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In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 10-3964

GEORGE H. RYAN, SR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA

Respondent-Appellee.

**On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 10 CV 5512 — Rebecca R. Pallmeyer, *Judge*.**

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of the defendant-appellant is not complete and correct.

In the original prosecution, defendant-appellant George H. Ryan, Sr. was charged in a second superseding indictment with violations of 18 U.S.C. §§ 1001, 1341, and 1962(d), and 26 U.S.C. §§ 7206 and 7212, and the district court had jurisdiction pursuant to 18 U.S.C. § 3231.

With respect to the proceedings giving rise to this appeal, on August 31, 2010, Ryan filed a motion for post-conviction relief pursuant to 28 U.S.C. § 2255. R. 1.[1] The district court had jurisdiction over the motion pursuant to that statute. The district court denied defendant's motion in a judgment entered on December 21, 2010, A-000001, and the district court granted a certificate of appealability the following day, A-000059. Defendant timely filed a notice of appeal on December 27, 2010. A-000060. This Court has jurisdiction pursuant to 28 U.S.C. § 2253 and 28 U.S.C. § 1291.

[1] Citations to defendant's brief and appendix are to "Br.," and "A-," respectively. Citations to the record on appeal are to "R." Citations to the trial transcripts are to "Tr."Citations to the government's trial exhibits are to "Gx__."

ISSUES PRESENTED

1. Did the honest services fraud scheme of which Ryan was convicted involve bribery or kickbacks?

2. Did any instructional errors have a substantial and injurious effect or influence the jury's verdict, given that no reasonable jury, properly instructed, would have convicted Ryan of honest services fraud without also convicting him of taking bribes, and of defrauding the State of Illinois of money or property?

3. Was Ryan prejudiced by the wrongful admission of evidence in light of *Skilling v. United States*?

4. Did the district court correctly conclude that the evidence was sufficient to establish that Ryan took bribes or kickbacks?

STATEMENT OF THE CASE

In December 2003, a federal grand jury returned a second superseding indictment charging defendant, George H. Ryan, Sr., and Lawrence Warner with racketeering conspiracy and mail fraud. A-000063. Ryan was also charged with making false statements to the FBI, obstructing and impeding the IRS, and filing false tax returns. *Id.*

After a trial, the jury returned a verdict of guilty on all counts against both defendants. A-000427. Subsequently, the district court granted defendants' motions for acquittal on two mail fraud counts, Counts Nine and Ten, but

otherwise denied their motions for acquittal and new trial. A-000429. On September 6, 2006, the court sentenced Ryan to serve concurrent terms of imprisonment of 78 months on the racketeering conspiracy count, 60 months on each of the mail fraud and false statement counts, and 36 months on each of the tax counts. A-000186.

This Court affirmed Ryan's convictions on direct review. *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007).

On August 31, 2010, Ryan filed a motion pursuant to 28 U.S.C. § 2255, challenging his convictions on the racketeering and mail fraud counts, based on the Supreme Court's decision in *Skilling v. United States*, 561 U.S. —, 130 S.Ct. 2896 (2010). R.1. On December 21, 2010, the district court denied Ryan's motion in a 58-page Memorandum Opinion, holding that Ryan's scheme involved bribery and kickbacks, and that any instructional or evidentiary errors were harmless beyond a reasonable doubt. A-000001.

STATEMENT OF FACTS

The evidence established that, throughout Ryan's tenure in statewide public office, Ryan accepted financial benefits from supporters and, in return, awarded these supporters state contracts and leases worth millions of dollars.

Official Actions Taken by Ryan in Return for Financial Benefits From Larry Warner

Arrangement Between Ryan and Warner

At the time Ryan was elected Illinois Secretary of State ("SOS") in November 1990, Don Udstuen and co-defendant Larry Warner were among Ryan's close friends. Udstuen, among other things, was a lobbyist who had supported Ryan for more than 12 years. R. Tr. 11600-01, 11604-05.[2] Warner was a wealthy insurance adjuster who had never worked as a lobbyist or government consultant, and who did no business with any state agency. Tr. 2753. At the time of the election, Udstuen and Warner had known each other only a short time; they had no financial relationship, and Udstuen did not even know what Warner did for a living. Tr. 11615, 12244-45.

A month or two after the election, however, Warner had several conversations with Udstuen in which Warner told Udstuen that Warner was going to capitalize on his relationship with Ryan by entering the lobbying business. Tr. 11620. Warner told Udstuen he "should be part of" Warner's lobbying efforts, because no one had done more for Ryan than Udstuen, and

[2]Ryan was beholden to Udstuen because, in addition to giving Ryan political support and assisting on Ryan's political campaigns, Tr. 11604-10, Udstuen provided a valuable personal benefit to Ryan in the mid-1980s when, at Ryan's request, he gave Ryan's daughter, who was then recuperating from a serious car accident, a job at the Illinois State Medical Society which continued through Ryan's terms as SOS and governor. Tr. 11593, 11600-01, 11612-13.

Udstuen, therefore, "deserved some of this." *Id*. Warner explained that he had talked to Ryan about this arrangement, and Ryan was "fine" with it. Tr. 11620-21. Warner also assured Udstuen, "I will take care of George." Tr. 11622. Udstuen understood from these conversations that Ryan had blessed the arrangement by which Warner would share lobbying fees with Udstuen, and that Warner would take care of Ryan. Tr. 12231.[3] Tr. 11620-22.

ADM Contract (Count Two)

One of Warner's first clients as a lobbyist was ADM, a manufacturer of validation stickers for license plates. Tr. 11637. 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. Tr. 8032-33, 8064, 8067-68, 8112-13. From 1991 through 1998, Warner, touting his relationship with Ryan, required ADM to pay Warner a monthly fee from $2,000 to $5,000 in order to keep the contract. Tr. 8664-69, 9159-65, 9332-36, 10652, 10663, 16903-04.

In early 1993, an SOS official decided to eliminate the metallic security mark from the contract's specifications. Tr. 8120-26, 8135-36. Warner became

[3] Udstuen's assistance to Ryan's family continued through Ryan's service as SOS. In 1994, Udstuen arranged, at Ryan's request, for one of Ryan's sons-in-law to work for the Medical Society. Tr. 11678-83. When, in early 1997, the Medical Society was contemplating terminating Ryan's son-in-law, Ryan insisted that the son-in-law not only be retained, but also be given a raise. Tr. 11690-91. Udstuen gave in; the son-in-law kept his job and got the raise Ryan demanded. Tr. 11691-96.

upset by the proposed change, and told the official that he would "take care of it." Tr. 8143. A day or two later, Ryan sternly directed the official to quietly retract the revised specifications and asserted—falsely—that his direction was based on a belief that the security mark was necessary for public safety. Tr. 8140-44, 9143-46. The official retracted his proposal, even though he believed it was against the state's best interests. Tr. 8146-47. As a result, ADM retained the contract. *Id.*

The "lobbying fees" paid by ADM to Warner totaled $399,000. Tr. 16903-04. As Warner received checks from ADM, he instructed his secretary to pay one-third of the amount of each check to a company used by Udstuen. Tr. 15153. Thus, about $122,000 was funneled to Udstuen, who did nothing to assist ADM. Tr. 11638-39, 12229, 16905, 16916. Neither Warner nor Udstuen ever registered as ADM's lobbyists. Tr. 13755-56.

Bellwood Lease (Count Three)

In 1992, Warner told Ryan and Scott Fawell (who later became Ryan's chief of staff) that Warner wanted to lease to the SOS Police a building he owned in Bellwood. Tr. 2771-73. When Fawell expressed concern that the press might discover Warner's involvement, Warner told Ryan and Fawell not to worry because his ownership interest was "buried in the paperwork." Tr. 2774. As promised, Warner's interest in the property was hidden behind front men, whose

names appeared on real estate trust documents. Tr. 16939-40. Warner's ownership interest eventually surfaced through a series of transactions—but not until after the lease took effect in March 1993. Tr. 16950-51. The state overpaid by about $246,583 over the course of the first five years of the Bellwood lease, Tr. 11045, 11399, bringing Warner a total of approximately $171,000 in profits. Tr. 16954.

Joliet Lease (Count Eight)

In about 1994, Warner told Ryan that Warner was looking for property in Joliet for the SOS Office to lease, whereupon Ryan directed an SOS official to deal with Warner on the lease. Tr. 2804-05, 7822-24, 10462-63. Warner bought property in Joliet, once again using front men to hide his ownership interest. Tr. 16954-58, and, once again, assuring Fawell that his ownership in the Joliet property was buried in paperwork. Tr. 2812, 3005. In December 1994, Ryan awarded the lease to Warner. Tr. 16958-59. The lease, personally signed by Ryan,[4] bore the name of Warner's front man. Tr. 3007, 6289-91. The State overpaid for this lease by $296,485, and Warner received a total of about $854,258 in rental payments. Tr. 11021. Once again, Warner's ownership interest in the property emerged through subsequent transactions only after the

[4]Ryan personally signed only two leases as SOS: the Joliet lease (for Warner), Tr. 3007, and the South Holland lease (for Harry Klein). Tr. 6289-91.

lease became effective. Tr. 16959-62. When Warner's role in the lease became public, Warner told Udstuen that he never should have done the Joliet lease because it was "too good a deal," Tr. 11727, and Ryan falsely told the press that he had nothing to do with awarding contracts or leases, and that he "left that to the professionals," Tr. 11434. Moreover, when questioned about this lease in October 2000, Ryan falsely told FBI agents that he and Warner never discussed Warner's interest in the Joliet lease, and that he was unaware that Warner profited from the lease. Tr. 18154-55.

IBM Mainframe Contract (Counts Four and Five)

In about late 1991, Ryan authorized Warner and Udstuen (neither of whom was a state employee) to conduct a search for a new director of the SOS department that dealt with mainframe computer issues. Tr. 3107-12, 12528-29. Warner and Udstuen chose a candidate who said that he would support a transition of the mainframe computer contract to IBM, a client of Warner's, Tr. 12528-29, and Ryan hired the candidate, even though Ryan had misgivings about him, Tr. 3107-12,12524-29. In 1996, as planned, the SOS office awarded IBM the $26 million mainframe computer contract. Tr. 3125, 12541. As a result, Warner received almost $1 million in lobbying fees from IBM. Tr. 16916-18. Once again, Warner arranged to funnel one-third of his fees (about $298,371) to Udstuen, this time instructing his secretary to provide the proceeds to a

company designated by Udstuen, thereby concealing Udstuen's receipt of the funds from IBM and the public. Tr. 15155-56, 16918, 16923.

