Rein's concern about the possibility of a holdout juror (likely generated by questions posed by defense counsel during *voirdire*) was plainly hypothetical. There is no reasonable basis to conclude that this statement indicates that Juror Rein prematurely deliberated, or was unwilling or unable to fairly deliberate.

C. Alleged Juror Misconduct During Deliberations

1. Extraneous documents consulted by the jurors during deliberations did not prejudice Defendants

(a) Background

Several days after deliberations began, the court was alerted to a conflict among the jurors. On September 20, 2006, the court received a note from one of the jurors, Evelyn Ezell, stating that the other jurors had been insulting her "for the last couple of days." Tr. at 24053 (03/20/06). In a brief written response, the court admonished the jurors [*145] to treat one another with "dignity and respect," despite their disagreements. *Id.* at 24055. Two days later, the court received a note drafted by Juror Losacco and signed by eight other jurors. Tr. at 24074-76 (03/22/06). Ms. Losacco and the other signatories to the letter claimed that Ms. Ezell refused to deliberate or consider the evidence, and further that she was verbally and physically aggressive. *Id.* In response to this note, the court reiterated that the jurors must treat each other with dignity and respect, and instructed them in writing that they deliberate together, and only in the jury room. Letter from Court to Jurors of 3/23/06. Each of the twelve jurors received an identical copy of this letter.

As previously discussed, Jurors Ezell and Pavlick were removed from the jury for reasons wholly unrelated to this conflict on March 27, 2006, shortly after the court received Ms. Losacco's note. The reconstituted jury was convened and instructed the following day, and returned a verdict on April 17, 2006. Approximately one week after the verdict was announced, Ms. Ezell alleged in a television interview that another juror, later identified as Ms. Peterson, had brought [*146] into the jury room extraneous materials that Ms. Ezell referred to as "case and law." *See* NBC Television Broadcast, Ex. 1 to Ryan's Post-Trial Mot. Defense counsel brought Ms. Ezell's statements to the court's attention the next day, and the court held an informal evidentiary hearing on May 5, 2005 to investigate Ms. Ezell's claims. At that hearing, Ms. Ezell testified by telephone that during the original jury's second week of deliberations, Juror Peterson had, in the presence of all the other jurors, read to Ms. Ezell from a sheet of paper words to the effect that a juror could be dismissed if he or she failed to deliberate in good faith. Tr. at 10-12 (05/05/06). According to Ms. Ezell, Ms. Peterson referenced "section" numbers as she read aloud, but Ms. Ezell could not recall specifics. *Id.* at 12. She further testified that when Ms. Peterson finished reading, Juror Losacco told Peterson to "read the one to her [Ms. Ezell] on bribery, because George Ryan was taking bribes and so are you. Because the only way you can vote the way you're voting is you've got to be getting paid." *Id.* By that time, according to Ms. Ezell, she and Juror Davis were crying, and when Ms. Ezell [*147] attempted to leave the jury room, Juror Cwick stood in the doorway to prevent her from exiting. *Id.* at 13. Mr. Davis also reportedly told Ms. Ezell to "watch [her] back." *Id.* at 12.

The court had some concern about the credibility of this allegation, which surfaced for the first time weeks after the episode allegedly took place, but concluded that at least brief investigation was appropriate. With counsel present, the court contacted Ms. Peterson by telephone and obtained from her the two documents that she acknowledged having brought into the jury room. In a telephone conference, Ms. Peterson testified that on March 20, 2006, the day prior to the confrontation that Ms. Ezell described, Ms. Peterson had brought into the jury room a two-page document from the American Judicature Society ("AJS"), entitled "Use of alternate jurors," that she obtained from an Internet search on March 17, 2006. *Id.* at 77. The first page of the document is largely devoted to juror-substitution mechanics; the last paragraph on the second page discusses dismissing jurors who are "unwilling or unable to meaningfully deliberate."

AJS Article, Ex. 2 to Ryan Post-Trial Mot. Ms. Peterson showed the [*148] full document to "a few people" that day -- she was certain that she showed it to Jurors Talbot and Pavlick, and less certain that she had shown it to Jurors Losacco, Cwick and Gomilla. *Id.* at 82. That evening, she cut out a portion of the document with pinking shears and brought it with her the next morning to the jury room. *Id.* at 80-81. On March 21, 2006, Ms. Peterson testified that she read the AJS excerpt to Ms. Ezell in the presence of the other jurors. *Id.* at 77-78. The excerpted paragraph states as follows:

> . . . personal hardship. But other bases for substitution raise serious issues about the sanctity of the deliberative process, primarily allegations by some jurors that another juror is unwilling or unable to meaningfully deliberate, or is unwilling to follow the law. Such an allegation requires a hearing where the judge must decide the tricky question whether the juror is truly unfit to serve, or is merely expressing an alternate viewpoint that will likely result in a hung jury. Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss that juror and substitute an alternate juror.

AJS [*149] Excerpt, Ex. 2 to Ryan Post-Trial Mot. The second document that Ms. Peterson brought into the jury room was a handwritten statement that Ms. Peterson herself wrote in pencil on a piece of paper that she had torn out of a paperback novel she had been reading on the commuter train. *Id.* at 78. Ms. Peterson's handwritten note stated as follows:

> You have the right to speak your opinion but you have responsibility [sic] to use the facts the testimony [sic] to seriously consider. If you don't use evidence and testimony to support your opinion your [sic] not being responsibly [sic].

Handwritten Note, Ex. 2 to Ryan Post-Trial Mot. Ms. Peterson's attorneys, who also participated in the May 5 hearing, represented that the handwritten note contained "her thoughts" about Ms. Ezell's responsibility as a juror. Tr. at 62, 66 (05/05/06). Ms. Peterson testified that she read this note to Ms. Ezell "maybe two or three times." *Id.* at 79. Consistent with Ms. Losacco's earlier note, Peterson testified that Ms. Ezell stated repeatedly that she was not required to deliberate or consider the evidence. *Id.* at 78-79. On two or three of those occasions, Peterson read her handwritten [*150] note to Ms. Ezell -- only once did she read from the American Judicature Society article. *Id.* In contrast to Ms. Ezell's version of events, however, Ms. Peterson testified that Ms. Losacco did not tell her to "read the one about bribery," *id.* at 83, although Peterson did recall a "couple people" asking Ms. Ezell on other occasions questions to the effect of: "[a]re you taking a bribe?" *Id.* at 84, 88-89. Ms. Peterson adamantly denied that there was any emotional reaction on the part of any jurors to her reading these materials to Ms. Ezell.

