UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

MICHAEL W. DOBBINS
CLERK

312-435-5670

January 5, 2011

Mr. Gino J. Agnello, Clerk
U.S. Court of Appeals-Seventh Circuit
219 South Dearborn Street-Room 2722
Chicago, Illinois 60604

RE: Ryan, Sr. v. United States of America

U.S.D.C. DOCKET NO. : 10cv5512

U.S.C.A. DOCKET NO. : 10-3964

Dear Mr. Agnello:

Please find attached the original record on appeal consisting of the following:

ELECTRONIC VOLUME(S) OF PLEADING(S): 1

ELECTRONIC VOLUME(S) OF TRANSCRIPT(S): 1

ELECTRONIC VOLUME(S) OF DEPOSITION(S):

EXHIBITS:

VAULT ITEMS:

OTHER (SPECIFY):

SPECIAL NOTE:

Please acknowledge date of receipt of the above mentioned materials on the attached copy of this letter.

Very truly yours,

Michael W. Dobbins, Clerk

By:_____
E.Fletcher, Deputy Clerk

I, MICHAEL W. DOBBINS, CLERK of the United States District Court for the Northern District of Illinois, do hereby certify to the United States Court of Appeals, for the Seventh Circuit, that the documents submitted herewith and annexed hereto are the original papers filed and entered of record in my office, on the dates in the List of Documents, and together with a true copy of docket entries as they appear in the official dockets in this office, consisting of:

1 Electronic Volume of Pleadings
1 Electronic Volume of Transcripts

In the cause entitled: Ryan, Sr. v. United States of America

USDC NO. : 10cv5512

USCA NO. : 10-3965

IN TESTIMONY WHEREOF, I hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 5th day of January.

MICHAEL W. DOBBINS, CLERK

By: _____
E. Fletcher, Deputy Clerk

A TRUE COPY-ATTEST
MICHAEL W. DOBBINS, CLERK

By s/ E. FLETCHER
DEPUTY CLERK
U.S. DISTRICT COURT, NORTHERN
DISTRICT OF ILLINOIS

DATE: JANUARY 5, 2011

United States District Court

Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

I, MICHAEL W. DOBBINS, CLERK of the United States District Court for the Northern District of Illinois, do hereby certify to the United States Court of Appeals, for the Seventh Circuit, that the following is transmitted as part of the record on appeal in the cause entitled: *Ryan, Sr. v. United States of America*

USDC No.: 10cv5512

USCA No.: 10-3964

FILED DATE	ITEM NO.	DESCRIPTION
09/27/10	15	Electronic Transcript of Proceedings held 9/9/10.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Chicago Illinois, this 5th day of January .

MICHAEL W. DOBBINS, CLERK

By:_____
E.Fletcher, Deputy Clerk

A TRUE COPY-ATTEST
MICHAEL W. DOBBINS, CLERK

By s/ E. FLETCHER
DEPUTY CLERK
U.S. DISTRICT COURT, NORTHERN
DISTRICT OF ILLINOIS

DATE: JANUARY 5, 2011

APPEAL, BROWN, TERMED

United States District Court
Northern District of Illinois - CM/ECF LIVE, Ver 4.2 (Chicago)
CIVIL DOCKET FOR CASE #: 1:10-cv-05512
Internal Use Only

Ryan, Sr. v. United States of America
Assigned to: Honorable Rebecca R. Pallmeyer
Case in other court: 10-03964
Cause: 28:2255 Remedies on motion attacking sentence

Date Filed: 08/31/2010
Date Terminated: 12/21/2010
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

Plaintiff

George H. Ryan, Sr.

represented by **Dan K. Webb**
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600
Email: dwebb@winston.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

Matthew Robert Carter
Winston & Strawn LLP
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Chicago, IL 60601
(312) 558-3181
Email: mcarter@winston.com
ATTORNEY TO BE NOTICED

V.

Defendant

United States of America represented by

Laurie J Barsella
United States Attorney's Office (NDIL)
219 South Dearborn Street
Suite 500
Chicago, IL 60604
(312) 353-5300
Email: laurie.barsella@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Marc Krickbaum
U.S. Attorney's Office
219 South Dearborn Street
Suite 500
Chicago, IL 60604
(312) 469-6052
Email: marc.krickbaum2@usdoj.gov
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/31/2010	1	MOTION to Vacate, Set Aside or Correct Sentence (2255) filed by George H. Ryan, Sr. (Webb, Dan) (Entered: 08/31/2010)

08/31/2010	2	ATTORNEY Appearance for Plaintiff George H. Ryan, Sr. by Dan K. Webb (Webb, Dan) (Entered: 08/31/2010)
08/31/2010	3	CIVIL Cover Sheet (Webb, Dan) (Entered: 08/31/2010)
08/31/2010	4	ATTORNEY Appearance for Plaintiff George H. Ryan, Sr. by James R. Thompson (Thompson, James) (Entered: 08/31/2010)
08/31/2010	5	ATTORNEY Appearance for Plaintiff George H. Ryan, Sr. by Greg J. Miarecki (Miarecki, Greg) (Entered: 08/31/2010)
08/31/2010	6	ATTORNEY Appearance for Plaintiff George H. Ryan, Sr. by Matthew Robert Carter (Carter, Matthew) (Entered: 08/31/2010)
08/31/2010	7	MOTION by Plaintiff George H. Ryan, Sr. for leave to file *Instanter, A Brief in Excess of Fifteen Pages* (Attachments: # 1 Exhibit A)(Webb, Dan) (Entered: 08/31/2010)
08/31/2010	8	MOTION by Plaintiff George H. Ryan, Sr. to Set Bail (Webb, Dan) (Entered: 08/31/2010)
08/31/2010	9	MEMORANDUM by George H. Ryan, Sr. in support of motion for miscellaneous relief 8 (Attachments: # 1 Exhibit 1-2)(Webb, Dan) (Entered: 08/31/2010)
08/31/2010		CASE ASSIGNED to the Honorable Rebecca R. Pallmeyer. Designated as Magistrate Judge the Honorable Geraldine Soat Brown. (daj,) (Entered: 08/31/2010)
09/01/2010	10	ATTORNEY Appearance for Plaintiff George H. Ryan, Sr. by Andrea D. Lyon (Lyon, Andrea) (Entered: 09/01/2010)
09/02/2010	11	DESIGNATION of Laurie J Barsella as U.S. Attorney for Defendant United States of America (Barsella, Laurie) (Entered: 09/02/2010)
09/07/2010	12	NOTICE of Motion by Dan K. Webb for presentment of motion for miscellaneous relief 8 , motion for leave to file 7 before Honorable Rebecca R. Pallmeyer on 9/9/2010 at 10:00 AM. (Webb, Dan) (Entered: 09/07/2010)
09/07/2010	13	DESIGNATION of Marc Krickbaum as U.S. Attorney for Defendant United States of America (Krickbaum, Marc) (Entered: 09/07/2010)
09/09/2010	14	MINUTE entry before Honorable Rebecca R. Pallmeyer: Motion hearing held Motion pursuant to 28 U.S.C. §2255 to vacate, set aside or correct sentence by a person in federal custody 1 and motion to set bail 8 entered and continued for briefing. Response to be filed by or on 10/7/2010; reply 10/21/2010; hearing set for 11/1/2010 at 10:30 AM. Movant's motion for leave to file, instanter, a brief in excess of fifteen pages 7 granted. Mailed notice (etv,) (Entered: 09/09/2010)
09/27/2010	15	TRANSCRIPT OF PROCEEDINGS held on 9/9/10 before the Honorable Rebecca R. Pallmeyer. Court Reporter Contact Information: FRANCES WARD (312)435-5561 or frances_ward@ilnd.uscourts.gov. IMPORTANT: The transcript may be viewed at the court's public terminal or

		purchased through the Court Reporter FRANCES WARD (312)435-5561 before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter FRANCES WARD (312)435-5561 or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings. Redaction Request due 10/18/2010. Redacted Transcript Deadline set for 10/28/2010. Release of Transcript Restriction set for 12/27/2010. (Ward, Frances) (Entered: 09/27/2010)
10/07/2010	16	MOTION by Defendant United States of America for leave to file excess pages (Attachments: # 1 Exhibit)(Krickbaum, Marc) (Entered: 10/07/2010)
10/07/2010	17	RESPONSE by United States of Americain Opposition to MOTION by Plaintiff George H. Ryan, Sr. to Set Bail 8 (Krickbaum, Marc) (Entered: 10/07/2010)
10/13/2010	18	MINUTE entry before Honorable Rebecca R. Pallmeyer: Government's motion for leave to file, instanter, a brief in excess of fifteen pages 16 granted. Mailed notice (etv,) (Entered: 10/13/2010)
10/13/2010	19	RESPONSE by United States of America to defendant's motion to vacate/set aside/correct sentence pursuant to 28 U.S.C. (2255) 1 . (mjc,) (Entered: 10/14/2010)
10/18/2010	20	MOTION by Plaintiff George H. Ryan, Sr. for extension of time to file response/reply as to Response 19 *(Agreed)* (Miarecki, Greg) (Entered: 10/18/2010)
10/18/2010	21	NOTICE of Motion by Greg J. Miarecki for presentment of motion for extension of time to file response/reply, motion for relief 20 before Honorable Rebecca R. Pallmeyer on 10/20/2010 at 08:45 AM. (Miarecki, Greg) (Entered: 10/18/2010)
10/19/2010	22	MINUTE entry before Honorable Rebecca R. Pallmeyer: Agreed motion for extension of time to reply to Government's response to Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 20 granted to and including 11/4/2010. Oral argument set for 11/1/2010 is stricken and reset to 11/22/2010 at 10:00 AM. Mailed notice (etv,) (Entered: 10/19/2010)
11/04/2010	23	ATTORNEY Appearance for Plaintiff George H. Ryan, Sr. by Albert W Alschuler (Alschuler, Albert) (Entered: 11/04/2010)
11/04/2010	24	MOTION by Plaintiff George H. Ryan, Sr. for leave to file *Instanter, a Brief in Excess of Fifteen Pages* (Attachments: # 1 Exhibit A)(Alschuler, Albert) (Entered: 11/04/2010)
11/04/2010	25	NOTICE of Motion by Albert W Alschuler for presentment of motion for leave to file 24 before Honorable Rebecca R. Pallmeyer on 11/22/2010 at 10:00 AM. (Alschuler, Albert) (Entered: 11/04/2010)
11/04/2010	26	REPLY by George H. Ryan, Sr. to MOTION by Plaintiff George H. Ryan, Sr. to Set Bail 8 (Alschuler, Albert) (Entered: 11/04/2010)