Viisage Digital Licensing Contract (Count Seven)

In July 1996, when the SOS Office was considering switching to digital driver's licenses, several companies, including one called Viisage, made presentations to Ryan. Tr. 3091-94. Shortly after the presentations, Warner entered into an arrangement with Viisage in which Warner would receive five percent of Viisage's revenues on the licensing contract in return for his help in landing it. Tr. 13191. A businessman named Irwin Jann served as a front man in this arrangement—Jann's name appeared on the original lobbying agreement with Viisage, and Jann was registered as Viisage's lobbyist, even though Jann performed no work for Viisage. Tr. 13178, 13188-206. In the weeks following the presentations, Fawell had Ryan determined that Viisage would get the lead on the contract, Tr. 3097-99, because, as Fawell put it, "We were interested in helping Larry." Tr. 3100.

In late 1996, months before the bidding process for the contract began, Ryan directed Warner to cut another longtime Ryan friend and supporter, Ron Swanson, in on the Viisage deal, and, although Warner was not happy about it, he did so, guaranteeing Swanson $36,000 for Swanson's non-existent "lobbying efforts." Tr. 3102-06, 10667-69. In June 1997, after the state awarded the $20

million contract to Viisage in June 1997, Tr. 13195, Warner removed Jann as the front man and had the Viisage lobbying arrangement transferred to Warner's company. Tr. 13202-05. Warner never registered as Viisage's lobbyist, however, and Viisage never filed a record reflecting the transfer until 2001. Tr. 13756-63. During the period from October 1998 through November 2002, Warner received fees totaling $834,000 based on the Viisage contract, $36,000 of which he provided to Swanson as Ryan had directed, even though Swanson did no work for Viisage, and Swanson never registered as Viisage's lobbyist. Tr. 13222-23, 16923-25, 17236.

Financial Benefits Provided By Warner to Ryan

As indicated above, in return for the state contracts and leases Ryan steered to Warner and Warner's clients, and consistent with the arrangement struck between Ryan and Warner just a month or two after Ryan became SOS, Warner "took care of" Ryan by giving a stream of benefits to Ryan and to Ryan's family members and associates. During the period 1992 through 1997, the evidence showed that Warner provided Ryan with the following benefits:

- Beginning in February 1992, Warner made payments to Ryan's Udstuen totaling over $400,000, from the fees he collected in connection with the ADM and IBM contracts, Tr. 16907;

- In July 1994, Warner loaned, with no expectation of profit, $50,000 to Comguard, a financially distressed company partly owned by Ryan's brother, and only $10,500 of this loan was ever repaid, Tr. 10704-07;

- In the summer of 1995, Warner billed one of Ryan's daughters over $11,000 for construction work on her house, but collected only several thousand dollars, allowing the remainder to go unpaid, Tr. 15164-69;

- In late 1996, Warner agreed, at Ryan's direction, to share his fee from Viisage with Ron Swanson, and ultimately paid Swanson $36,000 in 1999 pursuant to this agreement, Tr. 3102-06, 10667-69; Gx03-501.

- In 1996, Warner handled an insurance claim for Ryan without charging the otherwise-applicable adjusting fee of approximately $1,000, Tr. 15516-19;

- In January and March 1997, Warner gave a total of $6,000 to a fledgling cigar company partly owned by Ryan's son, Tr. 15176-77, 18092;

- In February 1997, Warner adjusted an insurance claim for one of Ryan's sons-in-law and once again declined to charge the usual 10% adjusting fee (about $1,668), Tr. 15160-63, 15516, 17088;

- In March 1997, Warner gave a $5,000 loan to the same Ryan son-in-law, which loan was never repaid, Tr. 17092, 17115;

- In June 1997, Warner gave Ryan a blank check, which Ryan used to pay over $3,000 for the band at his daughter's wedding, Tr. 15604-05; and

- In the fall of 1997, Warner loaned $97,000 to Ryan's brother's company, Comguard, which was repaid over more than a

year, through a circuitous paper trail that did not directly connect Comguard to Warner, Tr. 17243-47.[5]

Official Actions Taken by Ryan in Return for Financial Benefits From Harry Klein (Count Six)

Beginning in the 1990s, Ryan and Fawell enjoyed annual vacations at a Jamaican villa owned by Harry Klein, an Illinois currency exchange owner. Tr. 2832-34, 9421-23. On Fawell's first trip, Ryan suggested that, because Klein's business was regulated by SOS, they should each give Klein a $1,000 check for $1,000 lodging, and have Klein return to them the same amount in cash. Tr. 2838-42. Fawell agreed to the plan, which allowed both Ryan and Fawell to create a false paper trail giving the appearance that they were paying for their own lodging, whereas, in truth, the transaction was a "wash," and Klein was providing lodging to them for free. *Id.* This process was repeated every year from 1993 to 2001. Tr. 2844, 9432-33. In addition, both in 1994 and 1996, Klein also gave Ryan a free week's vacation at his Palm Springs condominium. Tr. 9694. When questioned about his vacations at Klein's Jamaican villa, Ryan falsely represented to FBI agents that he paid his own way, and went so far as to produce his negotiated checks to Klein, while concealing the cash-back arrangement. Tr. 18143-49.

[5] The evidence also showed that Warner participated in several campaign fundraisers on Ryan's behalf. Tr. 15734-35, 15744-46, 15750-51.

Throughout Ryan's first SOS term, Ryan received repeated requests for currency exchange fee increases, and Ryan opposed them. Tr. 2843-44. In January 1995, however, during one of Ryan's free stays at Klein's villa, Klein asked Ryan to approve a fee increase. Tr. 2851. Having been treated by Klein for several years, Ryan 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 villa, Klein told Ryan and Fawell that he wanted to lease the SOS a building he owned in South Holland. Tr. 2858-59. After returning from Jamaica, Ryan and Fawell discussed a plan to "help Harry," Tr. 2862, and Ryan ordered an SOS director to work out a lease for the Klein property. Tr. 6552. According to Ryan's direction, the SOS director, without reviewing other sites, cancelled a less-expensive lease in order to move an SOS office to Klein's property even though the SOS Office had not been looking for new rental space and, according to the head of SOS's property management division, Klein's building was not in an ideal location. Tr. 3010-11, 5239-40, 6263, 6266-67, 6557-60, 6635-37. When a dispute arose over certain lease terms, and the SOS director asked Ryan's views, Ryan responded, "What does Harry want?" and then approved Klein's terms, telling Fawell he wanted "Harry to be happy." Tr. 2870, 6578-80. In June 1997, Ryan personally signed the South Holland lease, authorizing $600,000 in payments to Klein over five

years. Tr. 6289-91,6476. Over a two-and-a-half year period, the state paid approximately $170,000 more for the South Holland lease than it had for the previous lease. Tr. 11036.

Official Actions Taken by Ryan In Return for Financial Benefits from Ron Swanson[6]

In early 1995, Ryan took a vacation in Cancun hosted by his friend, Ron Swanson. Tr. 15261-71, 16292-93. After returning to the U.S., Ryan steered an SOS lease to Lincoln Towers, a client of Swanson's. Tr. 2910-20, 15345. Ryan told Fawell to work out the lease, even after Swanson proposed a rental figure well above market rate. Tr. 2914-16. 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. Tr. 2919. The lease cost $97,000 more than the SOS office paid at its former location, and Swanson made over $21,000 on the deal. Tr. 15345, 19491-92.

In late 1995, Swanson provided Ryan with another free vacation– this time in Lake Tahoe, Tr. 15262-77, 15333, and gave the Ryans a figurine worth $1,200 for their anniversary in 1996. Tr. 15275-77; Gx16-045. Thereafter, Ryan directed Warner to give Swanson a cut in the lobbying fees Warner would get from

[6] While the exchanges between Ryan and Swanson were described as being part of the charged scheme to defraud, no substantive counts focused on those exchanges.

Viisage. Tr. 3102-06.Thus, in late 1996, Warner promised Swanson $36,000 for Swanson's non-existent lobbying efforts. Tr. 10667-69.

Ryan awarded Viisage the contract in June 1997, and Warner began his Viisage-related payments to Swanson in early 1999. Gx03-501. And the flow of benefits between Ryan and Swanson continued. In August 1999, Swanson paid $2,200 for Ryan's daughter to take a family trip to Disney World. Tr. 16665, 16880-81; Gx28-009. Shortly thereafter, Ryan told Fawell to hire Swanson as a lobbyist for the Metropolitan Pier & Exposition Authority. Tr. 2929-30. 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. Tr. 2934. Fawell then hired Swanson on Ryan's terms. Tr. 2937-38. As a result, Swanson's firm was paid $180,000 in state money over three years, even though it did virtually no meaningful work. Tr. 17238; Gx16-503.

Ryan's False Statements of Economic Interest

Every year from 1991 to 2002, Ryan, as SOS and then Governor, filed statements of economic interest, as required by state law. 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.*

SUMMARY OF ARGUMENT

The district court correctly concluded that the Supreme Court's decision in *Skilling* does not undermine Ryan's conviction. The offenses of which Ryan was convicted arose from a paradigmatic mail fraud scheme involving bribery and kickbacks, which the Supreme Court preserved in *Skilling* as constituting a violation of 18 U.S.C. § 1346. The indictment alleged, the evidence at trial established, and the government argued that Ryan committed honest services fraud when he accepted financial benefits for himself and his family members from supporters such as Warner and Klein, and took government actions, including the awarding to his supporters of lucrative state contracts and leases, in return. In other words, Ryan took bribes and kickbacks, and his conduct fell within the "core" of honest services fraud as interpreted by *Skilling*.