(b) Extraneous influence does not require a new trial

The Defendants contend that their right to an impartial jury was violated when Ms. Peterson read from the AJS article and her handwritten note during deliberations. Ryan Post-Trial Mot. at 3; Warner Post-Trial Mot. at 6-7, 19. Ryan further asserts that his right to have counsel present "at every 'critical stage' of the proceedings" was violated by the handwritten "instruction" that Juror Peterson crafted and read aloud to the Ms. Ezell. Ryan Post-Trial Mot. at 3 (citing *Iowa v. Tovar, 541 U.S. 77, 87, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (1955)*; *United States v. Neff, 10 F.3d 1321, 1324 (7th Cir. 1993)).* [*151]

[HN50] A new trial "is not automatically required whenever a jury is exposed to material not properly in evidence." *United States v. Sababu, 891 F.2d 1308, 1333 (7th Cir. 1989).* The question is whether there is a "reasonable possibility" that extraneous documents may have affected the verdict. *United States v. Bruscino, 687 F.2d 938, 940 (7th Cir. 1982).* This inquiry is "objective" and "fact-driven," *United States v. Genova, 187 F. Supp. 2d 1015 (N.D. Ill. 2002), aff'd in part and rev'd in part on other grounds, 333 F.3d 750 (7th Cir. 2003)* (citation and internal quotation marks omitted), and in making its determination this court may rely on its "familiarity with the proceedings when deciding whether the verdict was affected by outside information." *United States v. Sanders, 962 F.2d 660, 668 (7th Cir. 1992).* Prejudice to the defendants is presumed, *Remmer, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146,* but is rebutted if there is "no 'reasonable possibility' that the verdict was affected by the contact." *Sanders, 962 F.2d at 668.* [25]

25 In his opening brief, Ryan states that the government is required to prove that the extraneous influence on the jury was harmless "beyond a reasonable doubt." Ryan Post-Trial Mot. at 9, 46. Although *Remmer* describes the government's burden as "heav[y]," *347 U.S. at 229*, the Seventh Circuit has not interpreted that case to require the government rebut the presumption by any particular "quantum of proof." *Evans v. Young, 854 F.2d 1081 (7th Cir. 1988)*.

[*152] Although Defendant Ryan insists that, without interviewing every juror, the government cannot meet its burden, Ryan Post-Trial Mot. at 14-15, such a requirement is contrary to the objective nature of the court's inquiry. Interviewing additional jurors about the "emotional impact" of the extraneous materials, Ryan Post-Trial Mot. at 15, 46, or the confrontation with Ms. Ezell, is neither required nor appropriate. *See United States v. Paneras, 222 F.3d 406, 411 n.1 (7th Cir. 2000)*; *Haugh v. Jones & Laughlin Steel Corp., 949 F.2d 914, 917 (7th Cir. 1991)*. In *United States v. Rutherford, 371 F.3d 634 (9th Cir. 2004)*, a tax prosecution, a juror testified that IRS agents had glared and stared at jurors during the trial. In concluding that these circumstances warranted investigation of the impact this conduct had on the jurors, the Court of Appeals emphasized "the perceived, as well as actual, power that government actors have at their disposal and the positions of authority that they occupy." *Id. at 643*. In this case, in contrast, the "extraneous" influence came from a fellow juror; no conduct of any government agents is [*153] at issue here.

Moreover, the court is satisfied that its May 5, 2006 evidentiary hearing sufficiently revealed the factual circumstances surrounding Ms. Ezell's post-verdict allegations. 05/04/06 Order at 2-3; *see Evans, 854 F.2d at 1084* ("The trial courts retain wide latitude over how to conduct such hearings. . . ."). At that hearing, Ms. Ezell testified that Ms. Peterson read aloud from a sheet of paper, although she only recalled portions of what Ms. Peterson read: "when a juror refuses to deliberate" and "a juror could be dismissed for not deliberating in good faith." Tr. at 11-12 (05/05/06). Ms. Peterson confirmed that she brought extraneous documents into the jury room and read them to Ms. Ezell. She in fact retained the originals of these materials and furnished them to the court. The court is satisfied that Ms. Peterson has provided the court with all the materials that she consulted, and that any references to or allegations of bribery during deliberations were not made in connection with extraneous materials. [26]

26 Defendant Ryan filed a supplement to his post-trial brief attaching a newspaper article, dated June 2, 2006, in which Ms. Ezell claims to have discovered a document on the Internet that she believes is the document Ms. Peterson read aloud to the jurors. Ex. 1 to Supplement to Ryan's Motions for Judgment of Acquittal, New Trial, and Arrest of Judgment. According to the article, this document contains "section" references, consistent with Ms. Ezell's recollection. The court is not persuaded that this latest article warrants any further investigation of Ms. Ezell or any other juror. Ms. Ezell's speculation, surfacing almost a month after the court and counsel for both sides interviewed Ms. Ezell and Ms. Peterson, is insufficient grounds to reopen an inquiry into events that have already been fully investigated.

[*154] Ryan insists that the nature of Internet searches is such that Ms. Peterson necessarily would have been exposed to other materials online. Ryan Reply at 3. But it is clear from Ms. Peterson's testimony that only the AJS article, indeed only a portion of that article, was relevant from her perspective. *See* Tr. at 80-81 (05/05/06). She further stated at the hearing that she avoided publicity about the case, and that she did not believe that the AJS article was "about" the case. *Id.* at 81. Significantly, even though defense counsel were present and were permitted to pose questions to Ms. Peterson during the May 5 hearing, counsel chose not ask about what other materials Ms. Peterson may have seen in her Internet search. *Id.* at 93. In any event, the court does not believe that Ms. Peterson was exposed to any other materials relevant to the court's inquiry, and the court proceeds to assess whether the materials Ms. Peterson brought into the jury room prejudiced the Defendants.

As a threshold matter, this court rejects Defendant Ryan's repeated attempts to characterize Ms. Peterson's handwritten note as an extraneous legal "instruction." *See* Ryan Post-Trial Mot. at 8, 10, [*155] 13. This document is not a "technical exposition on a juror's good faith obligation to deliberate," nor was it somehow beyond the ability of a "substitute kindergarten teacher" (Ms.

Peterson works as a substitute teacher) to produce without the aid of outside research. Ryan Reply at 7. Even before Ms. Peterson did her "homework," Tr. at 80 (05/05/06), the jurors were clearly under the defensible impression that deliberation entailed discussion of the evidence. *See* Final Jury Instr. at 148 ("You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors."). Indeed, according to Ms. Peterson, that was what precipitated her Internet research. Tr. at 80 (05/05/06). The court believes that what Ms. Peterson gleaned from the AJS article was not that jurors were always required to support their views with the evidence -- the article takes no such position -- but that a juror could be removed for failing to "deliberate," as these jurors, Ms. Peterson in particular, understood that term. *See id.* at 83. The fact that Ms. Peterson committed her "thoughts" to paper, [*156] *id.* at 62, 66, is of no moment. [27] Accordingly, the court concludes that neither Ryan's right to have counsel present at every "critical stage" of the proceedings, nor his right to an impartial jury, were violated or even implicated by Ms. Peterson's note. Ryan Post-Trial Mot. at 3.