11/09/2010	27	MINUTE entry before Honorable Rebecca R. Pallmeyer: Movant's motion for leave to file, instanter, a brief in excess of fifteen pages 24 is granted.Mailed notice (mjc,) (Entered: 11/10/2010)
11/09/2010	28	REPLY by movant George H. Ryan, Sr. in support of his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. 2255. (mjc,) (Entered: 11/10/2010)
11/22/2010	29	MINUTE entry before Honorable Rebecca R. Pallmeyer: Oral argument on motion held on 11/22/2010. Case taken under advisement. Ruling to be issued shortly. Mailed notice (tlp,) (Entered: 11/24/2010)
12/15/2010	30	MOTION by Plaintiff George H. Ryan, Sr. for leave to file *a Supplement to His Motion to Set Bail* (Attachments: # 1 Exhibit A)(Lyon, Andrea) (Entered: 12/15/2010)
12/15/2010	31	NOTICE of Motion by Andrea D. Lyon for presentment of motion for leave to file 30 before Honorable Rebecca R. Pallmeyer on 12/22/2010 at 08:45 AM. (Lyon, Andrea) (Entered: 12/15/2010)
12/20/2010	32	MINUTE entry before Honorable Rebecca R. Pallmeyer: Ryan's motion for leave to supplement his motion to set bail 30 granted. Mailed notice (etv,) (Entered: 12/20/2010)
12/21/2010	33	MINUTE entry before Honorable Rebecca R. Pallmeyer: Enter Memorandum Opinion and Order. Ryan's motion to vacate, set aside, or correct his sentence 1 is denied. Ryan's motion to set bail 8 is also denied. (For further detail see separate order.) Civil case terminated. Mailed notice (etv,) (Entered: 12/21/2010)
12/21/2010	34	MEMORANDUM Opinion and Order Signed by the Honorable Rebecca R. Pallmeyer on 12/21/2010: Mailed notice (etv,) (Entered: 12/21/2010)
12/21/2010	35	ENTERED JUDGMENT on 12/21/2010: Mailed notice (etv,) (Entered: 12/21/2010)
12/22/2010	36	MINUTE entry before Honorable Rebecca R. Pallmeyer: In Skilling v. United States, 130 S. Ct.2896 (2010), the Supreme Court concluded that the law prohibiting honest services mail fraud must be limited to bribery and kickback schemes. Petitioner urges that his 2006 conviction for honest services mail fraud must be overturned. This court has concluded that the wrongdoing that the government proved at trial falls within the limits imposed by Skilling and that any error in the instructions was harmless. In the alternative, the conviction may be upheld because the evidence established pecuniary fraud. The court concludes, however, that Petitioner has made a substantial showing of the denial of due process and therefore grants his petition for a certificate of appealability. Mailed notice (etv,) (Entered: 12/22/2010)
12/27/2010	37	NOTICE of appeal by George H. Ryan, Sr. regarding orders 34 , 35 Filing fee $ 455, receipt number 0752-5553704. (Alschuler, Albert) (Entered: 12/27/2010)

12/28/2010	38	TRANSMITTED to the 7th Circuit the short record on notice of appeal 37 . Notified counsel (gel,) (Entered: 12/28/2010)
12/28/2010	39	ACKNOWLEDGEMENT of receipt of short record on appeal regarding notice of appeal 37 ; USCA Case No. 10-3964. (gcy,) (Entered: 12/29/2010)
12/28/2010	40	NOTICE of Case Opening. USCA, 10-3964. (gcy,) (Entered: 12/29/2010)

KEY

All circled items are included in this record. (and/or)
All crossed out items are not included on the record.
S/C: These items are sent under a separate certificate.
N/A: These items are not available.

APPEAL, BROWN, TERMED

United States District Court
Northern District of Illinois − CM/ECF LIVE, Ver 4.2 (Chicago)
CIVIL DOCKET FOR CASE #: 1:10−cv−05512
Internal Use Only

Ryan, Sr. v. United States of America
Assigned to: Honorable Rebecca R. Pallmeyer
Case in other court: 10−03964
Cause: 28:2255 Remedies on motion attacking sentence

Date Filed: 08/31/2010
Date Terminated: 12/21/2010
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

Date Filed	#	Page	Docket Text
08/31/2010	1	4	MOTION to Vacate, Set Aside or Correct Sentence (2255) filed by George H. Ryan, Sr. (Webb, Dan) (Entered: 08/31/2010)
08/31/2010	3	10	CIVIL Cover Sheet (Webb, Dan) (Entered: 08/31/2010)
08/31/2010	7	11	MOTION by Plaintiff George H. Ryan, Sr. for leave to file *Instanter, A Brief in Excess of Fifteen Pages* (Attachments: # 1 Exhibit A)(Webb, Dan) (Entered: 08/31/2010)
08/31/2010	8	46	MOTION by Plaintiff George H. Ryan, Sr. to Set Bail (Webb, Dan) (Entered: 08/31/2010)
08/31/2010	9	50	MEMORANDUM by George H. Ryan, Sr. in support of motion for miscellaneous relief 8 (Attachments: # 1 Exhibit 1−2)(Webb, Dan) (Entered: 08/31/2010)
09/02/2010	11	90	DESIGNATION of Laurie J Barsella as U.S. Attorney for Defendant United States of America (Barsella, Laurie) (Entered: 09/02/2010)
09/07/2010	13	92	DESIGNATION of Marc Krickbaum as U.S. Attorney for Defendant United States of America (Krickbaum, Marc) (Entered: 09/07/2010)
09/09/2010	14	93	MINUTE entry before Honorable Rebecca R. Pallmeyer: Motion hearing held Motion pursuant to 28 U.S.C. §2255 to vacate, set aside or correct sentence by a person in federal custody 1 and motion to set bail 8 entered and continued for briefing. Response to be filed by or on 10/7/2010; reply 10/21/2010; hearing set for 11/1/2010 at 10:30 AM. Movant's motion for leave to file, instanter, a brief in excess of fifteen pages 7 granted. Mailed notice (etv,) (Entered: 09/09/2010)
10/07/2010	16	94	MOTION by Defendant United States of America for leave to file excess pages (Attachments: # 1 Exhibit)(Krickbaum, Marc) (Entered: 10/07/2010)

10/07/2010	17	141	RESPONSE by United States of Americain Opposition to MOTION by Plaintiff George H. Ryan, Sr. to Set Bail 8 (Krickbaum, Marc) (Entered: 10/07/2010)
10/13/2010	18	146	MINUTE entry before Honorable Rebecca R. Pallmeyer: Government's motion for leave to file, instanter, a brief in excess of fifteen pages 16 granted. Mailed notice (etv,) (Entered: 10/13/2010)
10/13/2010	19	147	RESPONSE by United States of America to defendant's motion to vacate/set aside/correct sentence pursuant to 28 U.S.C. (2255) 1 . (mjc,) (Entered: 10/14/2010)
10/18/2010	20	191	MOTION by Plaintiff George H. Ryan, Sr. for extension of time to file response/reply as to Response 19 *(Agreed)* (Miarecki, Greg) (Entered: 10/18/2010)
10/19/2010	22	194	MINUTE entry before Honorable Rebecca R. Pallmeyer: Agreed motion for extension of time to reply to Government's response to Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 20 granted to and including 11/4/2010. Oral argument set for 11/1/2010 is stricken and reset to 11/22/2010 at 10:00 AM. Mailed notice (etv,) (Entered: 10/19/2010)
11/04/2010	24	195	MOTION by Plaintiff George H. Ryan, Sr. for leave to file *Instanter, a Brief in Excess of Fifteen Pages* (Attachments: # 1 Exhibit A)(Alschuler, Albert) (Entered: 11/04/2010)
11/04/2010	26	246	REPLY by George H. Ryan, Sr. to MOTION by Plaintiff George H. Ryan, Sr. to Set Bail 8 (Alschuler, Albert) (Entered: 11/04/2010)
11/09/2010	27	252	MINUTE entry before Honorable Rebecca R. Pallmeyer: Movant's motion for leave to file, instanter, a brief in excess of fifteen pages 24 is granted.Mailed notice (mjc,) (Entered: 11/10/2010)
11/09/2010	28	253	REPLY by movant George H. Ryan, Sr. in support of his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. 2255. (mjc,) (Entered: 11/10/2010)
11/22/2010	29	300	MINUTE entry before Honorable Rebecca R. Pallmeyer: Oral argument on motion held on 11/22/2010. Case taken under advisement. Ruling to be issued shortly. Mailed notice (tlp,) (Entered: 11/24/2010)
12/15/2010	30	301	MOTION by Plaintiff George H. Ryan, Sr. for leave to file *a Supplement to His Motion to Set Bail* (Attachments: # 1 Exhibit A)(Lyon, Andrea) (Entered: 12/15/2010)
12/20/2010	32	310	MINUTE entry before Honorable Rebecca R. Pallmeyer: Ryan's motion for leave to supplement his motion to set bail 30 granted. Mailed notice (etv,) (Entered: 12/20/2010)
12/21/2010	33	311	