The district court properly instructed the jury concerning the requirements of bribery and, taken as a whole, the instructions informed the jury that a conviction could be sustained only based on a finding that Ryan's scheme involved bribery. Ryan's challenges to specific honest services instructions, in particular the instruction related to undisclosed conflicts of interest, are insufficient to support a finding of error. *Skilling* held that a

conviction for honest services fraud may not rest solely on an undisclosed conflict of interest, but this does not help Ryan because the government's case was not based solely on an undisclosed conflict of interest. As this Court determined on direct review, the instructions taken as a whole required the jury to find that Ryan accepted a conflict of interest with the intent to perform official acts in return. In other words, the instructions taken together conveyed that a conviction required a finding of bribery, and the inclusion of an instruction regarding conflicts of interest did not render the instructions as a whole erroneous.

Even if one or more of the instructions provided to the jury arguably permitted the jury to convict without finding that Ryan's scheme involved bribery, no reasonable jury, properly instructed, would have done so, and so any error did not actually prejudice Ryan. Ryan contends that the jury might have found him guilty of nothing more than failing to disclose that he was taking official action on behalf of people who were his friends, or on behalf of people from whom he had innocently received gifts. These speculations imagine a different trial than the one that actually occurred.

The trial evidence showed that Warner and Klein provided Ryan a flow of benefits over many years; that Ryan reciprocated by giving Warner and Klein millions of dollars in state business; and that Ryan, Warner, and Klein went to

great lengths to cover up these transactions. Ryan and Warner both argued to the jury that Ryan and his supporters were merely friends exchanging gifts or favors, and, pointing to the bribery instructions, argued that the jury should acquit Ryan because he took no action in return for the benefits Ryan received, in other words, that Ryan did not take bribes. The government argued that Ryan "sold his office brick by brick" by steering lucrative state business to Warner and Klein in return for the financial and other benefits they had provided to him. Tr. 22971. Accordingly, as the district court found, the jury was presented with a clear choice, and it chose to convict Ryan for taking bribes. Thus, any errors in the honest services fraud instructions did not prejudice Ryan in this paradigmatic bribery and kickback case.

Any errors in the honest services fraud instructions were not prejudicial for a another reason: no reasonable jury, properly instructed, would have convicted Ryan of honest services fraud but acquitted him of money-property fraud. Contrary to Ryan's contention, the indictment, evidence, and arguments presented money-property fraud as an alternative theory of liability, establishing that the object of Ryan's fraud was state money in the form of contracts and leases, and that Ryan obtained this state money through material misrepresentations, including by concealing and lying about the bribes and kickbacks he received in return for awarding state money to Warner and Klein.

In light of the charges, evidence and arguments, any reasonable jury that found Ryan committed honest services fraud would also have convicted him of money-property fraud.

Ryan's argument that he suffered prejudice as a result of the admission of evidence that would not have been admissible under *Skilling* also lacks merit. Contrary to Ryan's contention, all of the evidence admitted in his trial continues to be admissible under *Skilling* to prove bribery and money-property fraud. Even if certain evidence were admitted erroneously, no such error could have affected Ryan's substantial rights, in light of the overwhelming evidence of Ryan's guilt.

Finally, contrary to Ryan's contention, the evidence presented at trial was not only sufficient to support a finding that Ryan engaged in a scheme involving bribery and kickbacks, it was overwhelming.

ARGUMENT

I. The Supreme Court's Decision in *Skilling* Had No Impact on Ryan's Conviction.

A. Standard of Review

Upon denial of a § 2255 motion, this Court reviews the district court's findings of fact for clear error, and its legal conclusions *de novo*. *Gant v. United States*, 627 F.3d 677 (7th Cir. 2010). This Court reviews the district court's

rulings about the admissibility of evidence for abuse of discretion, "mindful that evidentiary errors do not require reversal if they were harmless." *United States v. Courtright*, No. 09-2880, 2011 WL 102591 at *3 (7th Cir. Jan. 13, 2011).

The legal correctness of the instructions provided to the jury are subject to *de novo* review. *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 should 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). Under this standard, the defendant must show

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, reversal is only warranted on collateral review where, considering 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.

This Court has never addressed whether the *Brecht* standard applies in the context of a motion under § 2255. *Brecht* itself involved a post-conviction challenge to a state conviction under § 2254, and Ryan argues *Brecht* should be limited to that context and, thus, that the more stringent standard applicable on direct review, that is, a finding that any error was "harmless beyond a reasonable doubt," should apply. Br. 14; *see Chapman v. California*, U.S. 18 (1967). Ryan relies on *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000), in which this Court applied the "harmless beyond a reasonable doubt" standard on collateral review in the context of § 2255. This reliance is misplaced. In *Lanier*, neither the parties nor the Court discussed the applicability of *Brecht*; indeed, it appears that the government (erroneously) advocated use of the "harmless beyond a reasonable doubt" standard. Thus, the Court applied the "harmless beyond a reasonable doubt standard" without considering the applicability of *Brecht* and, instead, relying on the Supreme Court's decision in *Neder*, a case

decided on direct review. *Lanier*, 220 F.3d at 839 (citing *Neder*, 527 U.S. at 18). Because the applicability of *Brecht* was never raised or considered in *Lanier*, the government respectfully submits that *Lanier* is not controlling in this case. *See Brecht*, 507 U.S. at 631.[7]

On the merits, Ryan argues that *Brecht* standard should not apply here because it is based on federalism concerns that do not exist in the context of a district court's ruling on a defendant's § 2255 motion. Br. 14. Although the Court in *Brecht* did indeed mention comity and federalism as important concerns, it also noted that, "The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system." *Brecht*, 507 U.S. at 635. As the Supreme Court recognized in an earlier case, "[T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments." *United States v. Frady*, 456 U.S. 152, 166 (1982). Thus, it is no less true with respect to federal prisoners that "granting

[7] In *Brecht*, the Supreme Court noted that it previously had applied the "harmless beyond a reasonable doubt" standard to a handful of federal habeas cases, but had not in those cases considered whether the same standard should apply on collateral review. *Brecht*, 507 U.S. at 630. *Brecht* held that *stare decisis* did not compel the Court to follow decisions that did not "squarely address[]" the issue, and concluded that "since we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* [harmless beyond a reasonable doubt] standard on habeas, we are free to address the issue on the merits." *Brecht*, 507 U.S. at 631.

habeas relief merely because there is a 'reasonable possibility' that trial error contributed to the verdict . . . is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has 'grievously wronged.'" *Brecht*, 507 U.S. at 637. Not surprisingly, other courts have uniformly rejected the distinction urged by Ryan. *See 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). Indeed, every circuit that has considered this issue has held that the standard set forth in *Brecht* applies in the context of § 2255 motions. *See Dago*, 441 F.3d at1246; *Montalvo*, 331 F.3d at1057-58; *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000).

This Court should follow the reasoning of the above cases and hold that the standard set forth in *Brecht* applies in the context of § 2255 motions, and that relief is warranted only upon a finding that trial errors resulted in "actual prejudice." *Id.* at 637.[8]

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[8] This Court has said that whether an error is harmless, like other mixed questions of law and fact, is reviewed *de novo*. *Savory v. Lane*, 832 F.2d 1011, 1018 (1987). But this Court has also suggested more than once that when considering a district court's conclusion that an error is harmless, "[d]eferential review is more consonant with principles that govern the ordinary roles of district and appellate judges." *Hanrahan v. Greer*, 896 F.2d 241, 244 (7th Cir. 1990); *see also Stewart v. Peter*, 958 F.2d 1379, 1281-82 (7th Cir. 1992). The Supreme Court has explained that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question." *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Here, the district court, which heard all the evidence and the arguments firsthand, is arguably in a better position than an

B. Analysis

Under either the "actual prejudice" standard provided by *Brecht*, or the "harmless beyond a reasonable doubt" standard advanced by Ryan and applied by the district court,[9] any errors at trial were harmless, and thus the district court properly denied Ryan's motion.

In *Skilling*, the Supreme Court held that the honest services statute, 18 U.S.C. § 1346, is constitutional when limited to its "core" applications: mail fraud schemes involving bribes and kickbacks. 130 S. Ct. at 2905, 2929. The Court declined to extend the 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). Because in *Skilling* the government did not allege bribery, the Court concluded that Skilling did not commit honest services fraud. *Id.* at 2934.

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appellate court to determine, based on the record as a whole, whether any errors at trial resulted in prejudice. At a minimum, the district court's conclusion that any errors were harmless beyond a reasonable doubt is worthy of this Court's respectful consideration.

[9] The district court applied the more stringent "harmless beyond a reasonable doubt" standard, relying on this Court's decision in *United States v. Black*, 625 F.3d 386, 393 (7th Cir. 2010). *Black*, like *Neder*, was decided on direct review, however. *See Brecht*, 507 U.S. at 630.

1. The Indictment, Evidence, and Arguments Establish That this Was a Paradigmatic Bribery Case.

As the district court correctly concluded, in contrast to the offenses at issue in *Skilling*, the offenses of which Ryan was charged and convicted involved bribery. A-000005 ("Ryan's prosecution . . . targeted conduct that remains at the core of honest services fraud.") Indeed, like the offenses involved in other cases that this Court has found pass muster under *Skilling*, Ryan's mail fraud scheme is aptly characterized as a "paradigmatic" bribery and kickback scheme. *See United States v. Lupton*, 620 F.3d 790, 793-97, 804 n.3 (7th Cir. 2010) (affirming honest services fraud conviction of defendant who solicited a kickback from a potential state lessee); *United States v. Cantrell*, 617 F.3d 919, 920-21 (7th Cir. 2010) (affirming honest services fraud conviction of a city official who steered contracts in exchange for kickbacks, stating, "This was clearly a kickback scheme, so § 1346—even as pared down by *Skilling*—applies to Cantrell."); *see also United States v. Rezko*, No. 05 CR 691, Mem. Op. at 14, 17 (N.D. Ill. March 3, 2011) (denying motion for new trial based on *Skilling*, and holding that error in honest services instructions was harmless because defendant's scheme to steer investment contracts and a construction approval in exchange for kickbacks was a "classic bribery kickback scheme.")

Outside the context of campaign contributions, the parties agree concerning what counts as bribery. *See* Br. 16–17. To take a bribe, a public official must accept a benefit and agree to perform official action in return. *United States v. Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009), *cert. denied*, 121 S. Ct.124, 134, 136 (Oct. 4, 2010); *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).[10] This agreement need not be express, but may be "implied from [the official's] words and actions." *United States v. Evans*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring); *accord Kemp*, 500 F.3d at 284; *Giles*, 246 F.3d at 972. Further, "where there is a stream of benefits given by a person to favor a public official," there is no need to show "that any specific benefit was given in exchange for a specific official act." *Kemp*, 500 F.3d at 281. All that is required is that the official accept the benefit and, in return, agree to take official actions as opportunities arise. *Id*. at 282; *see also United States v. Isaacs*, 493 F.2d 1124, 1145 (7th Cir. 1974). The conduct that formed the basis of the charges, evidence, and arguments in this case fell well within the definition of bribery, as set forth in the above cases.