> 27 This is not a case where the juror's "personal experiences" constitute extrinsic evidence. Ryan Reply at 8. Ms. Peterson's thoughts about proper deliberation are not "personal knowledge regarding the parties or the issues involved in the litigation that might affect the verdict." *United States v. Navarro-Garcia, 926 F.2d 818, 821 (9th Cir. 1991).*

The AJS article, by contrast, was improperly consulted during deliberations. But whether viewed in its entirety, or specifically with reference to the portion that Ms. Peterson read aloud, it did not pertain to any substantive issue in the Defendants' trial. It concerned only the process of deliberation, and the substance of the article did not contradict any instruction [*157] that this court gave the jurors. *Cf. Genova, 187 F. Supp. at 1024* (jurors looked up the definition of bribery in a dictionary after being explicitly instructed to consult the jury instructions, only). Moreover, the article correctly points out that the decision whether to remove a juror who is refusing to "meaningfully deliberate" is vested with the court, not the jurors. *See* AJS Excerpt ("Only if the judge concludes that the challenged juror is truly unfit to serve, will the judge be authorized to dismiss that juror and substitute an. alternate juror."). The most troublesome interpretation of Ms. Peterson's comments would suggest that she believed this document was some sort of trump card in an ongoing dispute with Ms. Ezell. Tr. at 79 (05/05/06). Objectively, of course, it was no such thing, and as far as the record discloses, it did not sway the course of deliberations in the short period of time after it was brought into the jury room and Ms. Ezell was removed for failing to disclose her criminal history. *Id.* ("[A]fter I read that pinking shear one about having to deliberate, she still refused to cooperate or do anything or even look at the evidence, [*158] wouldn't even look at the screen when we were showing things."). More importantly, it did not play any role in the reconstituted jury's deliberations. Ms. Peterson testified, credibly in this court's estimation, that she did not discuss this document with the substituted jurors or otherwise refer to it during deliberations after Ms. Ezell and Mr. Pavlick were removed. *Id.* at 89-90. Even if she had, the court does not believe that, objectively, there is a "reasonable possibility" that this document affected the verdict in this case.

Both Defendants cite persuasive authority from the Ninth Circuit for the proposition that [HN51] "[j]urors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors." *See* Ryan Post-Trial Mot. at 9; Warner Post-Trial Mot. at 19-20 (citing *United States v. Rosenthal, 445 F.3d 1239, 1245 (9th Cir. 2006)*(superseded by *United States v. Rosenthal, 454 F.3d 943 (9th Cir. 2006)).* [28] Even if this court were bound by the decision in *Rosenthal*, it is distinguishable from the facts of this case. The defendant in *Rosenthal* was convicted of, among other offenses, [*159] manufacturing marijuana in violation of *21 U.S.C. § 841 (a)(1)*, despite the fact that the defendant operated as an agent of a cooperative that the City of Oakland had designated "an official medical-cannabis-provider association." *Rosenthal, 454 F.3d at 945-46.* The trial court became aware that one of the jurors, on the eve of rendering a verdict, asked an attorney-friend whether she "had to follow the Judge's instructions, or if [she] had any leeway at all for independent thought." *Id. at 948, 950.* The attorney told the juror that she was required to follow the court's instructions, and that the juror "could get into trouble if [she] tried to do something outside those instructions." *Id. at 950.* The clear import of the juror's question was whether the juror was free to conclude, contrary to the federal statutes at issue, that the defendant

was acting within the law.

28 After the parties filed their post-trial briefs, the Ninth Circuit amended its earlier decision. Although this court will cite the superseding opinion, it is, in all respects pertinent to this decision, identical to the earlier decision.

[*160] The focus of the Ninth Circuit's prejudice analysis was the potentially coercive effect of the attorney's warning on the juror's decision to "acquit or convict." *Id.* By contrast, this court does not believe that the AJS article, even though it raised the specter of juror dismissal, would lead a reasonable juror to "change his or her *determination"* for fear of punishment. *Id.* (emphasis added). The jurors in this case were instructed to "deliberate," and to "consult with one another, express [their] own views, and listen to the opinions of [their] fellow jurors." Final Jury Instr. at 148. The jurors may have reasonably believed, even without consulting extraneous material, that they could be removed if they refused to "deliberate." Tr. at 79 ("[Ms. Ezell] refused to deliberate, and she'd state over and over, 'I don't need to deliberate.'"). Accordingly, this court does not believe that the AJS article would coerce a reasonable juror into changing his or her ultimate determination, or abandoning his or her "honest beliefs." Final Jury Instr. at 148. This factor also distinguishes this case from those cases, cited by Defendant Ryan, in which a jury is admonished by someone [*161] other than the judge (typically a bailiff) that they must reach a decision. *See, e.g., United States ex rel. Tobe v. Bensinger, 492 F.2d 232, 238 (7th Cir. 1974)* (coercive statement by bailiff, "You must reach a decision," prejudicial). The AJS article does not state or imply that jurors must reach any decision, unanimous or otherwise, at the expense of their honestly held beliefs. Indeed, it suggests just the opposite. *See* AJS Excerpt (stating that juror cannot be removed if he or she "is merely expressing an alternative viewpoint that will likely result in a hung jury").

The court's conclusion is bolstered by its continued confidence that Ms. Peterson's decision to bring extraneous materials into the jury room was an honest mistake of judgment. Tr. at 94 (05/05/06). According to Ms. Peterson and other jurors, Ms. Ezell's behavior during deliberations caused significant discord in the jury room. Indeed, in addition to the AJS article, Ms. Peterson also obtained from the Internet an article entitled "Dealing with Difficult People". *Id.* at 61. Ms. Peterson believed, incorrectly though in good faith, that these materials did not violate the court's order about [*162] consulting extraneous materials because they were unrelated to the trial itself. *Id.* at 81. [29] The court is not persuaded by the notion, advanced on numerous occasions by Ryan's counsel, that a cadre of jurors sought to silence dissenting views of the evidence, and that Ms. Peterson's research is another facet of their scheme. On the contrary, the court believes that the jurors who deliberated to verdict in this case were diligent and impartial. *See Bruscino, 687 F.2d at 941* (trial judge's experience with jury during trial is relevant to court's analysis of possible prejudice). They sat attentively through nearly six months of evidence and deliberated 10 days before reaching their verdict. The court believes that these jurors made every effort to be fair, even amid extraordinary public scrutiny. With respect to the AJS article in particular, the court concludes that there is no reasonable possibility that any juror was persuaded to vote contrary to what his/her conscience and understanding of the evidence would otherwise dictate.

29 Although instructed not to consult the Internet, this court's admonitions were, as the government points out, couched in terms of avoiding trial publicity. *See* Tr. at 2426-28 (09/28/05); Tr. at 7695 (11/09/06). This does not excuse Ms. Peterson's conduct, but does give the court further comfort that its assessment of Ms. Peterson's credibility was sound.

[*163] *2. Impact of dismissing jurors in the midst of contentious deliberations*

As previously discussed, *see supra* Part IX.A, this court removed Ms. Ezell from the jury, without objection by defense counsel, because she failed to disclose her criminal history on her juror questionnaire. Tr. at 24483, 24485 (03/27/06). Coincidentally, she was removed on the heels of the contentious deliberations just discussed. After she was dismissed, Ms. Ezell made a number of statements to the media in which she claimed that she was the only member of the jury who believed Ryan was innocent of some of the charges. Ryan contends that the other jurors may have believed that Ms. Ezell's removal "bore some relationship to her support for Ryan," and that her dismissal chilled the free expression of pro-defense opinions in the jury room. Ryan Post-Trial Mot. at 24.