			MINUTE entry before Honorable Rebecca R. Pallmeyer: Enter Memorandum Opinion and Order. Ryan's motion to vacate, set aside, or correct his sentence 1 is denied. Ryan's motion to set bail 8 is also denied. (For further detail see separate order.) Civil case terminated. Mailed notice (etv,) (Entered: 12/21/2010)
12/21/2010	34	312	MEMORANDUM Opinion and Order Signed by the Honorable Rebecca R. Pallmeyer on 12/21/2010: Mailed notice (etv,) (Entered: 12/21/2010)
12/21/2010	35	370	ENTERED JUDGMENT on 12/21/2010: Mailed notice (etv,) (Entered: 12/21/2010)
12/22/2010	36	371	MINUTE entry before Honorable Rebecca R. Pallmeyer: In Skilling v. United States, 130 S. Ct.2896 (2010), the Supreme Court concluded that the law prohibiting honest services mail fraud must be limited to bribery and kickback schemes. Petitioner urges that his 2006 conviction for honest services mail fraud must be overturned. This court has concluded that the wrongdoing that the government proved at trial falls within the limits imposed by Skilling and that any error in the instructions was harmless. In the alternative, the conviction may be upheld because the evidence established pecuniary fraud. The court concludes, however, that Petitioner has made a substantial showing of the denial of due process and therefore grants his petition for a certificate of appealability. Mailed notice (etv,) (Entered: 12/22/2010)
12/27/2010	37	372	NOTICE of appeal by George H. Ryan, Sr. regarding orders 34 , 35 Filing fee $ 455, receipt number 0752−5553704. (Alschuler, Albert) (Entered: 12/27/2010)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Respondent, v. GEORGE H. RYAN, SR., No. 16627-424 Movant.	)	Case No. 10-cv-5512 Judge Rebecca R. Pallmeyer

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

Movant, George H. Ryan, Sr., in the custody of the Federal Bureau of Prisons pursuant to a judgment of this Court, by his attorneys, respectfully moves this Court to vacate and set aside the judgment and sentence previously imposed by this Court pursuant to 28 U.S.C. Section 2255. The Supreme Court's recent decision in *Skilling v. United States* establishes that Ryan's RICO and mail fraud convictions are invalid.

In support of this motion, Movant George H. Ryan, Sr., through counsel, states the following, substantially in the form contained in Section 2255 of Title 28, and further explains the necessity of the relief requested in the attached Memorandum of Law in Support of Movant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. Section 2255:

1. *Place of detention, or if on parole, date of parole release:*

   Ryan is confined at the Terre Haute Federal Correctional Institution.

2. *Name and location of court which imposed sentence and name of judge who imposed the sentence which is now under attack:*

   Judgment was entered by the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Rebecca R. Pallmeyer, presiding.

3. *Date of judgment of conviction:*

Judge Pallmeyer, in the Northern District of Illinois, issued a Judgment in a Criminal Case and sentenced Ryan on September 6, 2006.

The jury convicted Ryan of all eighteen counts against him. However, finding that the government had failed to prove two mail fraud counts, Judge Pallmeyer dismissed Counts 9 and 10.

4. *Case Number:*

U.S. v. Ryan was case number 02 CR 506.

5. *Length of Sentence:*

On Count 1, Ryan was sentenced to 78 months in the custody of the Bureau of Prisons. As to Counts 2-8 and 11-13, Ryan was sentenced to 60 months in the custody of the Bureau of Prisons. As to Counts 18-22, Ryan was sentenced to 36 months in the custody of the Bureau of Prisons.

These sentences were to run concurrently, resulting in a total term of incarceration of 78 months.

The Court also imposed a period of one year of supervised release as to counts 1-8, 11-13, and 18-22.

Additionally, the Court imposed a special assessment of $1,600, Mandatory Costs of Prosecution of $16,000, and Restitution of $603,348.

Judge Pallmeyer further ordered forfeiture in the amount of $1.7 million from Ryan and his co-defendant jointly. The $603,348 in restitution is included in this total.

6. *Nature of offenses involved:*

Ryan was charged in a twenty-two count indictment, of which eighteen counts named Ryan as a defendant. Ryan was convicted on sixteen of those counts. These sixteen counts were as follows:

(a) Count 1: Racketeering, in violation of 18 U.S.C. § 1962(d)

(b) Counts 2-8: Mail fraud, in violation of 18 U.S.C. §§ 1341, 1346, and 2

(c) Counts 11-13: Making materially fraudulent statements and representations, in violation of 18 U.S.C. § 1001(a)(2)

(d) Count 18: Obstructing/Impeding the Administration of the Internal Revenue Service, in violation of 18 U.S.C. § 7212(a)

(e) Counts 19-22: Filing false income tax returns, in violation of 26 U.S.C. § 7606(1)

7. *Nature of Movant's Plea:*

On December 23, 2003, Ryan entered a plea of not guilty as to each of the Counts in the Indictment.

8. *Kind of Trial:*

Ryan was tried before a jury.

9. *Whether Movant testified:*

Ryan did not testify.

10. *Whether Movant appealed from the Judgment of Conviction:*

Ryan appealed from the Judgment of Conviction.

11. *Appellate history:*

On February 20, 2007, the United States Court of Appeals for the Seventh Circuit affirmed Ryan's conviction. The Seventh Circuit denied Ryan's request for a rehearing *en banc*. The United States Supreme Court subsequently denied Ryan's petition for a writ of certiorari.

12-13. *The nature of any other petitions, applications, or motions filed with respect to this judgment in any federal court (excluding any direct appeal):*

Other than his direct appeal, Ryan has not filed any petitions, applications, or motions contesting this judgment in any court.

14. *State concisely every ground on which Movant claims that he is being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, attach pages stating additional grounds and facts supporting same:*

Attached is a Memorandum of Law in Support of Movant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. This Memorandum details the legal support and factual underpinnings of the grounds for relief listed below and explains why relief under 28 U.S.C. § 2255 is required in this case.

Ground One: Because the evidence is insufficient to support Ryan's mail fraud and RICO convictions under the standard established by *Skilling*, Ryan's Conviction and Sentence are Unlawful.

Ground Two: Because the court's jury instructions were erroneous under *Skilling* and the error was not harmless, Ryan's Conviction and Sentence are Unlawful.

15. *Whether any of the grounds for relief presented in this Motion have been presented previously:*

Ryan has not previously presented the claims set forth in paragraph fourteen to any court. Although Ryan did argue on appeal that his conviction rested on an unconstitutional interpretation of the law, the United States Supreme Court had yet to rule on the question. As described in the attached Memorandum of Law, in light of the Supreme Court's recent ruling in *Skilling v. United States*, 130 S. Ct. 2896 (2010), Ryan's conviction and sentence are invalid.

16. *Any petition or appeal now pending in any court as to the judgment under attack:*

Ryan has no petition or appeal now pending in any court as to this judgment.

17. *Names and addresses of each attorney who represented the Movant in the following stages of the judgment attacked herein:*

At all stages of the judgment attacked herein (preliminary hearing, arraignment and plea, trial, post-trial hearings and sentencing, appeal), Ryan was represented by:

WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

ANDREA D. LYON
DePaul University
25 East Jackson Boulevard
Chicago, Illinois 60604
(312) 362-8294

18. *Whether Movant was sentenced on more than one count of an indictment or more than one indictment in the same court and at approximately the same time:*

Ryan was sentenced on sixteen counts contained in a single indictment.

19. *Whether Movant has any future sentence to serve after completing the sentence imposed by the judgment under attack:*

Ryan does not have any future sentence to serve after completing the sentence imposed by the judgment under attack. He does seek a redetermination of sentences imposed on some counts included in this judgment.

WHEREFORE, Ryan prays that this Court vacate and set aside the Judgment of Conviction previously entered and the sentence previously imposed thereon. Movant further prays that this Court grant any and all other relief to which Ryan may be entitled.

DATED: August 31, 2010

Respectfully submitted,

s/ Dan K. Webb
Attorney for Movant

DAN K. WEBB
JAMES R. THOMPSON, JR.
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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Movant George H. Ryan, Sr., hereby certifies that he caused to be served a true and correct copy of the foregoing Motion Pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody and the Memorandum of Law in Support of Movant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, via hand-delivery this 31st day of August 2010 on counsel for the Government at the following address:

Patrick Fitzgerald
United States Attorney for the Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

DATED: August 31, 2010

s/ Dan K. Webb
Attorney for Movant

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JAMES R. THOMPSON, JR.
GREGORY J. MIARECKI
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CIVIL COVER SHEET

The civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form isrequired for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

(a) PLAINTIFFS
GEORGE H. RYAN, SR.

DEFENDANTS
UNITED STATES OF AMERICA

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)
Winston & Strawn LLP
35 W. Wacker Dr.
Chicago, Illinois 60601

Attorneys (If Known)
United States Attorney for the Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ■ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (excl. vet.)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Inj.

PERSONAL INJURY
- ☐ 362 Personal Injury—Med. Malpractice
- ☐ 365 Personal Injury — Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Satellite TV
- ☐ 810 Selective Service
- ☐ 850 Security/Commodity/Exch.
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 ADA—-Employment
- ☐ 446 ADA — Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ■ 510 Motions to Vacate Sentence
- Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- ■ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (Enter U.S. Civil Statute under which you are filing and write a brief statement of cause.)