[10] In *Skilling*, the Supreme Court singled out *Whitfield*, *Ganim*, and *Kemp* as cases that help provide content to the prohibition of bribery in the honest services statute. *Skilling*, 130 S. Ct. at 2934.

Indictment

The indictment charged a scheme to deprive the people and State of Illinois of the intangible right to honest services in which Ryan "performed and authorized official actions to benefit the financial interests" of himself, Warner, Klein, Swanson, and others, including by awarding state contracts and leases to Warner and Klein. A-000081-82. At the same time, the indictment alleged, Ryan "received personal and financial benefits" from Warner, Klein, and others, knowing such benefits "were provided with intent to influence and reward [Ryan] in the performance of official acts." A-000082. The indictment went on to enumerate the specific flow of benefits from Warner and Klein to Ryan, and the official actions Ryan took in return.

Evidence of Bribery

The evidence at trial proved that the charged scheme involved bribes and kickbacks.

As the evidence showed, Ryan and Warner entered into a bribery or kickback arrangement shortly after Ryan became SOS. A-000083-84. In testimony that Ryan has chosen to ignore, Udstuen described to the jury a conversation with Warner shortly after Ryan was elected as SOS in which Warner—an insurance adjuster who had never worked as a lobbyist—said that he intended to make money from his relationship with Ryan by becoming a

lobbyist; that he would share the lobbying proceeds with Udstuen, a man with whom Warner had no close relationship; that Ryan was fine with this arrangement; and that Warner would, in turn, "take care" of Ryan. The course of conduct that followed served corroborated Udstuen's testimony, and proved the existence of the agreement between Ryan and Warner. *See Ganim*, 510 F.3d at 149*; Kemp*, 500 F.3d at 282, 286. Specifically, the evidence showed that, over the course of years, Warner generously took care of Ryan by providing hundreds of thousands of dollars in payments, loans, and gifts to Ryan and Ryan's family and friends, including Udstuen and Swanson, and that, during the same period, Ryan reciprocated in a single way: he took state actions to benefit Warner, personally intervening or ensuring that others steered state business to Warner and his clients at every opportunity. A-000084, 88-89, 92, 94-95, 101-102.

The evidence showed that Ryan did whatever was necessary to help Warner line his pockets through state business, whether that meant personally signing a lease agreement, as in the case of the Joliet lease, or directing subordinates to work with Warner, as in the case of the SOS employee who handled the Joliet lease, Tr. 10462-63, and the employee who became uncomfortable with Warner's involvement in SOS business and who Ryan ordered to return Warner's phone calls, Tr. 8110.

Ryan's efforts on Warner's behalf also included taking steps to ensure that Warner's clients got contracts, even when those contracts were not in the best interest of the state. For example, when an SOS employee determined that it would be in the state's best interest to revise the specifications for state license plates—a move that would take away from ADM its monopoly on that business—Ryan went so far as to order the employee to retract the revisions (and to do so quietly), thus guaranteeing that Warner would continue to receive fees as ADM's lobbyist. This way, Udstuen would also continue to receive a share—which the government characterized as a kickback to Ryan since Ryan essentially was "going in Larry Warner's bank account and telling Larry Warner how he wants some of his money directed to friends of George Ryan." Tr. 22962.

Ryan stacked the deck in Warner's favor with respect to the state mainframe computer contract by putting Warner and Udstuen in charge of hiring the head of the SOS information technology section, and allowing them to choose a candidate who would agree to award the state contract to IBM—one of Warner's clients. As a result, Warner got his lobbying fees and Udstuen got his kickback. Similarly, months before the bids were submitted on the digital license contract, Ryan decided to give the contract to Viisage, Warner's client, because he was "interested in helping Larry,"and he directed Warner to kick

back a share of the lobbying proceeds to Swanson, who had recently given Ryan a Lake Tahoe vacation and an expensive figurine. Tr. 23086.

Ryan not only intervened to ensure that Warner got state business, he also agreed to take steps to conceal this largess from the public. For example, Warner was given the lease on his Bellwood property only after Warner assured Ryan and Fawell that Warner's ownership interest was "buried in the paperwork," and Ryan concealed the benefits he was receiving from Warner and Klein on his annual disclosure statements.

Ryan's relationship with Warner is a straightforward example of stream-of-benefits bribery. As the government argued to the jury, Warner had Ryan on retainer, *see United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 & n.15 (9th Cir. 2009), giving Ryan and Ryan's designees financial benefits and in return, getting state contracts and leases which netted him millions. Under settled law, this was a bribery and kickback scheme. *See, e.g., Kemp*, 500 F.3d at 269, 284-85 (affirming honest services conviction of city treasurer who accepted benefits such as loans to treasurer's friends and family, and in return rigged bids to ensure that bank executives got lucrative government contract); *Ganim*, 510 F.3d at 138-39 (affirming honest services conviction of mayor who accepted kickback of one-third of fees earned on city contracts he awarded); *United States v. Gorny*, 732 F.2d 597, 599-601 (7th Cir. 1984) (affirming honest services conviction of

deputy commissioner on board of tax appeals who took cash payments from lawyers, failed to disclose payments on statements of economic interest, and awarded bribe payers "an unusually high rate of success" before the board).

With respect to Harry Klein, the evidence showed that over the course of years, Ryan enjoyed free lodging at Klein's Jamaican villa on an annual basis—a series of benefits Ryan lied about on his disclosure forms and actively concealed through a secret cash-back arrangement. A-000103-05. In return, Klein asked for and received two official actions. First, in 1995, while Klein and Ryan were relaxing at Klein's villa, Klein asked Ryan for a fee increase for currency exchanges. Ryan later agreed, even though he had opposed a fee increase for years. Second, during a later vacation at Klein's villa, while Ryan and Klein were enjoying themselves sitting around a picnic table, Klein told Ryan that Klein wanted to lease his building in South Holland to the SOS. As soon as Ryan returned from Jamaica, Ryan caused the SOS Office 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 (responding to a question about the terms by asking "What does Harry want?"); and explained that he wanted to make Klein "happy." Underscoring how important it was to Ryan to "reciprocate" for benefits provided by Klein, Ryan personally signed the lucrative lease on behalf of the state.

Ryan argues that there was no evidence of "any commitment, explicit or implicit" from Ryan to Klein, Br. at 50, but Ryan's official actions soon after returning from Jamaica established just such a commitment. It was not necessary to prove that Ryan expressly stated his commitment in order to show the existence of a bribery scheme; proof of Ryan's course of action was sufficient. *See Whitfield*, 590 F.3d at 336 (affirming honest services fraud conviction of judge who received favorable loan from attorney, failed to disclose loan on disclosure forms, and years later ruled for attorney's client in a personal injury suit); *United States v. Abbey*, 560 F.3d 513, 515-16 (6th Cir. 2009) (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).[11]

Ryan's reliance on Klein's testimony that the free Jamaican vacations he provided to Ryan were not intended to influence Ryan as SOS, Br. 51-52, is misplaced. Klein's claim is refuted by his own admission that the SOS Office offered him the lease because of his relationship with Ryan, Tr. 9698-99, (which,

[11] Ryan points out that Harry Klein was not charged with a crime and argues that,"[i]f Ryan's stays at Klein's home were bribes, Klein was as guilty of this crime as Ryan." Br. 52. The government agrees. What Ryan fails to acknowledge is that the government was precluded from charging Klein because it secured Klein's testimony by obtaining an order granting him immunity from prosecution. Tr. 9398.

the evidence showed, amounted to little more than the series of free vacations he provided to Ryan), as well as by Ryan's actions—twice, Klein asked for government benefits while hosting Ryan in Jamaica, and both times, shortly after returning from Jamaica, Ryan awarded him the requested benefits. In fact, Klein's testimony was belied by Ryan's own statements of reasons for taking state action to benefit Klein. Ryan explained that he wanted to move the SOS office to a more expensive building on terms set by Klein because he was "helping Harry" and giving Harry what he wanted in order to "make Harry happy." As in the case of the city treasurer held to have committed bribery put it in *Kemp*, Klein was Ryan's "guy," so he got "special treatment." *See Kemp*, 500 F.3d at 286. In sum, the evidence showed that Ryan gave Klein the benefit of state actions in exchange for free vacations provided by Klein.[12]

[12] Ryan suggests that he did not take bribes from Klein because the official acts he took on Klein's behalf—increasing currency exchange rates, and giving Klein a lease—are not the same "kinds of influence," *Ganim*, 510 F.3d at 144, or the same "type of action," *Whitfield*, 590 F.3d at 350 (presumably because currency exchange rates and leases are two different things) required to establish bribery. Br. 50 n.16. Contrary to Ryan's contention, *Ganim* made clear that the requisite "kinds of influence" are exercises of influence "on behalf of the [bribe] payor as specific opportunities arise," 510 F.3d at 144-45, and *Whitfield* concluded that the "type of action" necessary means that "payments may be made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf." 590 F.3d at 350 (quoting *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998)). Ryan's actions clearly met these standards.

Arguments

The government's arguments, like the indictment and evidence, stressed facts showing that Ryan's scheme involved bribery. The government argued repeatedly that Ryan "sold his office" in return for "corrupt payments" from Warner, Klein, and others. Tr. 22836 ,22971, 23083-85, 23817-18, 23089, 23826. For example, the government argued that:

> [Ryan]violated [his] duty [to the people of Illinois] 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. 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.

Tr. 22836.

This passage, like many others in the government's closing arguments, emphasized that Ryan did more than simply fail to disclose the benefits he received—he reciprocated those benefits with government action. Referring to the flow of benefits, the government told the jury that "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." Tr. 22971.

This theme was repeated throughout the government's closing arguments:

- "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." Tr 23100.

- 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." Tr 23140.