Although this court had no knowledge of Ms. Ezell's views of the evidence, the court was nevertheless

sensitive to defense counsel's concern that the remaining jurors might believe her dismissal was related to their difficulties during the first week of deliberations. Accordingly, after Ms. Ezell and Mr. Pavlick were dismissed, the court [*164] instructed the reconstituted jury as follows:

> A word to my jurors. You have heard by now that two of the original jurors in this case were excused from further jury service. I want you to know, as I've told some of you already, that the circumstances that brought about the fact that these two jurors were excused, those circumstances were not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations, those of you who were here. Rather, the inquiry was generated by members of the media. It is not related to the lawyers in this case. I want you to know that in attempting to reach verdicts in this case you are answerable only to your own conscious [sic]. It is your job, and your job alone, to find the facts in this case and to apply the law that I have given you.

Tr. at 24804-05 (03/28/06). The court then reread the jury instructions to the reconstituted jury. *Id.* at 24806-90. After it was alleged that Juror Chambers had discussed the case with a third party (*see infra*), and that this individual had mentioned Ms. Ezell's dismissal, this court again admonished the jury by letter:

> As you know, two jurors were excused [*165] from further service on this case. The reasons they were excused have nothing to do with the views they expressed in early deliberations nor with any communications with me concerning those earlier deliberations.

Letter from Court to Jurors of 04/03/06; Tr. at 24972 (04/03/06).

Defendant Ryan contends that the court's instructions were insufficient because they did not disclose precisely why Ms. Ezell and Mr. Pavlick were removed. Ryan Post-Trial Mot. at 25. Ryan also points out that even if the jury knew why these two jurors were removed, other jurors with undisclosed arrests (Jurors Rein, Casino and Svymbersky) remained on the jury. *Id.* This, according to Defendant Ryan, created a "significant risk" that the reconstituted jury may have believed that the court sanctioned the removal of a pro-defendant juror, and/or that a "faction" of jurors had succeeded in ousting another juror *Id.* The court believes that Mr. Ryan's concerns are unfounded. This court rejected the prior request to remove Ms. Ezell in no uncertain terms. Letter from Court to Jurors of 3/23/06. If the jurors had any lingering doubts about the court's position, its March 28 and April 3 instructions [*166] dispelled those doubts. Accordingly, the court believes that it effectively refuted any suggestion that some jurors had successfully ousted one of their own.

Mr. Ryan's second concern, that jurors may have believed that Ms. Ezell was removed for her views of the evidence, is likewise unfounded. First, it necessarily implicates the court. After all, the court removed the Ms. Ezell and Mr. Pavlick and communicated that decision to the jurors. Besides explicit instructions, see Final Jury Instr. at 2, 148, the court communicates its impartiality to jurors in numerous ways over the course of a trial (e.g., ruling on objections). Accordingly, there is no reasonable basis to suppose that these jurors inferred that the court removed a juror because of his or her view of the evidence. Even assuming that the court's March 28, 2006 instruction left the door open for such an inference, it was closed by this court's April 3, 2006 instruction, which disavowed any connection between Ms. Ezell's and Mr. Pavlick's views of the evidence and their dismissal. The court rejects Defendant Ryan's contention that Ms. Ezell's removal chilled free expression of pro-defense opinions.

3. Impact of juror [*167] *investigations during deliberations*

Both Defendants contend that their right to an impartial jury was impaired by investigations into the jurors' backgrounds during deliberations. Ryan Post-Trial Mot. at 26; Warner Post-Trial Mot. at 19. As a threshold matter, there would not have been, contrary to Ryan's contention, any confusion about who prompted the investigations. Ryan Post-Trial Mot. at 26. This court explicitly told the jurors that neither defense nor prosecution counsel initiated the investigation. Tr. at 24804-05 (03/28/06) ("[T]he inquiry was generated by members of the media. It is not related to the lawyers in this case."); *see also* Tr. at 24516-17, 24542 (03/27/06); Tr. at 24643-44 (03/28/06). Nor is the court persuaded by

Ryan's more general argument that the jurors might want to curry favor with the prosecution if they believed they were being investigated. Ryan quotes several news reports published during deliberations that state that a juror could be subject to prosecution for lying on his or her juror questionnaire. *See* Exs. 7-9 to Ryan Post-Trial Mot. Ryan speculates that it is possible the jurors saw these statements, based on statements by two of the [*168] alternate jurors (one of whom, Mr. Masri, did not deliberate) that they were aware, based on headlines they had seen, that the media was reporting "juror problems." Ryan Post-Trial Mot. at 27.

Several jurors were questioned about omissions from their juror questionnaires, and yet were retained to deliberate with the reconstituted jury. Although, as Ryan points out, only Ms. Gomilla was explicitly told that she was not in any trouble, Tr. at 24502 (03/27/06), it is implausible that the retained jurors would harbor any fear of prosecution. As for the remaining jurors, who were not specifically questioned about their questionnaires, they would have no reason to conclude that they were the targets of any investigation. With respect to the news reports, there is no indication in the record that any jurors saw more than headlines in connection with this matter. Nor is the court prepared to assume that the jurors ignored this court's many explicit instructions to avoid such media coverage. [30] Finally, the court instructed the reconstituted jury that the *voirdire* process initiated in the wake of the allegations concerning Ms. Ezell and Mr. Pavlick, was "complete, and I do not anticipate [*169] any further questioning of jurors. In any event, none of my questions should be considered in any way as you deliberate in this case." Tr. at 24789 (03/28/06). Accordingly, the court believes that it dispelled any speculative fear the jurors may have had about being investigated.

30 Defendant Warner's argument that even seeing these headlines violated this court's order is incorrect. Warner Post-Trial Mot. at 5-6.

Remmer, which Ryan cites in his reply brief, is inapposite. *Remmer, 347 U.S. at 229*; Ryan Reply at 14. In that case, a juror reported to the court an incident of apparent jury tampering, and the court -- without consulting or informing defense counsel -- enlisted the prosecution and the F.B.I. to investigate. *Remmer, 347 U.S. at 228*. Indeed, the defense did not learn about the episode until reading about it in a newspaper after the verdict. *Id.* So, not only was the alleged act of jury tampering potentially prejudicial, but so too was the government's "unauthorized [*170] invasion." *Id. at 229*. In this case, the investigation took place with the parties' consent and, as previously discussed, the proper precautions. In sum, the court is not persuaded that there is any reasonable possibility that jurors failed to vote their conscience for fear of prosecution.