28 U.S.C. § 2255: Motion to vacate, set aside, or correct sentence by a person in federal custody

VII. PREVIOUS BANKRUPTCY MATTERS (For nature of suit 422 and 423, enter the case number and judge for any associated bankruptcy matter perviously adjudicated by a judge of this Court. Use a separate attachment if necessary)

VIII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 **DEMAND $** CHECK YES only if demanded in complaint: **JURY DEMAND:** ☐ Yes ■ No

IX. This case
- ■ **is not a refiling of a previously dismissed action.**
- ☐ **is a refiling of case number _____, previously dismissed by Judge _____**

DATE August 31, 2010

SIGNATURE OF ATTORNEY OF RECORD
/s/ Dan K. Webb

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Respondent, v. GEORGE H. RYAN, SR., No. 16627-424 Movant.	)	Case No. 10-cv-5512 Judge Rebecca R. Pallmeyer

MOVANT'S MOTION FOR LEAVE TO FILE, *INSTANTER*,
A BRIEF IN EXCESS OF FIFTEEN PAGES

Movant, George H. Ryan, Sr. ("Ryan"), by his attorneys and pursuant to Local Rule 7.1, respectfully requests this Court's leave to file, *instanter*, a brief in excess of fifteen pages. In support of this motion, Ryan states as follows:

1. Attached as Exhibit A is Ryan's Memorandum of Law in Support of his Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. This memorandum is 31 pages long.
2. Ryan's trial lasted over five months. In his Memorandum of Law, Ryan reviews the evidence presented at this trial and argues that it is insufficient to support his mail fraud and RICO convictions under the standard established by *Skilling v. United States*, 130 S. Ct. 2896 (2010). He also reviews the Court's jury instructions and argues that they were erroneous under the *Skilling* standard. Ryan contends that, when viewed in the context of the evidence presented at trial, the error in instructing the jury was not harmless.
3. The extraordinary length of Ryan's trial and the array of issues presented make a brief of more than fifteen pages necessary.

4. The Government has indicated to counsel that it does not oppose this motion.

WHEREFORE, Ryan respectfully requests that this Court, pursuant to Local Rule 7.1, grant him leave to file, *instanter*, the 31-page Memorandum of Law in Support of his Motion to Vacate, Set Aside, or Correct Sentence Pursuant To 28 U.S.C. § 2255 attached hereto as Exhibit A.

DATED: August 31, 2010

Respectfully submitted,

s/ Dan K. Webb
Attorney for Movant

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(312) 362-8402

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Movant George H. Ryan, Sr., hereby certifies that he caused to be served a true and correct copy of the foregoing Movant's Motion For Leave To File, *Instanter*, A Brief In Excess of Fifteen Pages and the attached Memorandum of Law in Support of Movant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, via hand-delivery this 31st day of August 2010 on counsel for the Government at the following address:

Patrick Fitzgerald
United States Attorney for the Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

DATED: August 31, 2010

s/ Dan K. Webb
Attorney for Movant

DAN K. WEBB
JAMES R. THOMPSON, JR.
GREGORY J. MIARECKI
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Exhibit

A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Respondent, v. GEORGE H. RYAN, SR., No. 16627-424 Movant.	)	Case No. 10-cv-5512 Judge Rebecca R. Pallmeyer

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

George H. Ryan, Sr., in the custody of the Federal Bureau of Prisons pursuant to a judgment of this Court, by his attorneys, respectfully presents this Memorandum of Law in Support of his Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. Section 2255. The Supreme Court's recent decision in *Skilling v. United States* establishes that Ryan's RICO and mail fraud convictions are invalid. Accordingly, this Court should vacate and set aside Ryan's judgment and sentence.

INTRODUCTION

Following a jury trial, Ryan was convicted on sixteen separate counts, including one count of racketeering predicated on seven counts of mail fraud. *See United States v. Warner*, 02 CR 506, Dkt. 888 (N.D. Ill., Sept. 6, 2006). The Government relied on an expansive theory of "honest services" fraud, repeatedly telling the jury to convict Ryan and his co-defendant Lawrence E. Warner even in the absence of a scheme to obtain bribes or kickbacks. During closing argument, the Government advised the jury that "a *quid pro quo* is not necessary." R.

23083-84.[1] *See also* R. 22956-57, 23764, 23817-18. The Government told the jury, "To lie to the public when you have a duty to be honest is a crime." R. 23755. It added, "This case, the way we charged it, ladies and gentlemen, it's about trust." R. 23736.

In *Skilling v. United States*, 130 S. Ct. 2896 (2010), the Supreme Court conclusively rejected the Government's theory of honest services fraud. "[H]onest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks . . . ." *Id.* at 2933. "[N]o other misconduct falls within § 1346's province." *Id.* As explained below, the evidence presented at trial was insufficient to convict Ryan under the *Skilling* standard. Moreover, even if the evidence were to be found sufficient, the Court's instructions invited the jury to convict the defendant for conduct that does not constitute honest services fraud or any other crime. Because it is not clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error, the Court's error in charging the jury was not harmless. This Court should vacate Ryan's conviction and sentence.

I. PROCEDURAL HISTORY

A grand jury returned a 22-count indictment against Ryan and Warner in December 2003. After a five-and-one-half-month trial, on April 17, 2006, a jury found Warner and Ryan guilty on all counts. R. 25422-23. The jury convicted Warner and Ryan of a RICO conspiracy (18 U.S.C. § 1962(d)) (Count 1) and mail fraud (18 U.S.C. §§ 1341, 1346) (Counts 2-5 & 7-9). The jury convicted Warner on separate counts of money laundering (18 U.S.C. § 1956(a)(1)(B)(i)) (Counts 15-16), structuring (31 U.S.C. § 5324) (Count 17), and extortion (18 U.S.C. § 1951) (Count 14). The jury convicted Ryan of two additional mail fraud charges (18 U.S.C. §§ 1341, 1346) (Counts 6 & 10), false statements (18 U.S.C. § 1001(a)(2)) (Counts 11-13), and various tax charges (26 U.S.C. § 7212(a)) (Count 18); *id.* § 7206(1) (Counts 19-22). This Court set aside

[1] The trial transcripts are cited as "R. –."

the jury's mail fraud convictions with respect to Counts 9 and 10 but entered judgment on the remaining counts against both defendants. R., Sept. 6, 2006 at 4. The district court sentenced Ryan to 78 months of imprisonment and 12 months of supervised release. Judgment at 2, Dkt. 888. Additionally, the Court imposed a special assessment of $1,600, prosecution costs of $16,000, and, jointly with Warner, restitution of $603,348. *Id*. at 4.

Ryan's conviction was upheld on direct appeal. *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2500 (2008). Ryan now files this motion pursuant to 28 U.S.C. Section 2255.[2]

---

[2] Because this motion has been filed within one year of the *Skilling* decision, it is timely. 28 U.S.C. § 2255(f)(3) provides that a motion under § 2255 may be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized and made retroactively applicable to cases on collateral review." The right asserted by Ryan was recognized by the Supreme Court on June 24, 2010. *See Skilling*, 130 S. Ct. at 2896. Although new rulings on issues of criminal procedure usually are not applied retroactively to cases on collateral review, *see Teague v. Lane*, 489 U.S. 288 (1989), new rulings on questions of substantive criminal law are applied retroactively. The Eleventh Circuit recently explained:

> In general, Supreme Court decisions that result in a new substantive rule retroactively apply to final convictions. *See Schiro v. Summerlin*, 542 U.S. 348 (2004); *see also United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002) (per curiam) ("Decisions of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect."). New substantive rules "include[] decisions that narrow the scope of a criminal statute by interpreting its terms." *Schiro*, 542 U.S. at 351. As the Supreme Court explained in *Schiro*, retroactive application is warranted because such rules "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352.

Weeks v. United States, 2010 U.S. App. LEXIS 11942 at *6, 2010 WL 2332084 at *2 (11th Cir. June 11, 2010).

Many federal courts have held § 2255 motions timely in cases indistinguishable from this one. *See, e.g., Fisher v. United States*, 285 F.3d 596, 599-600 (7th Cir. 2002); *Bass v. United States*, 2010 U.S. Dist. LEXIS 68612 at *8, 2010 WL 2735687 at *3 (W.D. Mich. July 9, 2010); *Rogers v. Hollingsworth*, 2010 U.S. Dist. LEXIS 66118, 2010 WL 2680806 (S.D. Ill. July 2, 2010); *United States v. Venancio-Dominguez*, 660 F. Supp. 2d 717, 720 (E.D. Va. 2009).

II. THE *SKILLING* DECISION

Skilling completely altered the legal landscape of honest services fraud. In *Skilling*, the defendant challenged 18 U.S.C. § 1346 as unconstitutionally vague.[3] Three justices accepted his contention, and the remaining six acknowledged that his "vagueness challenge ha[d] force." *Skilling*, 130 S. Ct. at 2905. The six-justice majority concluded, however, that Section 1346 could be salvaged by confining it to a "solid core" and construing it to reach only schemes to obtain bribes and kickbacks. *Id*. at 2930. The Court declared, "[W]e now hold that § 1346 criminalizes *only* the bribery and kickback core of the pre-*McNally* case law." *Id*. at 2931 (emphasis in the original). It also said, "In proscribing fraudulent deprivations of 'the intangible right of honest services,' . . . Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning . . . would encounter a vagueness shoal. We therefore hold that § 1346 covers only bribery and kickback schemes." *Id*. at 2907.

The Court noted that its construction of § 1346 established "a uniform national standard." *Id*. at 2933. It thus made clear that honest services convictions cannot be predicated on violations of state law. The Court also rejected the Government's contention that nondisclosure of a conflicting financial interest by a public official can justify an honest services conviction. *Id*. at 2933-34. It warned Congress, in fact, that an attempted legislative restoration of the Government's vague standard might be held unconstitutional. *Id*. at 2933 n.45.