- "Warner hit the jackpot during George Ryan's terms as secretary of state and as governor . . . $3 million in total benefits," and Warner "did a very nice job of taking care of George Ryan."Tr 22835.

- "Let's talk about Mike Chamness, the guy at Drivers Services. He doesn't have a clue about real estate. He gets a call from George Ryan saying, 'My good friend, Harry Klein, has this building. Check it out.' And, importantly, he says, 'I want to know, me, George Ryan, I want to know when there's a deal.' Not if, not maybe. 'I want to know when there's a deal, so I can tell Harry, so I can get the credit, so I can tell him that I am reciprocating for his generosity to me from South Holland—from Jamaica.'"Tr. 23710.

- Ryan had just gotten back from a pretty nice Cancun trip with Ron Swanson and his girlfriend. The evidence in the record is this was comped. This was on Ron Swanson. What happens days, weeks of this? Scott Fawell gets summoned down. . . . 'Scott, I got something for you. Help Ron with this [Lincoln Towers] lease.'. . . . [Ryan] did this because he just had a really nice vacation with Ron Swanson. . . . They are paying it for one reason: Because Ron Swanson got in George Ryan's office, and George Ryan just got back from Cancun with Ron Swanson. Tr. 23780-81, 23783.

- "The winners here were Ron Swanson, who got a lucrative makework contract; the Koehls [Ryan's daughter] who got a very nice Disney World vacation; and George Ryan, who was able to take care of his friend Ron, and who in turn, of course, had taken care of his daughter." Tr. 23705-06.

- And I submit to you this is evidence of a business relationship. And the business that they are in is George Ryan gets personal benefits, gifts to himself, his family. Ron Swanson gets state business, leases, contracts. . . ." Tr. 23787-88.

See also Tr. 22851-52, 22912, 22975, 23099, 23710, 23714, 23807-08.

In its rebuttal argument, the government told the jury that the first element of mail fraud, a scheme to defraud, was satisfied by the evidence showing a conflict of interest, but described that conflict of interest as Warner's and Klein's having given Ryan an undisclosed flow of benefits, and Ryan's having awarded Warner and Klein state contracts and leases in return. Tr. 23772-73. In other words, the "conflicts of interest" the government described involved bribes. For instance, with respect to Klein, right after describing the conflict of interest instruction, the government explained that Ryan agreed "to take this [Jamaican] vacation" and "to take [Klein's] benefits," and Ryan also agreed to be "partial" to Klein when it came to state business, Tr. 23772. The government reminded the jury with respect to the currency exchange rate increase, that Ryan's change of heart occurred "right after a trip to Jamaica." Tr. 23714. With respect to the South Holland lease, the government argued that

when Ryan gave Klein the South Holland lease, Ryan was "reciprocating for [Klein's] generosity . . . from . . . Jamaica." Tr. 23710. Thus, the government clearly argued that Ryan took Klein's benefits intending to be influenced in his official decision-making. With respect to Warner, the government in rebuttal dismissed the notion that Ryan and Warner were merely friends who exchanged gifts, noting that what Ryan delivered to Warner was exclusively state business. "How did George Ryan reciprocate this longtime friendship? Government business is how he did it. $3 million worth of government business." Tr. 23763-64. While allowing that there was no specific *quid pro quo*, this was an argument that Ryan gave Warner government business in return for the undisclosed flow of benefits Warner gave Ryan.

In the face of these arguments, Ryan's contention, Br. 30, that the government made only two statements "hint[ing]" to the jury that Ryan might have taken bribes falls flat.

On appeal, Ryan argues that when the government told the jury that it did not have to find a "*quid pro quo,*" it was disavowing a bribery theory. Br. at 32-33. This argument ignores that during the trial, the term "*quid pro quo*" was used narrowly by all concerned—the government, the defense and the district court—to refer to an exchange of one specific thing for another specific thing, and all agreed (correctly) that, outside the context of campaign contributions, the law

did not require the government to prove such a specific exchange. To illustrate, during the jury instruction conference, when the government offered an instruction expressing the proposition that jurors needed to be told "in some fashion that they don't need to find a direct *quid pro quo* in order to find a violation of the honest services obligation," Tr. 22080-81, Ryan's counsel responded, "[I]f *quid pro quo* means that this money or this benefit is given for this particular official action, and that's what we mean by *quid pro quo*, then—and I think that's what the Court is referring to. I understand that's not a requirement, that that kind of one-to-one match-up is not required . . . Tr. 22081.[13] Thus, in context, the government's use of the term *quid pro quo* in argument did not suggest that Ryan's conduct did not amount to bribery, or that a conviction could rest solely on an undisclosed conflict of interest.

[13] Many courts have defined the term *quid pro quo* in exactly this way. In *United States v. McNair*, 605 F.3d 1152, 1187-88 (11th Cir. 2010), for instance, the Eleventh Circuit defined "*quid 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 18 U.S.C. § 666 does not require a specific *quid pro quo*); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997) (same). Other courts use the term *quid pro quo* more broadly to refer to "payment . . . in return for official acts," without requiring that the payment or the acts be a specific this for that. *See Ganim*, 510 F.3d at 145. Regardless of the definition, it is well settled that the jury instructions need not include the term *quid pro quo*, so long as they adequately explain the "in return" concept. *See Whitfield*, 590 F.3d at 353; *Giles*, 246 F.3d at 972, 973.

In reality, the government's closing argument was consistent with the correct definition of "*quid pro quo*":

> [George Ryan] did not make announcement 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.

Tr 22852-53.

This argument, in a nutshell, described a stream-of-benefits theory of bribes and kickbacks. When the government later told the jury that it did not need to find a *quid pro quo*, it meant (and in context, the jury understood) that the jury did not have to find an express promise to give a specific benefit for a specific official action—a conclusion that the parties did not dispute at the close of trial, and that (outside of campaign contributions) Ryan now accepts as obvious. Br. 16. It is clear that, in context, the government's arguments conveyed the legally proper proposition that evidence of an express "this for that" is not

required to establish honest services fraud based on bribery.[14] Moreover, Ryan's own arguments to the jury support the same conclusion. Ryan repeatedly told the jury that they could not convict unless they found an exchange, Tr. 23147-49, 23154, 23473. and this argument was never refuted by the government.

2. The Jury Was Correctly Instructed with Respect to Honest Services Fraud Through Bribery, and Any Error Was Not Prejudicial.

Instructions Regarding Bribery

Four separate times, the district court properly instructed the jury about the "in return" concept at the heart of bribery. First, in an instruction Ryan does not challenge, the court told the jury:

> 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 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.

Tr. 23905-06.

Second, in another instruction Ryan does not challenge, the court told the jury:

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[14] For example, the government told the jury that "on matters big or small, Ryan's decision-making process was corrupted or influenced by people who had given him personal benefits. . . . You don't have to have a *quid pro quo* conversation here, but there is no doubt that Ryan's actions in connection with the low-digit plate arena were influenced . . . by his receipt of the DeSantis money." Tr. 22973-74.

> 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.

Tr 23906. These instructions accurately summarized the stream of benefits concept that both parties agree correctly states the law.

Third, in an instruction Ryan challenges, the court told the jury:

> A public official's receipt of personal or financial benefits, or the receipts of such 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 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.

Tr 23906-07.

Ryan criticizes this instruction because he claims the last sentence focuses on the intent of the bribe-payer to influence, rather than on the intent of the public official to be influenced. Br. 44-45. Ryan did not challenge this language on direct appeal, and he cannot show cause and prejudice to do so now, so the claim is procedurally defaulted. *Mankarious v. United States*, 282 F.3d 940, 943 (7th Cir. 2002).[15]

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[15] Below, Ryan suggested that this and other challenges to the jury instructions were not available to him before *Skilling*. R. 24 at 9 n.5. Ryan's argument that this instruction was flawed is based on *McCormick v. United States*, 500 U.S. 527 (1991),

Far from objecting to this instruction below, at trial, Ryan told the jury the instruction required bribes. During closing arguments, Ryan's attorney displayed this instruction on a screen and read it to the jury. Tr. 23148. After doing so, the attorney argued that "no witness has testified that George Ryan accepted any personal or financial benefits from anybody, ever to perform an official act," and concluded that "the trial is over," urging the jury to acquit. *Id.* at 23148, 23154.

Moreover, even if the last sentence of the instruction focused on the intent of the bribe payer, the district court did not give, and this Court does not review, the instruction in isolation. The Court has repeatedly explained that it reviews the instructions as a whole, and that if a particular "instruction contains an error or misguides the jury, [the Court] reverse[s] a jury verdict only if the error prejudiced a litigant." *Cote*, 504 F.3d 682 at 687. The instruction was immediately preceded by two instructions clearly informing the jury that the public official must accept benefits intending to perform official acts "in return," Tr 2905-06, and intending to "ensure favorable official action when necessary," Tr 23906, and followed by an instruction stating that a public official must receive a campaign contribution "knowing that it is given in exchange for a

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Br. at 45, a case that preceded *Skilling* by 19 years. *Skilling* did nothing to change the meaning of bribes under federal law.

specific official act," A-000019. Taken as a whole, these instructions clearly communicated that a public official must accept a benefit with the intent to be influenced in order to be convicted of fraud.

Ryan brings a second challenge to the second half of the same instruction, which explained to the jury that providing personal or financial benefits to a public official or his family does not violate the mail fraud statute, "so long as the personal or financial benefits were not intended to influence or reward the public official's exercise of office." Tr. 23907. Ryan objects to the use of the word "reward," which he says means a gratuity, not a bribe. Br. 45-46. The district court rejected Ryan's argument, A-000017-18, and for several reasons, this argument is foreclosed. First, Ryan proposed the use of the word "reward," R. 53 at 40, 73, and thus waived any challenge to it. *United States v. Yu Tian Li*, 615 F.3d 752, 757 (7th Cir. 2010). Ryan's proposal was apparently based on his position in a pre-trial filing—directly contrary to the position he takes now—that "the universally accepted definition of the word 'reward' denotes some sort of exchange." A-000172 (citing numerous dictionary definitions of "reward"). Second, Ryan did not challenge this instruction on direct appeal, and as explained above, any challenge is procedurally defaulted.[16] Third, this section of

[16] The primary case Ryan relies on, *Sun-Diamond Growers v. United States*, 526 U.S. 398 (1999), Br. 46, was decided eleven years before *Skilling*.

the instruction focused solely on the criminality of the bribe payer, not the public official, and so it did not apply to Ryan at all. Finally, taken as a whole, the instructions unmistakably informed the jury about the "in return" concept that defines bribery; the use of a single word "reward" in a single instruction did not "misguide the jury to [Ryan's] prejudice . . . ."*Cote*, 504 F.3d at 687.