4. Alleged ex parte communications

This court instructed the jury on numerous occasions not to discuss the case with third parties. Defendant Ryan maintains that Juror Chambers violated those instructions, and that her improper *ex parte* communications are presumptively prejudicial. Ryan Post-Trial Mot. at 39-40 (citing *Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)*. On March 28, 2006, an individual (Dennis McLaughlin) phoned a local radio show to describe a conversation he claimed to have had with a juror in this case. *See* Transcript of 3/28/06 WLS-AM (ABC) Radio Broadcast, Ex. 14 to Ryan Post-Trial Mot. Mr. McLaughlin, who owns a small coffee stand in a commuter rail station where he says the conversation with Ms. Chambers took place, was subsequently subpoenaed and questioned by this court concerning the substance of the conversation. Tr. at 25112 [*171] at (04/10/06). Mr. McLaughlin identified Juror Chambers as the person he had spoken with, and recounted that she had told him, in response to his question about whether they were going restart deliberations after Jurors Ezell and Pavlick were excused, that the jurors had not started deliberations proper, as they were "still dealing 148 pages of rules." Tr. at 25129 (04/11/06); *cf. id.* at 25137 (suggesting that he (Mr. McLaughlin) may have made the reference to "148 pages," as it had appeared "in the paper."). Mr. McLaughlin stated that he also told Ms. Chambers about a statement Ms. Ezell's son had made in an television interview to the effect that none of the remaining jurors, after Ms. Ezell's departure, were on Ryan's side. *Id.* Ms. Chambers' response, according to Mr. McLaughlin, was that "maybe that was why she was off the case." *Id.* For her part, Ms. Chambers stated that the conversation never took place. *Id.* at 25206-07.

There are, the parties agree, two issues: (1) whether the *ex parte* communication occurred in the manner described by Mr. McLaughlin; and (2) whether the Defendants were prejudiced by the communication. This

court has expressed misgivings [*172] about Mr. McLaughlin's account, *see id.* at 25236-37, and its experience with Ms. Chambers over the course of *voir dire* and an long trial has left the court with a positive impression of her candor. Defendant Ryan argues that post-verdict statements by jurors in this case corroborate Mr. McLaughlin's story, Ryan Post-Trial Mot. at 38-39, but those statements do not foreclose the possibility that Mr. McLaughlin gleaned information about the progress of deliberations from one or more of the many media reports that were circulating at that time.

Even if Ms. Chambers did have a conversation with Mr. McLaughlin, the court does not believe that there is a reasonable possibility that that conversation prejudiced the Defendants. Ryan contends that prejudice must be presumed, citing *United States v. Remmer, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)*. As previously discussed, *Remmer* dealt with suspected jury tampering -- an unknown third party contacted a juror and "remarked to him that he could profit by bringing in a verdict favorable to the petitioner." *Id. at 450-51*. The Seventh Circuit has noted that it is unclear whether *Remmer's* presumption of prejudice applies to [*173] *ex parte* communications not involving jury tampering. *Whitehead v. Cowan, 263 F.3d 708, 724 (7th Cir. 2001)*. Irrespective of whether the presumption ever applies to such communications, the court noted that the nature of some *ex parte* communications do not warrant the presumption. *Id.* The defendant in *Whitehead* was accused of aggravated kidnaping and murder. *Id. at 714*. After the victim's mother took the stand to testify, the judge inexplicably retired to chambers with counsel and the court reporter, leaving the witness, the defendant and the jury in court. *Id. at 723*. While the judge was absent, the witness began shouting at the defendant, asking at one point why the defendant killed her daughter. *Id.* When the judge returned and discovered that the communication had taken place, he admonished the jury to disregard her comments. *Id.* The Seventh Circuit held that the *Remmer* presumption did not apply, noting that the mother's comments were directed to the accused, not the jury, and that the "mother did not attempt to persuade the jury, nor did she provide them with any extraneous information about the facts [*174] of the case." *Id.*

If the court were to adopt Mr. McLaughlin's version of events, there would have been, unlike *Whitehead*, a communication between a third party and a juror. But like the comment in *Whitehead*, the communication in this case was "innocuous," *id. at 724-25*; much more so in fact: In the communication at issue in this case, it was the juror who allegedly provided information to a third party, not an effort by a third party to influence the juror. Mr. McLaughlin explicitly stated that he did not attempt to persuade Ms. Chambers or do anything that might affect the trial. Tr. at 25131 (04/11/06). The only piece of information Mr. McLaughlin is alleged to have communicated to Ms. Chambers was the fact that Ms. Ezell's son had made comments to the media concerning the attitude of the deliberating jurors towards Defendant Ryan. *Id.* at 25129. Ms. Chambers' alleged response, to the effect that "maybe" that was why Ms. Ezell was removed from the jury, is at best ambiguous and may, as this court has previously suggested, been an attempt to extricate herself from an uncomfortable situation. *Id.* at 25148-50. Even if the court accepted the Defendants' [*175] highly speculative suggestion that this was a window into the jurors' understanding of Ms. Ezell's removal, this court instructed the reconstituted jury that the Jurors Ezell and Pavlick were not removed because of what had occurred during their prior deliberations. Tr. at 24804-05 (03/28/06); Tr. at 24972 (04/03/06). The court concludes that the alleged conversation between Ms. Chambers and Mr. McLaughlin "would not affect a reasonable juror's deliberation as to whether or not" the Defendants committed the crimes they were charged with. *Whitehead, 263 F.3d at 725*.

5. Juror exposure to trial publicity

Defendants Warner and Ryan contend that Jurors Svymbersky and Rein violated the court's repeated instructions to avoid media coverage of the trial. The Defendants' trial was well-publicized, and the court was sensitive to the fact that undue media exposure could prejudice the Defendants. Accordingly, this court instructed the jurors to avoid newspaper accounts by removing articles about the case before they read the paper, and to walk out of the room if the television news featured a story about the trial. Tr. at 2427 (09/28/05). At the same time, this court also [*176] acknowledged that short of sequestering the jury -- a step that would have entailed an even greater intrusion into the lives of these jurors than they were already subjected to -- the jurors' most diligent attempts to avoid media coverage would not be completely successful. *See, e.g.*, Tr. at 2427 (09/28/05); Tr. at 25044 (04/06/06). So, the fact that Jurors Rein and Svymbersky were exposed to headlines

and pictures related to the case is not surprising, nor was it prejudicial in this case. Although both jurors stated that they read newspapers, which was not contrary to the court's instructions, *see* Tr. at 17646 (12/05/05), they further stated that they attempted to avoid stories regarding the trial. Tr. at 24547 (03/27/06) (Svymbersky: "If I saw a headline, I would just pass it. I wouldn't read anything about it."); Tr. at 24639-40 (Rein threw away the "Metro" section of the paper). Svymbersky stated that he read a front-page headline that quoted rhetoric from the government's closing argument ("12 Years of Christmas"), but Svymbersky was, of course, present for the closing argument and heard the original statement in person. While the court would have preferred that jurors [*177] not be exposed to such rhetoric outside the courtroom, the court does not believe that it affected the course of deliberations or otherwise prejudiced the Defendants. Nor is the court troubled that these jurors did not bring these matters to the court's attention on their own, rather than in response to specific questioning. *See* Warner Post-Trial Mot. at 5. Although the court did ask the jurors to tell the court if they had been exposed to trial publicity, the jurors could have reasonably inferred that court did not require them to report *de minimis* or fleeting exposure. *See, e.g.*, Tr. at 2427 (09/28/05) ("I know that you are going to see some things that pass through your consciousness."). In any event, the court is confident that the jurors who deliberated to verdict in this case were not prejudiced by any inadvertent exposure to media coverage.