Skilling's view of honest services fraud has little in common with the view taken by the Seventh Circuit prior to that decision. The Seventh Circuit articulated its basic pre-*Skilling* standard in *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998): "[A] public official owes a

[3] This statute provides, "[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

fiduciary duty to the public, and misuse of his office for private gain is a fraud. . . . Misuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime." *Id.* at 655 (internal quotation omitted). *See also United States v. Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003) (declaring that honest services fraud consists of "misuse[of a] fiduciary relationship (or information acquired therefrom) for personal gain.").

III. THE *SKILLING* STANDARD: BRIBES AND KICKBACKS

The Supreme Court said in *Skilling*, "We perceive no significant risk that the honest-services statute, as we interpret it today, will be stretched out of shape. Its prohibition of bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes." 130 S. Ct. at 2933.[4] Several Supreme Court decisions have clarified the meaning of bribery. "[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange for* an official act." *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404 (1999) (emphasis in the original). Moreover, *Skilling* cited three recent decisions by federal courts of appeals that have further clarified the concept.

Majority, concurring, and dissenting opinions reveal an unwavering insistence on the *quid pro quo* requirement by every Supreme Court justice who has addressed the issue. The Court initially articulated this requirement in *McCormick v. United States*, 500 U.S. 257 (1991). This case arose under the Hobbs Act, which had been construed by the courts of appeals to

[4] Because the Court read the honest services statute to incorporate the same concept of bribery as other federal statutes, it acknowledged that § 1346 might be "superfluous" as applied to federal officials. 130 S. Ct. at 2933 n.45.

forbid any receipt of a bribe by a public official.[5]

McCormick, a West Virginia legislator, had been supportive of allowing foreign medical school graduates to practice without licenses while they studied for state licensing exams. Moreover, he had discussed with a lobbyist for the doctors the possibility of allowing some doctors to practice permanently without passing the exams. During his re-election campaign, McCormick complained to the lobbyist that his campaign was expensive and that he had not heard from the doctors. The lobbyist then delivered several cash donations, which the legislator neither listed as campaign contributions nor reported on his tax returns. After McCormick's reelection, he sponsored legislation to permit some foreign doctors to be permanently licensed without passing the state exams.

The trial court charged the jury that to convict the defendant they must be "convinced beyond a reasonable doubt that the payment . . . was made . . . with the expectation that such payment would influence McCormick's official conduct, and with the knowledge on the part of McCormick that they were paid to him with that expectation." *Id.* at 261 n.4. The Court held this instruction insufficient. It concluded that campaign contributions[6] could be treated as bribes only when "the payments are made in return for an explicit promise or undertaking by the

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[5] *See, e.g.*, *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir.), *vacated on other grounds*, 484 U.S. 807 (1987) ("Extortion 'under color of official right' equals the knowing receipt of bribes."). Justice Scalia observed in a concurring opinion in *McCormick* that the appellate courts' construction of the statute had "no hint of a justification in the statutory text." 500 U.S. at 277 (Scalia, J., concurring). Because the defendant had not challenged it, however, Justice Scalia accepted this construction for purposes of decision. *Id.* Justice Scalia and two other justices later dissented from the Supreme Court's endorsement of this broad reading of the Hobbs Act. *See Evans v. United States*, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting).

[6] The Court did not "decide whether a *quid pro quo* requirement exists in other contexts." 500 U.S. at 273 n.10.

official to perform or not to perform an official act." *Id*. at 273.[7]

Justice Stevens objected in dissent to the requirement of an "explicit" *quid pro quo*, but he declared, "I agree with the Court that it is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver . . . . In this sense, the crime does require a '*quid pro quo*.'" *Id*. at 283 (Stevens, J., dissenting). Justice Stevens added that "the crime . . . was complete when petitioner accepted the cash pursuant to an understanding that he would not carry out his earlier threat to withhold official action and instead would go forward with his contingent promise to take favorable action on behalf of the unlicensed physicians. . . . When the petitioner took the money, he was either guilty or not guilty." *Id*.

In *Evans v. United States*, 504 U.S. 255 (1992), the Court reiterated what it called "the *quid pro quo* requirement of *McCormick v. United States*" and declared, "[T]he offense is complete at the time when the public official receives a payment in return for his agreement to perform specific official acts." *Id*. at 268. In a concurring opinion, Justice Kennedy declared that the public official and his benefactor should not be required to "state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." *Id*. at 274 (Kennedy, J., concurring). Justice Kennedy added, however:

> The requirement of a *quid pro quo* means that without pretense of any entitlement to the payment, a public official . . . intends the payor to believe that absent

[7] The Court did not purport to find support for this conclusion in the statutory language. It said, "To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion." *McCormick*, 500 U.S. at 272-73. Justice Thomas later observed, "We . . . imposed [the *quid pro quo* requirement] to prevent the Hobbs Act from effecting a radical (and absurd) change in American political life." *Evans*, 504 U.S. at 286 (Thomas, J., joined by Scalia, J., & Rehnquist, C.J., dissenting).

> payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor or to give the prospective payor less favorable treatment if the *quid pro quo* is not satisfied. . . . In this respect, a prosecution under the statute has some similarities to a contract dispute, with the added and vital element that motive is crucial. . . . [The public official's] course of dealings must establish a real understanding that failure to make a payment will result in victimization of the prospective payor or the withholding of more favorable treatment.

Id. at 274-75.

The defendant in *Sun-Diamond Growers v. United States*, 526 U.S. 398 (1999), was a trade association representing 5,000 growers of fruit and nuts. It gave expensive gifts to the Secretary of Agriculture while he was considering two matters of interest to the association. The association was convicted at trial of providing an illegal gratuity—that is, of giving a thing of value to a public official "for or because of any official act performed or to be performed by such public official." *See* 18 U.S.C. § 201(c)(1)(a).

The Supreme Court reversed. The trial court had told the jury that the gratuities statute, "unlike the bribery statute, did not require any connection between respondent's intent and a specific official act," *Sun Diamond Growers*, 526 U.S. at 405, and this instruction was erroneous. A gratuity, like a bribe, must be given "for or because of some particular act." *Id*. at 406.

The Court noted that there remained a significant difference between bribes and gratuities: "[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange for* an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that public official will take . . . or for a past act that he has already taken." *Id*. at 404-05 (emphasis in original). The Court observed that bribery is a substantially more serious crime than providing an improper gratuity. Bribes are punishable

by as much as fifteen years in prison; gratuities, by no more than two years. *Id*. at 405.[8]

The three court of appeals decisions cited by *Skilling* to illustrate the clarity of federal bribery law all presented the same issue. The following are incomplete and simplified descriptions of the facts of the cases:

- A mayor agreed to steer city contracts to the clients of a lobbyist, and the lobbyist agreed to give the mayor one-third of the fees he received for obtaining these contracts. *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007) (Sotomayor, J.).

- A lawyer arranged a large bank loan for a judge and regularly paid the interest needed to keep the loan in place. The judge agreed to rule in favor of the lawyer's clients whenever he reasonably could. *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009).

- A bank officer approved substantial loans for an uncreditworthy city treasurer as well as the treasurer's uncreditworthy friends and his church. The officer also agreed to dispense with the bank's usual investigations and fees. The treasurer told the officer, "You are my guy, so you get special treatment." He steered city business to the bank and gave the officer confidential information about bids submitted to the city by competing banks. *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007).

In the scenarios described above, public officials received benefits without specifying what contracts they would steer, what cases they would fix, and what confidential information they would provide. Does it follow that these officials are not guilty of bribery? Of course not, and the decisions cited by *Skilling* upheld the defendants' convictions while reiterating the *quid pro quo* requirement. In all of these cases, alleged bribe-takers or bribe-givers were convicted of honest services fraud, and the cases make clear that the *quid pro quo* requirement extends to bribery prosecutions under the honest services statute.

In *Ganim*, the court reiterated an earlier Second Circuit ruling that, although campaign

[8] When a prosecutor charges the giver or receiver of a bribe with "honest services" fraud, the maximum penalty becomes twenty years. *See* 18 U.S.C. § 1341. The severity of this penalty cautions against defining bribery broadly enough to encompass improper gratuities. The *quid pro quo* requirement is crucial.

contributions may not be treated as bribes without an explicit *quid pro quo*, fact finders examining other sorts of benefits may infer the necessary agreement from an official's words and actions. 510 F.3d at 143 (describing *United States v. Garcia*, 992 F.2d 409 (2d Cir. 1993)). "'[I]t is sufficient if the public official understand that he or she is expected as a result of the payment to exercise particular kinds of influence.'" *Id*. at 144 (quoting *Garcia*). The court concluded, "[R]equiring a jury to find a quid pro quo, as the governing law does, ensures that a particular payment is made in exchange for a *commitment* to perform official acts to benefit the payor in the future." *Id*. at 147 (emphasis in the original). "'[T]he intended exchange in bribery can be "this for these" or "these for these," not just "this for that."'" *Id*. at 148 (quoting *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998)).

Whitfield similarly declared, "[A] particular, specified act need not be identified at the time of payment to satisfy the *quid pro quo* requirement, so long as the payor and payee agreed upon a specific *type* of action to be taken in the future." 590 F.3d at 350 (emphasis in the original). And *Kemp* observed, "The key to whether a gift constitutes a bribe is whether the parties intended for the benefit to be made in exchange for some official action; the government need not prove that each gift was provided with the intent to prompt a specific official action." 500 F.3d at 282.

To summarize the law described above:

1. Campaign contributions may not be treated as bribes in the absence of an explicit *quid pro quo*.

2. Other payments may be treated as bribes if the circumstances establish a mutual understanding that the payee will take official action to benefit the payor. The specific action need not be identified as long as the payor and payee have agreed upon a *type* of action. The

critical question is what agreement, understanding, or commitment existed at the time the payment was made.