The final bribery instruction informed the jury that giving and receiving a campaign contribution does not, on its own, violate the mail fraud statute, even if the contributor has business pending before the public official. A-000019. The instruction explained that a campaign contribution is criminal only "when a person gives and a public official receives a campaign contribution knowing that it is given in exchange for a specific official act. . . ."*Id.* Ryan objects only to the last sentence of the instruction, which stated that "[t]he intent of each party can be implied from their words and ongoing conduct."*Id.* The district court correctly rejected Ryan's challenge. A-000016-17.

Again, this argument, based on *McCormick,* is procedurally barred due to Ryan's failure to raise it on direct review. In any event, the instruction conformed to *McCormick*'s requirements. *McCormick* held that a campaign contribution violates the Hobbs Act only if it is paid "in return for an explicit promise" of an official act. Since *McCormick*, courts have made clear that an "explicit" promise means a "specific" promise. *See Evans*, 504 U.S. at 258

(upholding jury instruction referring to "[a] specific requested exercise of his or her official power"); *United States v. Siegelman*, 561 F.3d 1215, 1227 (11th Cir. 2009) (vacated on other grounds by *Scrushy v. United States*, 130 S. Ct. 3541 (2010)). In this case, the instruction tracked this language, telling the jury that a campaign contribution violates the mail fraud statute only if it is "given in exchange for a specific official act." A-000019.

While a *quid pro quo* relating to campaign contributions must be explicit, it need not be express. The instruction upheld in *Evans* said nothing about the *quid pro quo* being stated in express terms, and Justice Kennedy's concurrence explained that such a requirement would allow crimes to take place through "knowing winks and nods." *Evans*, 504 U.S. at 274 (Kennedy, J., concurring).[17] Lower courts have applied Justice Kennedy's reasoning in the context of campaign contributions. *See, e.g., Siegelman*, 561 F.3d at 1227; *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992). As the Ninth Circuit has recognized, "[a]n official may be convicted without evidence equivalent to a statement such as: 'Thank you for the $10,000 campaign contribution. *In return for it*, I promise to introduce your bill tomorrow.'" *United States v. Inunza*, 580

[17] Ryan asserts that the instruction as given "would criminalize many everyday campaign contributions." Br. 42. Ryan's characterization of exchanges of campaign contributions for specific official acts as everyday occurrences rather than as crimes is troubling, but inaccurate.

F.3d 894, 900 (9th Cir. 2009). Thus, Ryan's challenge to the campaign contribution instruction is meritless.[18]

The Instructions As a Whole Required Bribes

The district court held that three instructions—the conflict of interest instruction (A-000420), the *Bloom* instruction (A-000421),[19] and the state law instruction (A-000421)—were incorrect after *Skilling*, but that the errors were harmless beyond a reasonable doubt. A-000013-14, 19-21, 24. Read in context, rather than in isolation, these instructions were not erroneous; but in any event the district court's conclusion was correct; any error was not prejudicial. Based on the evidence, arguments, and the instructions as a whole, no reasonable jury would have convicted Ryan without concluding that Ryan took bribes and kickbacks.

Several instructions focus the jury's attention on conduct comprising bribes and kickbacks, and the district court explicitly and repeatedly directed the jury to read the instructions as a whole. The conflict of interest instruction and the *Bloom* instruction required the jury to consider, not only whether Ryan

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[18] Ryan also incorrectly suggests that campaign contributions were "the most substantial" benefits Warner provided Ryan. Br. 42. In fact, the evidence of Warner's fundraisers played a small role in the government's case, and the government mentioned it only briefly in its closing argument. Tr. 22959.

[19] This name refers to the Court's decision in *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998).

failed to disclose a conflict of interest and misused his official position for private gain, but also whether "the other elements of the mail fraud offenses [were] met." A-000420-21. This Court addressed the "other elements" provisions on direct review. There, the Court rejected Ryan's challenge to the conflict of interest instruction, 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.

This Court recognized that, in context and taken as a whole, the jury instructions required the government to prove not only that Ryan had an undisclosed conflict of interest, but that Ryan accepted the conflict of interest (in this case benefits from Warner and Klein) with the intent to perform official acts in return—in other words, Ryan agreed to take bribes.[20]

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[20] Ryan contends that the phrase "other elements of the mail fraud offenses" refers to the legal elements of mail fraud: a scheme to defraud, intent to defraud, and a mailing. Br. 27-28 n.8. But the subsequent instructions provide content to those elements—explaining, for instance, what constitutes a scheme to defraud (in this case, an agreement to take bribes). Ryan also suggests that this Court's interpretation of the jury instructions has been superseded by a contrary decision, *id.* at 28 n.8, but he does not explain what that decision is or how it is contrary. *Skilling* itself—which held that the honest services statute requires bribes—is not contrary to this Court's conclusion on direct appeal that the jury instructions for honest services in this case required

3. No Reasonable Jury Would Have Convicted Ryan For an Undisclosed Conflict of Interest without Finding that Ryan Knowingly Accepted Bribes.

Ryan focuses most of his attention on the conflict of interest instruction, which stated:

> 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 of 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.

A-000420.

The district court found that the only "personal or financial interest" Ryan had in the state contracts and leases he awarded to Warner and Klein were the bribes Warner and Klein paid Ryan to steer the contracts and leases to them. A-000039, 41. Ryan argues that the district court erred because the jury might have convicted him without finding that he accepted bribes based on his failure to disclose that the recipients of the contracts and leases he awarded were his friends, Br. 24-27, or his failure to disclose legitimate gifts that played no role in his decision to award the contracts and leases, *id.* 22-23, or his failure to disclose gifts provided solely in an effort to create goodwill, *id.* 22. These speculations bear little connection to the evidence and arguments presented at

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bribes.

trial and do him no good, as this Court's "inquiry is limited to a review of the case as it was presented to the jury and not how it might have been presented." *Messinger v. United States*, 872 F.2d 217, 221 (7th Cir. 1989) (quotations omitted). In light of the actual record, none of Ryan's hypotheticals withstand scrutiny.

In light of the evidence, no reasonable jury would have convicted Ryan merely for failing to disclose that Warner and Klein were his friends. The government offered no evidence that Ryan concealed only his friendship with Warner or Klein, and never suggested that the jury should convict on this ground—for good reason. Ryan's friendship with Warner was public information, *e.g.*, Tr. 2750-52, 8110, 11432-33, 11468, and Ryan and Klein had little relationship beyond the vacations Klein provided and the official actions Ryan took in return—and these began only after Ryan was elected SOS, Tr. 9409-10, 9421-22, 9431-32.

Not only did the jury never hear anyone argue that it should convict Ryan for concealing a friendship, they heard just the opposite. Both defendants argued at length that the jury must acquit because the benefits between Ryan and Warner were just favors between friends, *e.g.*, Tr. 23194,[21] and the government

[21] For example, defense counsel argued, "[W]e've come to the point in this courtroom where they want this man to become a convicted felon and his life destroyed because he had friendships that resulted in the normal things that happen every day

argued that the benefits were "corrupt payments" and official action taken in exchange, *e.g.*, Tr. 22836, 23085, 23708, 23763-64. And while no evidence showed that Ryan merely concealed his friendships with Warner and Klein, overwhelming evidence established that Ryan accepted from Warner and Klein a stream of corrupt benefits in return for state contracts and leases. In short, as the district court found, Ryan's conviction demonstrated that the jury chose to credit the government's version of events: that Ryan took bribes. A-000038-39, 40-41, 50-51.

Finally, as the district court noted, the only reference in the jury instructions to benefits received from friends was the statement that benefits based on friendship were *not* a basis for conviction. The state law instruction explained that a public official could properly receive "anything provided on the basis of personal friendship, unless the officer had reason to believe the gift was provided because of the official position of the officer, and not because of friendship." A-000421. Thus, the instructions eliminated any danger that the jury would convict Ryan merely for failing to disclose a gift based on friendship.

Nor would a reasonable jury have convicted Ryan solely for failing to disclose that he had received "gifts" from Warner and Klein in light of the evidence and arguments presented at trial. The evidence clearly refuted that

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in life."Tr. 23194.

argument. It is far-fetched to say the least to argue that the jury may have believed that, when Warner told Udstuen at the beginning of Ryan's tenure as SOS that he was going to "take care of George" as part of an arrangement in which both he and Udstuen would profit from lobbying business obtained as a result of Warner's relationship with Ryan, Tr. 11620-22, he was referring to "gifts" based on friendship. And the benefits funneled to others at Ryan's direction—including the kickbacks to Udstuen from the ADM and IBM lobbying fees, and the kickbacks to Swanson from the Viisage fees—did not even purport to take the form of "gifts."

As the government emphasized to the jury in its rebuttal argument, there was no friendly exchange of gifts between Ryan and Warner and Klein. Tr. 23763-64. Ryan never paid for Warner's or Klein's vacations, or invested in their relatives' companies, or wrote checks to their family members. Tr. 23763-64. In return for benefits provided by Warner and Klein, Ryan gave only one thing: state business. The elaborate efforts Ryan, Warner, Klein made to cover up these transactions proved that the benefits Ryan accepted were bribes, not gifts.

Nor did the government ever ask the jury to convict Ryan for concealing mere gifts. To the contrary, the defense repeatedly asked the jury to *acquit* on that ground, Tr. 23193 (" . . . friends to exchange gifts sometimes. That's part of

friendship.") In response, the government argued that the financial benefits provided by Warner and Klein were "corrupt payments," for which Ryan sold "his office brick by brick." Tr. 22836 ,22971, 23083-85, 23817-18, 23089, 23826, 22971. These arguments, as the district court found, presented the jury with a clear choice between believing that benefits to Ryan were gifts or corrupt payments, and they chose the latter.

Finally, Ryan submits that the benefits Warner and Klein provided could have been to secure general good will rather than particular official actions. Ryan argued this to the jury as well, contending that "[i]t's a crime if George Ryan accepted benefits to perform official acts. But it's not a crime if all George Ryan did is try to do things that sometimes benefitted political supporters." Tr. 23159-60.