D. Juror Substitution Pursuant to *Rule 24(c)*

When the case initially was submitted to the jury, the court excused the remaining alternates, but directed them to continue to abide by instructions that they not discuss the case with anyone or consider any media attention, pending a verdict. On March 28, 2006, eight days [*178] after deliberations began, this court seated two alternate jurors pursuant to *FED. R. CRIM. P. 24(c)*. *Rule 24(c)(3)* provides as follows:

> [HN52] The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that the retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

FED. R. CRIM. P. 24(c). Before *Rule 24* was amended in 1999, a district court that replaced a deliberating juror with an alternate, instead of proceeding with 11 jurors or declaring a mistrial, committed reversible error. *See, e.g., United States v. Beard, 161 F.3d 1190, 1194 (9th Cir. 1998)* (finding decision to replace two deliberating jurors with alternates an abuse of discretion under the pre-1999 version of *Rule 24*). The concern, in such cases, was that the substituted juror was at a disadvantage during deliberations, "and as a result the defendant may not really be getting the jury of 12 [*179] to which he is entitled." *United States v. Josefik, 753 F.2d 585, 587 (7th Cir. 1985)*. Nevertheless, trial courts were loathe to toss out lengthy trials based upon last-minute juror misconduct, especially when alternates were available, and those appellate courts that did not reverse the trial court for violating the letter of *Rule 24*, created elaborate justifications for their failure to do so. *See, e.g., United States v. Virgen-Moreno, 265 F.3d 276, 289 (5th Cir. 2001)* (setting out a four-factor test to determine whether the defendant was actually prejudiced by substituting jurors post-submission). After the 1999 amendments, such machinations are no longer necessary.

Although the Seventh Circuit has yet to directly address this issue, it has given every indication that the amended rule reverses the prior presumption that a late-arriving juror is incapable of deliberating fairly with jurors who have already begun deliberations. In *United States v. Johnson*, a juror who had served during the guilt phase of a capital-punishment trial failed to appear for the penalty phase and was replaced with an alternate. *223 F.3d 665, 669 (7th Cir. 2000)*. [*180] When the defendant argued that this late-substitution violated *18 U.S.C. § 3593(b)(1)*, (requiring that a death penalty sentencing hearing be conducted "before the jury that determined the defendant's guilt"), the Seventh Circuit turned to the amended *Rule 24(c)* for guidance. *Id. at 670*. Citing the portion of *Josefik* that Ryan relies on, see Ryan Post-Trial Mot. at 32, the court observed: "[T]he fact that the alternate missed some of the deliberations is no longer regarded as a fatal objection, or indeed as any objection, to his participating in the jury's decision." *Johnson, 223 F.3d at 670*. Significantly, the Defendants rely exclusively on case law interpreting pre-amendment *Rule 24*. [31] [HN53] The plain language of *Rule 24(c)* and the Seventh Circuit's discussion in *Johnson* refute the notion, advanced in the pre-amendment cases Ryan cites,

[32] that substituted jurors are at an insurmountable disadvantage in deliberations.

31 *Cf. United States v. Bradley, 79 Fed. Appx. 335 (9th Cir. 2003)* (Caselaw interpreting pre-amendment *Rule 24* is superseded "by the plain language of the new rule.").

[*181]

32 *See People v. Burnette, 775 P.2d 583, 588 (Colo. 1989)*; *State v. Lehman, 108 Wis. 2d 291, 321 N.W.2d 212, 220 (Wis. 1982)*; *cf. United States v. Register, 182 F.3d 820, 843 n.36 (11th Cir. 1999)* (finding no prejudice to defendant in violation of pre-amendment *Rule 24* before quoting the then-proposed amendment and observing: "This rule, announced by the Supreme Court, intimates that such a procedure does not deprive defendants of any rights.").

Nevertheless, Defendant Ryan contends that seating two alternates in this case prevented meaningful deliberations. Ryan Post-Trial Mot. at 29. Ryan contends that the jurors did not, indeed could not, heed this court's admonition to begin deliberations anew. *Id.* at 29-30. The original jury deliberated for eight days, although, as this court observed at the time, they were not "full" or "long days." Tr. at 24603-04 (03/28/06). In any event, according to Ryan, the jurors who participated in both the original and the reconstituted juries' deliberations could not have put their prior deliberations out of their minds. [*182] Ryan further argues that the substituted jurors were exposed to improper outside influences. *Id.* at 28-29. While the court does not believe that *Rule 24(c)* permits the court to substitute jurors during deliberations in all circumstances, the court is convinced that substitution in this case preserved the "essential feature" of the jury. *Henderson v. Lane, 613 F.2d 175, 177 (7th Cir. 1980)*.

Consistent with *Rule 24(c)*, this court took a number of precautions to ensure that the reconstituted jury began deliberations anew. *FED. R. CRIM. P. 24(c)(3)* ("If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."). As noted, when the alternates were initially excused, the court directed that they not consider media attention until they learned that a verdict was returned. When the alternates were called back, the court confirmed on the record that Jurors Svymbersky and DiMartino had not in fact been unduly exposed to trial publicity or to the comments of other third parties. Tr. at 24539-43 (03/27/06). Both jurors explained that they had adhered to that direction, [*183] cutting off any person who attempted to speak with them about the case. Tr. at 24539-40, 24547 (03/27/06). Of course, these jurors were not completely shielded from information concerning the trial, but the court satisfied itself that both jurors' exposure was inadvertent and innocuous. Tr. at 25044-45 (04/06/06); *see Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)* ("[HN54] [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.").

With respect to the jurors who had participated in the first week of deliberations, the court interviewed each of them individually and received assurances that they were capable and willing to "start all over today and completely disregard any of the discussions that have happened before." Tr. at 24759-78 (03/28/06). Once the decision to proceed with the alternate jurors was made, the court instructed the entire jury that they must "completely put out of your prior deliberations out of your mind. . . . You also should not discuss or mention any statements or comments made during the prior deliberations when you begin these new deliberations." *Id.* at 24805. The court then reinstructed [*184] the reconstituted jury. *Id.* at 24804-91. Case law from other jurisdictions interpreting pre-1999 *Rule 24* support the conclusion that, in this case, such precautions obviated any prejudice to the Defendants. *See, e.g., United States v. Hillard, 701 F.2d 1052, 1056-57 (2d Cir. 1983)*; *United States v. Kopituk, 690 F.2d 1289, 1307-08 (11th Cir. 1982)*. More importantly,[HN55] the current version of *Rule 24* presumes that post-submission substitution, when accompanied by instructions to begin deliberations anew, is *not* prejudicial. *FED. R. CRIM. P. 24(c)(3)*; *Johnson, 223 F.3d at 670*. The court has no basis to conclude that the presumption has been rebutted in this case.