3. Gratuities are not bribes, even when they are given in hope and expectation that they will prompt official action. Moreover, for a public official to give a governmental benefit to someone who has done favors for him is not bribery in the absence of an agreement to provide the benefit at the time of the favors.

One can examine the circumstances of an alleged bribery transaction and imagine what the person who supplied the benefit to a public official might plausibly have said if the official had never given a benefit to him. If the donor could have said no more than that the official failed to return a favor, the benefit given the public official could not appropriately be characterized as a bribe. The benefit would be a bribe, however, if, under the circumstances, the donor plausibly could have said that the official violated an implicit or explicit understanding or deal. In the absence of this *quid pro quo* requirement, meaningful standards would disappear, and prosecutors, judges, and juries would effectively invent the law for each case.

IV. THE GOVERNMENT'S THEORY OF THE CASE AND VIEW OF THE EVIDENCE: NO *QUID PRO QUO* REQUIRED

A single theme pervaded the five-and-one-half-month trial of George Ryan. Witnesses declared that Ryan had never to their knowledge taken a benefit in exchange for official action, and Ryan's lawyers argued that there was no *quid pro quo*. The government replied that it had never claimed that Ryan took a bribe and that whether he did or not did not matter. The Ryan trial was an anti-*McCormick*, anti-*Evans*, anti-*Sun Diamond Growers* trial, a paradigmatic pre-*Skilling* honest services trial, and a forum in which the government successfully and repeatedly contended that no *quid pro quo* was necessary.

It began before trial. George Ryan told the press, "[T]hey haven't got one witness that

said they gave me a corrupt dollar." *Ryan Confident He Will Be Exonerated at Upcoming Trial*, Chicago Sun-Times, July 22, 2005. The Government was apparently offended—and not because Ryan's statement was untrue. It clipped the news stories and attached them as appendices to its Motion for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations. Case 1:00-cr-00506, Dkt. 280, 8/31/05. The Government argued that it would be "clearly *improper* . . . for the defense to argue or suggest to the jury that 'corrupt dollars' for contracts or other specific quid pro quo evidence is a *prerequisite* to a finding of guilt on the particular mail fraud charges here." *Id*. at 3 (emphasis in the original). It argued that "[o]ther circuits . . . have upheld public corruption prosecutions rooted in . . . the failure of a public official to disclose a financial interest or relationship affected by his official actions." *Id*. at 4.

In reply, the defendant offered arguments under the headings "A *Quid Pro Quo* Is Required Where Mail Fraud Charges Are Predicated on the Receipt of a Campaign Contribution" and "A Quid Pro Quo Is Required Where Federal Criminal Charges Are Predicated on The Receipt of A Gift." Ryan's Response to United States' Motion for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations, Case 1:02-cr-00506, Dkt. 323, 9/15/05. The defendant thus objected from the outset to the Government's broad theory of honest services fraud and proposed a standard resembling the *Skilling* standard.

This Court did not rule specifically on the Government's pretrial request for instructions. It observed that "the law does not require the government to identify a specific contract, perquisite, or other government benefit given in exchange for each particular gift." *United States v. Warner*, 2005 U.S. Dist. LEXIS 21367 at *12, 2005 WL 2367769 at *4 (N.D. Ill. Sept. 23, 2005). It also noted that, while proof of a specific *quid pro quo* was not required, the defendant was "free to argue lack of specific quid pro quo evidence" in his effort to establish a lack of

criminal intent. *Id*.

Ryan took advantage of the opportunity. During opening statements, his counsel announced:

> [T]here's not going to be a single witness that's going to testify that they gave any corrupt payments of money to George Ryan, not a single solitary witness. No one is going to go on that witness stand and tell you that they gave George Ryan any money to influence his judgments as secretary of state or governor, not one single witness.

R. 2562. Counsel then cross-examined prosecution witnesses by asking such questions as, "Were you ever aware of anybody ever giving money to George Ryan to affect his decisions as secretary of state?" and "[d]id you ever observe or see George Ryan do anything that indicated to you that he had received any money or benefit from anyone to influence or affect his judgments as secretary of state?" R. 3758-59. Every witness—Fawell, DeSantis, Juliano, Klein, Udstuen, Wright, Easley, Cernuska, Reeser, and others—answered no. R. 3758-59; R. 6922-24, R. 7316-17; R. 9520-21; R. 11773-74; R. 13499-502; R. 15992; R. 10728-29; R. 10622-23. By the end of the trial, counsel was able to tell the jury that, of the 83 witnesses the Government had called, none had "testified that George Ryan accepted anything from anybody to perform his official acts." R. 23149.

With one exception, to be discussed in the next section of this memorandum, the Government did not claim to have proven a corrupt act or *quid pro quo*. It conceded in its closing argument that it had not:

> [I]t's important to remember that it is not necessary for us to prove a quid pro quo. I used that term before, I think. In other words that it was I give you this, you give me that; it doesn't have to be that sort of relationship.
>
> The defense throughout its questioning of witnesses and in opening statement has repeatedly attempted to focus you on corrupt payments of money or cash bribes, but *that's not the case that we have charged here*. What the Government's case is about is that George Ryan received these financial benefits for himself and steered

> other benefits to third parties, benefits that were not disclosed to the public . . . .
>
> One of the instructions that the Judge will be reading to you concerns a conflict of interest by a public official . . . . The judge is going to instruct you that a public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest, also known as a conflict of interest, in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services if the other elements of the mail fraud offense are met.

R. 22956-58 (emphasis added).

> Now, did Ryan have a conversation with Anthony DeSantis in which they discussed: Well, you pay me for this, and I'll give a low-digit plate? No, they didn't do that. However, when Ryan had the opportunity to help DeSantis, a man who was interested in a low-digit plate, did he do it? Yes, he did. . . . 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, were influenced by his receipt of the DeSantis money.

R. 22973.

> How did George Ryan reciprocate this longtime friendship [with co-defendant Lawrence Warner]? Governmental business is how he did it. $3 million worth of government business. *Was it a quid pro quo? No, it wasn't. Have we proved a quid pro quo? No, [we] haven't. Have we charged a quid pro quo? No, we haven't.* We have charged an undisclosed flow of benefits back and forth. And I am going to get to the instructions in a minute, folks, but that's what we have charged. . . . We have charged an undisclosed flow of benefits, which, under the law, is sufficient . . . .

R. 23764 (emphasis added).

Ryan's conviction marked the triumph of the "undisclosed flow of benefits" or "no *quid pro quo*" theory of honest services fraud. From before the trial began until its end, the Government proclaimed that no *quid pro quo* was necessary. The Supreme Court has now said, "Yes it is."

V. THE EVIDENCE IN THIS CASE WAS INSUFFICIENT TO ESTABLISH MAIL FRAUD OR RACKETEERING UNDER THE *SKILLING* STANDARD

Evidence is insufficient to support a conviction if "upon the record evidence adduced at

the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). In this case, no rational juror could have found Ryan guilty of mail fraud or racketeering in light of the holding in *Skilling*.[9]

The Government charged Ryan with a wide-ranging scheme to defraud that extended over twelve years and with a RICO conspiracy predicated upon the alleged mail fraud scheme. Most of the conduct alleged to be part of the scheme cannot remotely be characterized as bribes or kickbacks. Evidence of this conduct would be inadmissible in a post-*Skilling* mail fraud trial and would be highly prejudicial in a trial of legitimate mail fraud charges. The Government presented evidence that Ryan:

- Accepted gifts in excess of a $50 limit established by regulations of the Illinois Secretary of State's Office and by Ryan's announced personal policy. *See* R. 22844.
- Accepted a consulting fee from the presidential campaign of Senator Phil Gramm and then concealed it. *See* R. 22843-44.
- Discharged and reassigned employees of the Secretary of State's Inspector General's office in order to limit that office's investigation of alleged wrongdoing by Secretary of State employees. *See* R. 22865-91.
- Allowed co-defendant Lawrence Warner, a private individual, to assign low-number license plates to friends. *See* R. 22971-75.
- Revealed to a friend where a new state prison would be built, enabling the friend to profit as a lobbyist. *See* R. 22850-51.[10]
- Allowed government employees to work on his political campaigns, *see* R. 22861-63, and also allowed property belonging to the Secretary of State's office, including

[9] Ryan does not challenge his convictions for false statements and various tax offenses. He does, however, ask the Court to recalculate his sentences for these offenses. *See* Sec. VIII *infra*.

[10] Although the jury convicted Ryan of a mail fraud charge grounded specifically on this conduct (Count 10), this Court set the conviction aside because Ryan's disclosure might have been inadvertent, because the friend was immediately advised that the information was confidential, and because the Government had offered no evidence that Ryan had knowledge of the friend's improper lobbying. *See United States v. Warner*, 2006 U.S. Dist. LEXIS 64085 at *40-45, 2006 WL 2583722 at *12-13 (N.D. Ill. Sept. 7, 2006).

> various office supplies, to be converted for the use of Ryan's political campaigns. *See* R. 22941.[11]

None of this evidence remotely suggested a scheme to obtain bribes or kickbacks.

The Government's remaining evidence concerned licenses, leases, and government contracts. It indicated that Ryan received favors from friends and sometimes awarded government benefits to these friends, but it fell far short of establishing kickbacks or bribes.