The jury rejected this defense because the evidence refuted it. Warner and Klein did not seek goodwill; they requested, and Ryan delivered, specific state contracts and leases worth millions of dollars.

At bottom, all of Ryan's arguments about the conflict of interest instruction boil down to a single contention: the jury might have believed that the contracts and leases Ryan gave Warner and Klein were not in return for the substantial benefits they had given him. Ryan made the same argument to the jury, but the evidence refuted it, and the jury rejected it.

Instructions Regarding State Law Duties

The jury was instructed about a number of state laws that governed Ryan's conduct. A-000421 ("the state law instruction"). As this Court has recognized, the purpose of the instruction was to aid in defining the duties Ryan owed to the people of Illinois. *See Warner*, 498 F.3d at 698 (the "cited provisions of Illinois law identified for the jury various ways in which a public official could 'misuse his fiduciary relationship,'"); *United States v. Segal*, 495 F.3d 826, 834 (7th Cir. 2007) ("state laws are useful for defining the scope of fiduciary duties"). In addition, as this Court explained on direct appeal, "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." *Warner*, 498 F.3d at 698. Twice, the instructions informed 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." A-000421. After the second such admonishment, the instructions related the following:

> Where a public official or employee misuses his official position (or material, non-public 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 offenses have been met.

A-000421 ("the *Bloom* instruction").

The district court carefully examined the instructions and concluded that "the state law instruction did not permit the jury to convict Mr. Ryan of a federal offense solely for the violations of state law." A-000021. Ryan does not appear to challenge that conclusion. Ryan does, however, claim that the state law instruction, in combination with the *Bloom* instruction, permitted the jury to convict Ryan for a misuse of office for private gain that is not a bribe. The district court shared this concern, and found that the *Bloom* instruction was in error. *Id.*

Ryan points to the Supreme Court's decision in *Black*, which held that the *Bloom* instruction was incorrect in light of *Skilling*. *Black v. United States*, 130 S. Ct. 2963, 2968 (2010). But *Black* held that the *Bloom* instruction was error at least in part because "[t]he scheme to defraud alleged here did not involve any bribes or kickbacks." *Black,* 130 S. Ct. at 2968 n.7. In this case, the scheme did involve bribes and kickbacks, and the government argued that Ryan misused his office by taking bribes—telling the jury, for example, that Ryan was "selling his office brick by brick."Tr. 22971. As with the conflict of interest instruction, Ryan contends that the jury might have concluded that Ryan merely did favors for friends, and failed to disclose the benefits his friends gave him. But, as discussed above, if the jury had believed that, it would have acquitted Ryan. Based on the

facts of this case and the arguments of the parties, Ryan's only misuse of office for private gain was accepting bribes to award contracts and leases. No reasonable jury would have found the former without also finding the latter.

4. No Error in the Honest Services Fraud Instructions Caused Prejudice Given That Ryan Also Committed Money-Property Fraud.

Even if this Court were to find that the honest services instructions were flawed, the Court should affirm Ryan's conviction because any reasonable jury that convicted Ryan of honest services fraud would also have convicted him of money-property fraud—a crime about which the jury was correctly instructed.[22] Ryan committed money-property fraud by awarding state money to Warner and Klein while concealing and lying about the bribes Warner and Klein paid Ryan in return.[23]

Post-McNally Money-Property Fraud Decisions

After the Supreme Court invalidated the honest services theory in *McNally v. United States*, 483 U.S. 350 (1987), numerous decisions from this

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[22] On direct appeal, Ryan challenged neither the jury instructions nor the sufficiency of the evidence with respect to money-property fraud, and he therefore has defaulted any such arguments.

[23] Ryan assumes for the sake of argument that if he concealed bribes in this context he committed money-property fraud (as well as honest services fraud). Ryan is correct that if he is guilty of honest services fraud, the money-property theory does not "add to his guilt," Br. 36, but it does provide another reason to find that any errors in the honest services instructions were harmless, and a reason this Court has repeatedly endorsed in prior cases.

Court and others 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*, 872 F.2d at 222; *United States v. Saks*, 964 F.2d 1514, 1521 (5th Cir. 1992). More recently (and following *Skilling*), in *Black*, this Court affirmed a conviction that was not based on a bribe scheme, after concluding that any reasonable jury that convicted the defendants of honest-services fraud would also have convicted them of money-property fraud. *United States v. Black*, 625 F.3d 386, 393 (7th Cir. 2010). The same analysis applies here, where state money and property was the object of the fraud.[24]

[24] Ryan argues that the Supreme Court silently overruled all of the previously cited precedents in *Neder*, because, he says, after *Neder*, it was necessary to show that the jury found all the elements of common law fraud, including an intent to cause harm. Br. 33 n.10. *Neder* itself does not discuss intent to harm, and Ryan cites no case in support of this interpretation of *Neder*'s holding. "This Circuit has never required the government to establish a contemplated harm to the victim," *United States v. Fernandez*, 282 F.3d 500, 506-07 (7th Cir. 2002), either before or after *Neder*. Indeed,

Money-Property Fraud Was Presented to the Jury.

Ryan claims that the jury did not hear about money-property fraud and that the government and the district court invented it for the first time after Ryan filed his § 2255 motion. Br. 33-36. That is incorrect. The indictment charged that Ryan devised and participated in a single 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. . . ."A-000081. The mail fraud counts alleged specific mailings of state money, or money derived from state contracts, in furtherance of the single scheme. A-000121-27.

The government argued the money property theory 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." Tr. 23771. Far from making only three "allusions" to money-property fraud, as Ryan contends, Br. 35, the government repeatedly argued that Ryan deprived the state of money through material misrepresentations. The government emphasized Ryan's

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in *Black*, this Court found harmless error without discussing such a requirement of money-property fraud. 625 F.3d at 393; *accord United States v. Welch*, 327 F.3d 1081, 1104-06 (10th Cir. 2003) (holding that intent to harm is not an element of fraud); *United States v. Kenrick,* 221 F.3d 19, 28-29 (1st Cir. 2000) (*en banc*) ("Commentators of the nineteenth and twentieth centuries agree that common-law fraud has no additional 'intent to harm' requirement"). In any event, this argument was waived by virtue of Ryan's failure to press it on direct review.

misrepresentations throughout its argument. *See, e.g.*, Tr. 22892-93, 22904-05, 23130-32. The government also told the jury that through these misrepresentations, Ryan deprived the state of money. *See, e.g.,* Tr. 22892-93, 22901, 22903-04, 22913-14, 22925-26, 22930-31, 22941. For example, the government 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 contracts and leases. Tr. 23097, 23099. The government emphasized the loss to the state, explaining that the state was "ripped off" for $173,000 for the South Holland and Joliet leases, Tr. 22914, 22899, and, more generally, that "Warner, Swanson, Klein t[ook] in thousands and thousands of dollars on these leases," while "[t]he state was a loser." Tr. 22892-93.

Finally, the district court instructed the jury on money-property fraud, A-000419, informing the jury that the money-property fraud was part of "a single scheme to defraud." *Id*. In short, money-property fraud was presented to the jury.

Ryan Deprived the State of Money by Concealing Bribes and Kickbacks.

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. *Sorich*, 523 F.3d at 713; *United States v. Leahy*, 464 F.3d 773, 788 (7th Cir. 2006); *United States v. Barber*, 881 F.2d 345, 349 (7th Cir. 1989).

The object of Ryan's fraud was state money: Ryan gave state money to Warner and Klein by awarding them, or their clients, lucrative state contracts and leases. Ryan awarded this state money through material misrepresentations. As outlined above, Ryan concealed from his subordinates in the SOS and from the public the bribes and kickbacks Warner and Klein paid him, and Ryan also lied about the bribes by failing to report them on his annual statements of economic interest. This is fraud. *See United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003) (holding that mayor's failure to disclose kickbacks in statements of economic interest was mail fraud because it "hoodwinked Calumet City out of the money he received as kickbacks."). In addition to the false statements of economic interest, Ryan and his co-schemers engaged in multiple acts of concealment, including Warner—with Ryan's knowledge—burying his name in the paperwork on the Bellwood and Joliet leases; Warner using a front man on the Viisage contract; Ryan falsely telling

a subordinate to withdraw the specifications on the ADM contract for safety reasons, and instructing the subordinate to do so quietly; and Ryan creating a sham paper trail of checks to Klein to make it appear that he had reimbursed Klein for the Jamaican vacations.

These misrepresentations were material, because they were capable of influencing the SOS office and the state. Indeed, it is precisely because the information required by statements of economic interest is material that Illinois requires its public officials to file such statement. *See Genova*, 333 F.3d at 759 (relying on statements as misrepresentations in fraud scheme); *United States v. Bush*, 522 F.2d 641, 647 (7th Cir. 1975) (same). State officials might have blocked or cancelled the contracts and leases to Warner and Klein if the officials knew that Ryan was awarding contracts and leases to men who had paid bribes and kickbacks to get them, or officials might have renegotiated those contracts and leases on terms more favorable to the state. And as in *Genova*, the misrepresentations furthered the scheme to defraud, because "Keeping a lid on the [bribes and] kickbacks was essential to permit their continuation." *Genova*, 333 F.3d at 759.

Ryan's misrepresentations also exposed the state to the risk of loss and cost the state money. As discussed above, the evidence established that the state lost hundreds of thousands of dollars on the South Holland, Bellwood, and Joliet

leases. Ryan caused the state to continue to pay ADM for a contract based on specifications that were not necessary. And the Viisage and IBM contracts were essentially no-bid contracts steered to Warner's clients. 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*, 621 F.3d 312, 328 (3d Cir. 2010); *United States v. Welch*, 327 F.3d. 1081, 1108 (10th Cir. 2003).