The Defendants argue that because of the "extensive juror misconduct" in this case, the court cannot assume that these jurors followed the court's instructions to begin deliberations anew. Ryan Reply at 16. As previously discussed, the court believes that the Defendants have significantly overstated the degree of juror "misconduct" in this case. *See supra* Part IX.C. The jurors who deliberated to verdict in this case were attentive [*185] and conscientious, a conclusion the court believes is further bolstered by the fact that they deliberated for ten

days after they were reconstituted. *See Kopituk, 690 F.2d at 1311* (individual assurances from jury that they would begin deliberations anew, plus the fact that they deliberated for "a full week" after being reconstituted, sufficiently indicated that they followed instructions to begin anew); *Cf. United States v. Lamb, 529 F.2d 1153, 1156 (9th Cir. 1975)* (overturning guilty verdict rendered by jury that deliberated for 29 minutes after they were reconstituted). In *Lamb*, the original jury had already returned a guilty verdict that the court rejected, a circumstance lending further support for the court's conclusion that the reconstituted jury did not heed the trial court's instruction to "begin and the beginning." *Lamb, 529 F.2d at 1155*. According to Defendant Ryan, the present case is somewhat analogous insofar as "we now know that the jury deliberated to verdict on some counts." Ryan Reply at 16. Ryan asserts that the jurors had reached verdicts on two counts based on post-verdict statements that some jurors made to [*186] the media. Ryan Post-Trial Mot. at 38-39 n.16. First, the court notes that Ryan's assertions about the first jury's progress vary as it suits his purposes. *Compare* Ryan Post-Trial Mot. at 31 (stating the jurors had deliberated to verdict on two counts); *with id.* at 39 (citing newspaper articles that purportedly corroborate Mr. McLaughlin's recollection of his conversation with Juror Chambers to the effect that the jury was still "working through the instructions"). Second, and more importantly, these statements are not competent evidence. *See FED. R. EVID. 606(b)*.

Ryan also relies on post-verdict comments to the media for the proposition that the reconstituted jury did not, in fact, follow the court's instruction. *Id.* at 29-30. Leaving to one side the fact that these statements cannot be used to impeach the verdict, the substance of the juror's post-verdict comments actually confirms that they did endeavor to begin anew. The jury, as a whole, appears to have allowed the substituted jurors to set the agenda for the entire group "so the original jurors 'would not try to sway [them], or give [them] an opinion." 04/18/2006 Article, [*187] Ex. 12 to Ryan Post-Trial Mot. Ryan's suggestion that these and similar statements indicate that the jurors did not deliberate as a group is, at best, unconvincing. "[H]anding the reins" to the alternate jurors was a sensible procedure for following the court's instructions, not an indication that they flouted those instructions.

In sum, court concludes that substituted two jurors after deliberations began did not violate either *Rule 24(c)* or the *Sixth Amendment*.

E. Seating Additional Alternates

This court seated eight alternates, two more than is contemplated by *Rule 24(c)(1)*. This fact was brought to the court's attention by the prosecution before opening statements were completed. Tr. at 2499 (09/28/05). Indeed, the government explicitly asked whether defense counsel objected. *Id.* ("[I] assume there's no objection by anybody to that?"). Defense counsel for Warner stated expressly that he did not object, *id.*, a claim that Warner does not dispute in his post-trial motion. The record does not reveal any response from Ryan's counsel. The government contends that Ryan waived the objection; Ryan contends that, at most, he merely forfeited the objection.

[HN56] Waiver is [*188] the "intentional relinquishment or abandonment of a known right." *United States v. Williams, 272 F.3d 845, 854-55 (7th Cir. 2002)* (citations and internal quotation marks omitted). Forfeiture "is simply the failure to make a timely assertion of a right." *Id.* Waiver can be implied "where an intention to relinquish the right, although not expressed, can be inferred," although "implied waiver" is often difficult to distinguish from "forfeiture." *Johnson, 223 F.3d at 668*. Consistent with its previous ruling, (Tr. at 24367 (03/27/06)), the court concludes that Ryan implicitly waived the objection. The court's deviation from the letter of *Rule 24(c)* was explicitly called to defense counsel's attention by the prosecution, and yet counsel for Ryan said nothing. There were, of course, daily reminders over the course of an almost six-month trial that there were 20 jurors in the jury box. It is implausible that Ryan's counsel simply forgot to object, or was waiting for the right opportunity. Moreover, Ryan's argument that the court "represented that [the additional alternates] would not be seated" is frivolous. Ryan Post-Trial Mot. at 35 n. 14. The court [*189] stated that the "worst case scenario" was that the additional alternates would hear all of the evidence but never deliberate, not that the court would not seat these alternates. Defense counsel cannot seriously contend that the court would require two citizens to sit through a very long trial as spectators. Moreover, as the government points out, defense counsel never articulated this rationale despite multiple opportunities to do so as the parties discussed what to do in the wake of dismissing Jurors Pavlick and Ezell. Accordingly, the court concludes that

Ryan waived his objection to the *Rule 24* violation.

F. The Court Properly Denied Defendants' Request to Interview Jurors

Defendant Ryan also argues that the court improperly relied on Federal *Rule 606(b)* and *Tanner v. United States, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987)*, in denying his motion to interview Jurors Ezell and McFadden. In *Tanner*, the Supreme Court held that the defendant's *Sixth Amendment* rights were not violated when, pursuant to *Rule 606(b)*, the trial court declined to hold an evidentiary hearing at which jurors would testify after allegations surfaced that some jurors were impaired by alcohol and drugs [*190] during portions of the trial. *Tanner, 483 U.S. at 127*. Ryan argues that since he requested only an opportunity to interview jurors informally, *Tanner* and *Rule 606(b)* are not implicated. [HN57] This court has discretion under *Local Criminal Rule 31.1* to deny counsel's request to interview jurors. In exercising that discretion, the likelihood that juror interviews will yield admissible evidence is certainly a factor. *See, e.g., United States v. Moten, 582 F.2d 654, 665 (2d Cir. 1978)*.

At the time that the Defendants sought to interview Ms. Ezell and Ms. McFadden, there were no allegations that improper external influence had been brought to bear on any juror. Only after this court denied Defendants' motion did Ms. Ezell allege that another juror brought extraneous material into the jury room. Ryan Post-Trial Mot. at 47 n.21. The court then conducted a thorough hearing on the matter, during which defense counsel was permitted to pose questions. But at the time the court ruled on the request to interview jurors, the Defendants were relying on statements to the press made by Ezell and McFadden that amounted to little more than name-calling. There was certainly [*191] no indication that the interviews would yield information that could be used to impeach the verdict. This was especially true with respect to Ms. McFadden, who was removed from the jury for reasons that have nothing to do with the alleged misconduct of other jurors, and who played no part in either the first or the second round of deliberations in this case. Even though these jurors may have wanted to speak with defense counsel, interviews with either or both jurors about what went on in the jury room would necessarily entail further intrusion into the lives of the other jurors, who would feel compelled to respond to any actual or perceived inaccuracies in Ezell's and McFadden's statements. The fact that some of these jurors have chosen to speak with the media on their own terms does not persuade the court that they have invited or would welcome the additional attention that interviews would entail. There are also powerful institutional interests in respecting the finality of verdicts that caution against any further intrusion into the jurors' deliberations. The court reaffirms its decision to deny juror interviews.