A. Licenses. The jury might have found that Ryan tended to favor campaign contributors in awarding low-digit license plates. R. 22849. This conduct was not bribery. The Supreme Court has held that campaign contributions may not be treated as bribes in the absence of an explicit *quid pro quo*, *McCormick*, 500 U.S. at 273-74, and the Government offered no proof that Ryan explicitly promised low-digit license plates to contributors.[12]

B. The South Holland Lease. Although the Government's arguments to the jury generally conceded the absence of a *quid pro quo*, *see* R. 22956-58, 22973, 23764 (quoted in the

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[11] Like the other alleged misconduct described above, these activities plainly could not be the basis of an honest services conviction after *Skilling*. Misusing government property and the services of government employees is not bribery and has nothing to do with kickbacks. This conduct also would not establish a fraudulent scheme to deprive people of money or property in violation of 18 U.S.C. § 1341. For one thing, the Government offered no proof of any mailing in furtherance of this alleged misconduct. For another, the Supreme Court held in *Neder v. United States*, 527 U.S. 1, 20-25 (1999), that § 1341 punishes only schemes to engage in conduct that would have constituted fraud at common law. Common law fraud was a tort with the following elements: "(1) that the defendant made a false statement of a material fact, (2) with intent to induce the plaintiff to rely on the statement's truthfulness, (3) that the plaintiff actually and justifiably relied on the statement, (4) causation, and (5) damages." G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 Nw. U.L. Rev. 1198, 1231-32 (1988). *See also* Wayne R. LaFave, *Substantive Criminal Law* § 19.7, at 957 (4th ed. 2003) (listing the five elements of the statutory crime of false pretenses: "(1) a false representation of a material present or past fact (2) which causes the victim (3) to pass title to (4) his property to the wrongdoer, (5) who (a) knows his representation to be false and (b) intends thereby to defraud the victim."). The conversion of property is not fraud, and a theft of property or services does not become fraud simply because the wrongdoer lies about it later or fails to disclose it.

[12] If favoring campaign contributors in the award of low-digit license plates constituted mail fraud, the next step might be to prosecute elected officials for favoring contributors in deciding which phone calls to take. With this application of the pre-*Skilling* honest services statute, the Government probably could have convicted every elected official in Illinois.

preceding section), its opening statement declared, "I anticipate defense counsel is going to suggest that no corrupt dollars changed hands here. . . . [T]he fact is you will see corrupt dollars in this case." R. 2477-78. In its closing argument, the Government reiterated this claim: "[W]ith regard to the evidence in this case, there actually has been evidence of corrupt payments." R. 23084. After each of these statements, the Government described Ryan's annual vacations at the home of Harry Klein in Jamaica (vacations that began in 1993), Ryan's pretense that he paid for these vacations (a pretense that included writing checks to Klein and taking cash back[13]), and Ryan's participation in two governmental actions that benefitted Klein—a 1995 currency exchange rate increase that aided Klein (along with every other currency exchange owner in the state) and a 1997 lease of property that Klein owned in South Holland. *See* R. 23084-85. This evidence appeared to be the strongest the Government could muster in an effort to show "corrupt payments" or bribery. Count 6 of the indictment consisted of a mailing related to the state's lease of the South Holland property.

Because this mailing was not in furtherance of a scheme to obtain bribes or kickbacks, the evidence was insufficient to support Ryan's conviction on Count 6. Ryan's concealment of Klein's gift did not tend to establish bribery. The acceptance of any gift worth more than $50 violated Secretary of State regulations, so Ryan had a motive to conceal it whether or not he made any commitment at the time he received it. *See Ganim*, 510 F.3d at 147 ("[R]equiring a jury to find a quid pro quo, as governing law does, ensures that a particular payment is made in exchange for a *commitment* to perform official acts to benefit the payor in the future.") The Government presented no evidence of any commitment, explicit or implicit, at the time of Ryan's initial trip to Jamaica and no evidence that Ryan and Klein's understanding changed in

[13] Ryan's pretense contributed to his conviction for false statements, a conviction he does not challenge.

subsequent years. Certainly there was no agreement to provide a "particular kind[] of influence," *Ganim*, 510 F.3d at 144, or "a specific *type* of action to be taken in the future." *Whitfield*, 590 F.3d at 350. A rate increase and a lease are not benefits of the same type. Moreover, it would be an extraordinary bribe in which the first "quo" occurred two years after the "quid," and the second "quo" (the one that benefitted Klein specifically rather than everyone in his business) four years after the "quid."

Klein testified:

> [D]id you allow Mr. Ryan and his wife to stay as guests in your Jamaican home because you wanted to affect or influence any decision George Ryan ever made as Secretary of State?
>
> Answer: No, sir.
>
> Did that thought ever even enter your mind?
>
> Answer: No, sir.
>
> Ever once?
>
> Answer: No, sir.
>
> Did you ever have any conversations with George Ryan at any time in which you indicated or told him that you wanted or expected anything from him as secretary of state as a result of the fact that he was a guest in your Jamaican home?
>
> Answer: No, sir.
>
> Did that ever happen at any time ever?
>
> Answer: No, sir.
>
> At the time that George Ryan began, at the time he began to vacation as your guest in your Jamaican home, were you aware of any issues or matters pending before the secretary of state's office that could have any impact or effect on you that you knew of?
>
> Answer: No, sir.

R. 9552. The Government's evidence offered no reason to doubt that Klein was telling the truth.

C. Other Leases. Counts 3, 8, and 9 consisted of mailings in furtherance of other leases. The jury convicted Ryan on all of these counts, but this Court set aside the conviction on Count 9 (concerning the rental of a property at 17 North State Street on which Lawrence Warner obtained a commission) partly because there was no evidence that Ryan had a part in arranging this lease. *See United States v. Warner*, 2006 U.S. Dist. LEXIS 64085 at *38-40, 2006 WL 2583722 at *12 (N.D. Ill. Sept. 7, 2006). The evidence on Counts 3 and 8 (concerning the rental of properties in Joliet and Bellwood in which Warner had an interest) was of the same type as the evidence on Count 6 and certainly no stronger. At most, it suggested that, in making official decisions, Ryan favored Warner, a friend who had done favors for him.

This evidence is insufficient to support Ryan's convictions on Counts 3 and 8 under the *Skilling* standard. The Government's evidence may have indicated that Ryan favored Warner in awarding leases and other business, but it did not indicate that Warner ever gave Ryan a bribe or kickback. Warner provided only one significant financial benefit to George Ryan. He sponsored two political fundraisers—one raising $75,000 and the other $175,000. R. 22959. Sponsoring a fundraiser is a political contribution, appropriately treated as a bribe only when the beneficiary has explicitly promised a *quid pro quo*. *McCormick*, 500 U.S. at 273-74. Because the Government offered no evidence of an explicit *quid pro quo*, the fundraisers should be disregarded.

Warner also made loans and gifts to members of Ryan's family. Most notably, he wrote a check for $3,185 to pay for the band at the wedding of Ryan's daughter, Jeanette. R. 22969. The evidence offers no basis for inferring an agreement at the time this check was written. *See Evans*, 504 U.S. at 268 ("[T]he offense is completed at the time when the public

official receives a payment in return for his agreement to perform specific official acts."). In closing argument, the Government suggested that Warner might have paid for the band because one of his clients, Viisage, had obtained a government contract five days before Jeanette's wedding. R. 22969. The speculation that Warner was motivated by this contract rather than by affection for Jeanette and her parents was unsupported. Moreover, even if this speculation had been accurate, it would have suggested a gratuity rather than a bribe. Elsewhere in its closing argument, the Government expressly conceded that none of the benefits Warner provided to Ryan and his family were *quid pro quo* bribes. R. 23764 (quoted in the previous section).

D. Government Contracts. The remaining mail fraud counts consist of mailings in furtherance of contracts the Secretary of State's Office entered with American Decal & Manufacturing Co. ("ADM") (Count 2), IBM (Counts 4 and 5), and Viisage (Count 7). These firms were lobbying clients of Lawrence Warner, and he was convicted on these counts along with Ryan.

Ryan's convictions on Counts 2, 4, 5, and 7 apparently rested on the theory that he favored Warner's clients in awarding government contracts, and convictions on this theory fail for the same reason Ryan's convictions on Counts 3 and 8 (the Warner lease counts) fail. The evidence does not show that Warner ever gave any bribe or kickback to Ryan.

Ryan bore no responsibility for the improper threats and promises that Warner allegedly made to ADM—threats that led to Warner's conviction of extortion on Count 14 of the indictment. The Government did not charge Ryan in Count 14, and no evidence indicates that he approved of or was aware of Warner's improper conduct.

The evidence is therefore insufficient to support Ryan's conviction of any of the mail

fraud counts. Because his RICO conviction was predicated on the mail fraud charges, it is invalid as well.

VI. THE JURY INSTRUCTIONS WERE ERRONEOUS

Even if the evidence were found sufficient to support Ryan's RICO and mail fraud convictions, this Court's instructions were flawed in five respects.

First, the instructions incorporated the honest services standard of *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998). The Supreme Court held in *Black v. United States*, 130 S. Ct. 2963 (2010), that this sort of error alone requires reversal.

Second, the instructions described the duty not to accept bribes and kickbacks merely as one of the duties of public officials whose violation could lead to an honest services conviction. Under *Skilling*, a scheme to obtain a bribe or kickback is not just one possible path to conviction; it is essential.

Third, the instructions concerning the duty not to accept bribes and kickbacks, taken as a whole, did not convey the *quid pro quo* requirement.

Fourth, the instructions invited the jury to convict Ryan for failing to disclose conflicts of interest. They thereby endorsed a theory of honest services fraud that the Government advanced in *Skilling* and that the Supreme Court emphatically rejected.

Fifth, the instructions invited the jury to convict Ryan for violating state laws, another position clearly rejected by *Skilling*.