This Court and others have repeatedly affirmed convictions despite errors related to honest services fraud instructions, where the defendants' conduct also constituted money-property fraud. *See Moore*, 865 F.2d at 153-54 (affirming conviction because the government "plainly lost money or property as a result of the proven bid-rigging scheme" involving a $10,000 bribe, and therefore 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."); *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"); *Perholtz*, 836 F.2d at 558

(finding harmless error where kickback scheme caused the government to overpay for a subcontract). The same analysis applies here.[25]

5. There Was No Prejudicial Spillover.

Ryan argues that he was prejudiced by the admission of certain categories of evidence that he claims would be inadmissible after *Skilling*. Br 57. The district court examined each category of evidence, and found that only one—evidence of Ryan's misuse of government employees and resources for campaign purposes—would not have been admissible post-*Skilling*, and that any error in admitting this evidence was harmless beyond a reasonable doubt.[26] A-000057. Because no reasonable juror would change its view of the case if the challenged evidence were excluded, the district court's determination was correct. *See United States v. Owens*, 424 F.3d 649, 656 (7th Cir.2005).

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[25] Ryan's concealment of and lies about the substantial and ongoing benefits Warner and Klein provided him were material because they were capable of influencing state officials in their decisions about whether to award, and whether to continue, state contracts and leases on favorable terms to people who had showered Ryan with substantial benefits. By lying about who state money was going to, and what those people had done for Ryan, Ryan obtained state money "through false pretenses," or fraud. *See Leahy*, 464 F.3d at 788; *United States v. Lack*, 129 F.3d 403, 406 (7th Cir. 1997). This fraud involved not only failures to disclose, but active concealment and lies—in other words, material misrepresentations—about benefits he received from Warner and Klein that caused the state to spend money it might not have had the true facts been known.

[26] In the government's view, no evidence admitted at trial was rendered inadmissible by *Skilling*.

Acceptance of Gifts Over $50.

As the indictment alleged, Ryan imposed a regulation prohibiting SOS employees from accepting gifts over $50, and he also had a personal policy against accepting such gifts. A-000071; Tr. 2888-90, 18120. Ryan repeatedly violated these restrictions. As the district court found, this evidence would be admissible post-*Skilling* under either a bribery or money-property fraud theory because it relates to Ryan's intent to defraud by accepting gifts in return for state action. A-000054. Ryan claims the district court's finding lacked 404(b) analysis. Br. 55. But this was not "other acts" evidence falling under Rule 404(b); Ryan's violation of the rules was part of the charged offenses. In committing his fraud against the people of Illinois, Ryan knowingly violated gift rules, and this helped prove he fully intended to defraud.

Gramm Campaign Fund and Use of State Resources for Campaign Purposes

Ryan was charged with failing to report on his tax returns a consulting fee from Phil Gramm's presidential campaign, A-000142-43, A-000147-48, and, therefore, evidence of Ryan's dealings with the Gramm campaign was admissible on those tax charges. Further, the indictment alleged that Ryan and others schemed to defraud the State of Illinois of money and property in various ways, one of which was using state resources and employees for campaigns, A-000116,

including the Gramm campaign. A-000117. Thus, evidence of Ryan's actions in the Gramm campaign and other campaigns was relevant to the alleged pecuniary fraud. In its ruling on Ryan's § 2255 motion, the district court acknowledged that evidence of use of state resources for campaigns was relevant to the pecuniary fraud theory, but it rejected this basis for admissibility because there was no mailing in furtherance of this alleged misconduct. A-000057. The district court's conclusion is legally incorrect. This Court has held that evidence of all parts of a charged fraud scheme are admissible, even those parts not furthered by mailings. In *United States v. Boone*, 628 F.3d 927 (7th Cir. 2010), this Court reaffirmed its holding in *United States v. Lanas*, 324 F.3d 894 (7th Cir. 2003), where it rejected "the misperception that the scope of a mail fraud scheme is defined by the mailing charged in the indictment," and held that "even acts that occurred well before the [charged] mailings, and which involved different participants in the scheme, could be introduced to prove the overarching scheme." *Boone*, 628 F.3d at 934. Since Ryan was charged with a pecuniary fraud scheme that encompassed misuse of state resources for campaigns, including the Gramm campaign, evidence supporting these allegations was admissible as direct evidence of the scheme, regardless of whether a mailing was alleged in furtherance of these parts of the scheme.

Discharge and Reassignment of SOS Employees

Evidence that Ryan dismantled the SOS Inspector General's ("IG") Office was admissible to prove Ryan's intent to defraud the state of money and property. Ryan used his massive campaign war chest both for campaign purposes and for personal purposes (which led to the charged tax violations). By far the most lucrative source of campaign funds for Ryan were SOS employees, who were expected to do campaign work, often on state time, and to sell campaign event tickets. Tr. 3302-04. Starting in 2003, Ryan was personally notified that the SOS IG's Office was investigating wrongdoing by SOS employees linked to campaign fundraising, including campaign funds raised through bribes paid for licenses. Tr. 3503-11,14526-28,14533-53. The Inspector General was an old friend of Ryan's who tried to end the investigations, Tr. 3502-03,18112, especially an investigation into a well-publicized fatal accident that was caused by a truck driver who obtained his license from an SOS employee acclaimed for raising large amounts of campaign contributions. Tr14570-71. One month after the fatal accident, Ryan and Fawell discussed getting rid of the "freelancing" investigators. Fawell wanted to "get someone in there who won't screw our friends, won't ask about FR [fundraising] tickets . . . ." Tr. 3552. In fact, several months later, the IG investigators who had initiated the investigations into SOS employees' improper activities on behalf of Ryan's

campaign were fired or reassigned to non-investigative positions. Tr. 14179-80. In this way, Ryan preserved his improper use of SOS employees for campaign activities, especially fundraising. This was direct evidence of Ryan's intent to continue to defraud the state of money and property, by using state employee resources for his personal benefit.

Low-Digit License Plates

When Ryan became SOS, Warner and Ryan discussed how low-digit license plates were "plums" and "shouldn't just be given out." Tr. 7808. As the government argued in a pre-trial filing, and again in closing argument, evidence that Ryan allowed Warner to assign large numbers of low-digit plates and maintain a cash kitty in the SOS office to pay plate fees showed Warner's "unique, unprecedented access to Ryan. . . . [and that] Ryan accorded Warner a unique level of access to SOS decisionmaking." R. 53 Att. 6 at 6; *see also* Tr. 23004-05. Because this evidence showed the co-schemers' relationship in SOS operations, it would be admissible as evidence of the honest services fraud scheme even post-*Skilling*. Evidence of Ryan himself assigning low-digit plates was confined to one witness, Tony DeSantis, who testified about personal checks he wrote to Ryan and Ryan family members that were at issue in two tax counts and one false statement count. Tr. 6899-6900; A-000133, A-000144, A-000149. DeSantis also testified that in 1998 he sent two $500 checks to Ryan and Ryan's

wife as a Christmas present and because Ryan was good to him by giving him low-digit plates. A week or so later, Ryan's office offered DeSantis a low-digit plate. Tr. 6917, 6919-20. The government told the jury that in doing so, Ryan was "influenced by his receipt of the DeSantis money." Tr. 22974. This evidence is admissible after *Skilling* as evidence of Ryan's acceptance of a bribe.

Grayville Prison

The charged fraud scheme included allegations that Ryan used his office to benefit Ron Swanson, who showered Ryan and his family with vacations and gifts, including by leaking confidential information to Swanson regarding plans for a new prison. A-000105, A-000106-08, A-00129. Ryan did not challenge the admission of this evidence at trial and, as the district court determined, the evidence was obviously admissible because it related directly to a charged count, A-000056, the allegations of which were proper under *Skilling*. Neither *Skilling* nor the district court's post-trial finding that the evidence was insufficient to support a conviction on this count rendered evidence of this incident inadmissible. In any event, as the district court observed, the Grayville evidence "related only to a discrete occurrence, and . . . was not unfairly prejudicial."A-000056.

Finally, and with respect to all of Ryan's evidentiary challenges, even if this Court were to conclude that some of this evidence is inadmissible after

Skilling, or that some of it should have been admitted with a limiting instruction, in the context of all the evidence the jury heard throughout this six-month trial, the admission of this evidence did not affect Ryan's "substantial rights," and so any error is harmless. *See United States v. Jones*, 389 F.3d 753, 758 (7th Cir. 2004).

II. The Evidence Was Sufficient to Establish that Ryan Took Bribes in Exchange for State Action.

Finally, Ryan argues the evidence was insufficient to convict him a bribery. Br. 48-53. Because the evidence was not only sufficient, but overwhelming, this argument fails.

A. Standard of Review

Ryan faces a "daunting task" in establishing that the evidence supporting his conviction because this Court's review is "exceedingly deferential." *United States v. Blanchard*, 542 F.3d 1133, 1154 (7th Cir. 2008) (internal quotations omitted). This Court "view[s] the evidence and all reasonable inferences derived therefrom in the light most favorable to the government," and will "overturn a verdict only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* (internal quotations omitted). "In other words, [the Court] will reverse only if the

fact finder's take on the evidence was wholly irrational." *Id.* (internal quotations omitted).

B. Analysis

Ryan does not come close to meeting the applicable standard. Ryan tries to dismiss evidence that he took bribes from Klein, for example, by claiming the evidence "can be readily explained by other hypotheses." Br 51. But that argument addresses the wrong question. "The existence of an innocent explanation does not foreclose a jury from finding guilt beyond a reasonable doubt." *United States v. Harris*, 271 F.3d 690, 704 (7th Cir. 2001). As the district court correctly held, and as is demonstrated in the previous discussion, the evidence presented at trial was more than sufficient to establish that Ryan accepted financial benefits in exchange for state action. The evidence at trial that Ryan took bribes was not only sufficient, it was overwhelming.

CONCLUSION

For all of the foregoing reasons, the government respectfully requests that this Court affirm the district court's denial of Ryan's § 2255 motion.

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RULE 32 CERTIFICATION

I hereby certify that:

1. This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 16989 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the WordPerfect X3 proportionally-spaced typeface of Century Schoolbook with 13-point font in the text and 12-point font in the footnotes.

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CIRCUIT RULE 31(e) CERTIFICATION

Pursuant to Circuit Rule 31(e), I hereby certify that I have furnished a digital version of our brief and all available appendix items in nonscanned PDF format.

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CERTIFICATE OF SERVICE

I, Marc Krickbaum hereby certify that on March 15, 2011, I caused a copy of the foregoing BRIEF OF THE UNITED STATES, and a computer disk containing an electronic copy of the same in Adobe Acrobat format, to be mailed in a first-class, postage-paid envelope to the following individuals:

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