G. Juror Problems, Viewed as a Whole, Do Not Rebut the Presumption [*192] **that Jurors Followed Instructions to Assess Warner's Culpability Independently**

As Warner points out, a critical issue with respect to his numerous motions for severance is whether the jury was able to sort out the evidence among the defendants. *United States v. Thompson, 286 F.3d 950, 968 (7th Cir. 2002)*. To ensure that the jury would draw the necessary distinctions between the Defendants, this court gave numerous limiting instructions both during and at the end of the trial. Jurors are presumed to follow such instructions, *Thompson, 286 F.3d at 968*, but Warner contends that a host of juror-related issues already described rebut that presumption. Warner Post-Trial Mot. at 2.

As previously discussed, the court rejects Warner's contention that jurors who deliberated to verdict in this case lied on their juror questionnaires. *See supra* Part IX.A. The court has likewise rejected Warner's argument that jurors violated this court's numerous admonitions to avoid trial publicity. *See supra* Part IX.C.5. Warner adds to the list of perceived juror misconduct the decision of Jurors Svymbersky and James to remove their notebooks from the jury room [*193] after being discharged. Warner Post-Trial Mot. at 8. As to Juror Svymbersky, the court concluded that it was an innocent mistake, Tr. at 24448-50 (03/27/06). [33] In any event, the court does not agree that two jurors' removal of their notebooks conclusively establishes the entire jury's inability to follow instructions. So, as a threshold matter, the court rejects the underlying factual premise for Warner's theory that "[i]f the jurors could not follow simple instructions on these topics, then they could not follow more-difficult instructions regarding the compartmentalization of evidence, [etc.]." Warner Post-Trial Mot. at 9.

33 The court advised the jurors to leave their notebooks in the jury room during the course of the trial but did not repeat the admonition, nor did

> it explicitly prohibit them from removing their notebooks at the conclusion of the trial.

Moreover, the two cases Warner cites in support of his argument that juror misconduct in this case rebuts the presumption that jurors follow instructions [*194] are plainly distinguishable. *See Dyer v. Calderon, 151 F.3d 970, 983 (9th Cir. 1998)* ("If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror -- to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions -- with equal scorn."); *United States v. Colombo, 869 F.2d 149 (2d Cir. 1989)*. In *Dyer*, a juror in a death penalty case failed to disclose at *voir dire* that her brother was the victim of a murder performed in a manner similar to the Dyer defendant's alleged crime. *151 F.3d at 976-77*. Furthermore, the *Dyer* prosecutor had prosecuted the juror's brother's killer. *Id.* When given the opportunity to correct her initial omission, rather than doing so, the juror told the trial judge that she believed that her brother's death was an accident. *Id.* The facts surrounding the juror's brother's death, however, plainly bespoke foul play -- facts known to the juror in her capacity as the plaintiff in her brother's wrongful death suit. *Id.* In a further bizarre twist, after the conviction of the [*195] *Dyer* defendant, the juror went on to take a job as a guard on death row in San Quentin where the Dyer defendant awaited execution. *Id. at 982 n. 18*. The Ninth Circuit concluded that the juror lied and that her lies gave rise to an inference of implied bias against the defendant because the subject matter of what she concealed and the repetition of her lies indicated that she had lied to protect her position on the jury. *id. at 982*. *Colombo* involved a juror who deliberately concealed her relationship with a government lawyer. *869 F.2d at 150*. The *Colombo* court did not have to guess at this juror's intentions: the juror involved actually stated to another juror that she had lied in order to obtain a seat on the jury. *Id.* The *Colombo* court observed:

> Knowingly lying during the *voir dire* violated, *inter alia*, *18 U.S.C. § 1621 (1982)*, and subjected the juror to possible criminal contempt pursuant to *18 U.S.C. § 401 (1982)*, as well as to possible substantial restitution claims by the government. . . . It exhibited a personal interest in this particular case that [*196] was so powerful as to cause the juror to commit a serious crime. Such an interest not only suggests a view on the merits and/or knowledge of evidentiary facts but is also quite inconsistent with an expectation that a prospective juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court.

869 F.2d at 151-52 (citations omitted).

The jurors' deliberate and outrageous misrepresentations in *Dyer* and *Colombo* are in no way analogous to the honest mistakes that the jurors in this case made. Nevertheless, Warner argues that the court should infer from individual juror's honest mistakes with regards to particular instructions that the jury as a whole was unable to follow the court's limiting instructions. The court finds this inference suspect on at least two grounds. First, as *Dyer* and *Colombo* demonstrate, courts draw a distinction between honest mistakes and purposeful deceptions. Drawing this distinction is sensible. For all but the theoretically least competent juror, the possibility of misinterpreting an instruction from the court will be less than the certainty that the instruction [*197] will be disregarded by a juror who purposefully intends to do so. Second, the court does not find a compelling connection between evidence that individual jurors occasionally made individual mistakes implementing the court's instructions, and the assumption that these same jurors would make much graver mistakes when acting together. Unlike the mistakes the jurors made alone, the possibility that one juror would think some piece of evidence admitted only against Ryan was also applicable to Warner must be balanced against the likelihood that his or her eleven peers on the jury would recognize the juror's error and correct him or her.

For the same reason, the court is unwilling to assume that the jurors were incapable of following its instruction that Defendant Ryan as a public official had a duty of honest services while Warner, as a private citizen, did not. The court instructed the jurors to this effect. Final Jury Instr. at 70, 82. Warner draws sinister meaning from the fact that the jury unanimously convicted both Defendants of all counts. Warner Post-Trial Mot. at 10. [HN58] While it is true that a court can bolster its presumption that a jury has followed its instruction by reference [*198] to the fact the jury did acquit some of the defendants on some counts, *see, e.g., Thompson, 286*

F.3d at 968, a split verdict is not a necessary condition for the ordinary presumption that the court's instructions were effective. Warner also contends that the juror issues in this case would have caused the court to declare a mistrial in a shorter trial, citing this court's recent decision declaring a mistrial in a wholly unrelated matter. *See* Warner Post-Trial Mot. at 20. The length of a trial, or more accurately, the amounts of judicial, prosecutorial, and private resources expended over the course of a long trial, are relevant and appropriate considerations. *See, e.g., McDonough, 464 U.S. at 555* ("To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give."); *FED. R. CRIM. P. 24(c)*.

For all these reasons, the court finds that it did not err in denying Warner's repeated motion for severance and does not find that the interests of justice require it to grant [*199] Warner a new trial on this basis now.

CONCLUSION

Ryan's motion for judgment of acquittal is granted with respect to Counts Nine and Ten and otherwise denied. Ryan's motions to dismiss, for new trial, and for arrest of judgment (686, 721-1,2,778,817-1,2,3) are denied. Warner's motion for acquittal is granted with respect to Count Nine and otherwise denied. His motions for severance (260-1,2, 584, 674, 829) are denied. Warner's motions to dismiss, for new trial, and arrest of judgment (673, 818, 830-1,2) are denied.

Dated: September 7, 2006

REBECCA R. PALLMEYER

United States District Judge