A. The *Bloom* Standard. In *Black v. United States*, 130 S. Ct. 2963 (2010), decided the same day as *Skilling*, the trial court's instructions advised the jury of the honest services standard set forth in *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998). "[T]he District Court informed the jury, over Defendants' objection, that a person commits honest-services fraud if he misuses

his position for private gain for himself and/or a co-schemer and knowingly and intentionally breaches his duty of loyalty." 130 S. Ct. at 2967 (internal quotations and alterations omitted). The Supreme Court held this instruction erroneous: "We decided in *Skilling* that § 1346, properly confined, criminalizes only schemes to defraud that involve bribes or kickbacks. . . . That holding renders the honest-services instructions given in this case incorrect." *Id*. at 2968. It remanded *Black* to allow the Seventh Circuit to determine whether the error in instructing the jury was harmless.

In this case, the Court recited the *Bloom* standard in similar language: "Where a public official misuses his official position or material nonpublic information he obtained in it for private gain for himself or another, then that official or employee has defrauded the public of his honest services if the other elements of the mail fraud offense have been met." R. 23911. *Black* is on point; this instruction is erroneous.

B. The Structure of the Instructions. The Court organized its other instructions in accordance with *Bloom*. It advised the jury of the duties whose breach could lead to an honest-services conviction "if the other elements of the mail fraud offense are met," R. 23905-11, and it described separately the other elements. These elements were mailing, R. 23912-13, a material false representation, R. 23904, an intent to defraud, R. 23904-05, and gain "no matter who receives the benefits." R. 23911.

One of the duties the Court listed was the duty of a public official not to accept "personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." R. 23906. This duty, however, was not the only one. The instructions made the acceptance of a bribe or kickback only one path to conviction rather than the only one. They said that the acceptance of a bribe or kickback was sufficient

rather than required.

C. The Failure to Require a *Quid Pro Quo*. The Court's instructions concerning improper payments treated campaign contributions and other benefits separately. With respect to campaign contributions, they said, "When a person gives and a public official receives a campaign contribution, knowing that it is given in exchange for a specific official act, that conduct violates the mail fraud statute if the other elements of the mail fraud offense are met. The intent of each party can be implied from their words and ongoing conduct." R. 23908. When the question becomes the one that *Skilling* makes it—whether campaign contributions are bribes—this instruction is erroneous. A jury may not treat a campaign contribution as a bribe simply because the jury has implied an exchange from words and ongoing conduct; it must find an "explicit" *quid pro quo*. *McCormick*, 500 U.S. at 273.

With respect to benefits other than campaign contributions, the Court's instructions gave the jury two different standards. The first came close to requiring a *quid pro quo*:

> 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.

R. 23905-06.[14] Even this instruction turned the issue on the understanding of one person—the public official—rather than on whether two parties had agreed to an exchange.

The second standard was further from the mark:

> [T]he providing of personal or financial benefits by a private citizen to and for the benefit of a public official or to and for the benefit of a public official's family, friends, employees, or associates, does not, standing alone, violate the mail fraud statute, even if the private citizen does business with the state, so long as the

[14] When the Court approved this instruction over Ryan's objection, it emphasized the instruction's negative message: "I think we do need to tell the jurors 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." R. 22080-81.

> personal or financial benefits were not intended to influence or reward the public official's exercise of office.

R. 23907. Benefits intended to reward a public official's exercise of office are gratuities, not bribes. Moreover, it is not bribery for a citizen to provide a benefit intended to influence a public official as long as the official makes no commitment to the citizen in return. Similarly, an official may accept a benefit that he knows is intended to influence him as long as he makes no commitment to the provider of the benefit. *See Evans*, 504 U.S. at 268 ("[T]he offense is complete at the time when the public official receives a payment in return for his engagement to perform specific official acts.").[15]

D. Undisclosed Conflicts. The Court told the jury:

> A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest, also known as a conflict of interest, in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services if the other elements of the mail fraud offense are met.

R. 23905. This instruction invited the jury to convict for conduct that does not constitute a bribe or kickback. It incorporated the theory of honest services fraud that the Government supported in *Skilling* and that the Court forcefully rejected. *See* 130 S. Ct. at 2931-33.

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[15] The Court in fact gave the jury a third instruction that falls somewhere between the two described in text:

> 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.

R. 23906.

Perhaps the benefit need not be conferred or received in exchange for a specific official action, but the benefit must be conferred or received in exchange for something. An intent to ensure favorable action when necessary is not enough.

E. Violations of State Law. Finally, the Court said, "I instruct you that the following state laws were among the laws applicable to state officials . . . ." R. 23908. It then noted an Illinois Constitutional provision "that public funds, property, or credit shall be used only for public purposes," a statutory prohibition of acting "in excess of [an official's] lawful authority," a prohibition of soliciting or knowingly accepting "for the performance of any act a fee or reward which [an official] knows is not authorized by law," a statute requiring an official to file an annual statement of his economic interests, another statute prohibiting the acceptance of gifts from lobbyists and other "prohibited sources," and a statute forbidding the use of public funds in political campaigns. R. 23908-11. The Court declared:

> Again, not every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation. Where a public official or employee misuses his official position or material nonpublic information he obtained in it for private gain for himself or another, then that official or employee has defrauded the public of his honest services if the other elements of the mail fraud offense have been met.

R. 23911.

By declaring that its construction of § 1346 established "a uniform national standard," *Skilling* made clear that honest services convictions cannot be predicated on violations of state law. 130 S. Ct. at 2933. Moreover, violations such as failing to file a state-mandated economic report, accepting a prohibited gift from a lobbyist, and using state funds in a political campaign are not bribes or kickbacks.

The instructions given in this case were clearly erroneous. They invited the jury to convict Ryan for conduct that, after *Skilling*, is not a crime.

VII. THE ERROR IN INSTRUCTING THE JURY WAS NOT HARMLESS

Although *Skilling* presented an issue of statutory construction, the Court noted that "*constitutional* error occurs when a jury is instructed on alternative theories of guilt and returns a

general verdict that may rest on a legally invalid theory." 130 S. Ct. at 2934 (citing *Yates v. United States*, 354 U.S. 298 (1957)) (emphasis added). It also observed that "errors of the *Yates* variety are subject to harmless-error analysis." *Id.* (citing *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008)).

The standard for judging harmlessness in Section 2255 proceedings is unclear. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court described the standard for judging the harmlessness of both constitutional and non-constitutional errors in habeas corpus proceedings brought by *state* prisoners as whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 631 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Court explained why the more demanding test applied in its direct review of constitutional errors was inappropriate:

> 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. . . . We have also spoken of comity and federalism. "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."

Id. at 635 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)) (citations omitted).

The federalism concerns that prompted *Brecht* are absent in Section 2255 proceedings brought by federal prisoners. In *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000), a Section 2255 proceeding, the Seventh Circuit rejected the movant's argument that it must be "apparent beyond a reasonable doubt that the error did not contribute to the verdict at all." *Id.* at 839. According to the Court, the question was: "'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). This Court should apply the "beyond a reasonable doubt"

standard announced in *Lanier*.

The issue is not of great consequence. *O'Neal v. McAninch*, 513 U.S. 432 (1995), refined the *Brecht-Kotteakos* standard. It rejected *Brecht*'s suggestion that habeas corpus petitioners must show prejudice and said that prosecutors must explain why errors are harmless. *Id*. at 438-40. Moreover, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *Id*. at 436. There is more than a grave doubt in this case.

As discussed above, error pervaded the Court's instructions. These instructions did not simply give the jury a technically imprecise statement of the law; they rested on a view of honest services fraud that the Supreme Court has repudiated in its entirety. Moreover, the Government reinforced the Court's erroneous instructions by telling the jury repeatedly that no *quid pro quo* was required and that the jury was bound to convict if it found an "undisclosed flow of benefits." Part IV, *supra*.

When this Court set aside two of the defendant's mail fraud convictions, seven mail fraud convictions remained. As discussed above, the evidence was insufficient to support these convictions under the *Skilling* standard. Even if this Court were to find the Government's evidence *sufficient* to support a conviction on one or more of the mail fraud counts, however, the jury was not *required* to find the defendant guilty on these counts. The evidence was not so compelling that every rational juror would have found bribes or kickbacks. In this situation, the Court's instructions did not tell the jurors to resolve the issue that *Skilling* makes crucial—whether the evidence established a scheme to obtain bribes or kickbacks beyond a reasonable doubt. Rather, the Court invited the jurors to convict if they found an undisclosed conflict of

interest. The instructions were both erroneous and prejudicial.

The prejudice was compounded by the wide-ranging mail fraud scheme the Government alleged. Over the course of a five-and-one-half-month trial, the Government presented evidence of conduct that bore no resemblance to bribes or kickbacks. The Court's instructions then invited the jury to find a fraudulent scheme if Ryan accepted gifts worth more than $50, failed to file required financial disclosures, or misused state property. Although the Government alleged no mailings in furtherance of these aspects of the scheme, its endless accusations of misconduct (misconduct that, under *Skilling*, does not violate the mail fraud statute) must have influenced the jury's consideration of the charges the Government did bring. There would have been no reason for the Government to present this evidence otherwise.

The errors in the Court's jury instructions were not harmless.

VIII. THIS COURT SHOULD RE-DETERMINE THE SENTENCES IT IMPOSED FOR RYAN'S FALSE STATEMENTS AND TAX OFFENSES

Although Ryan does not challenge his convictions for false statements (Counts 11-13) and various tax offenses (Counts 18-22), setting aside his mail fraud and RICO convictions would require this Court to re-determine his sentences for these other offenses. Ryan received the statutory maximum sentences on both the false statements counts (five years) and the tax counts (three years) only because these counts were joined with the mail fraud and RICO counts.

Section 2255 affords this Court broad remedial powers. Upon a finding that a judgment or sentence is subject to collateral attack, "the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). Moreover, "when part of a sentence is vacated the entire sentencing package becomes 'unbundled' and the judge is entitled to resentence a defendant on all counts." *United States v. Smith*, 103 F.3d 531, 533 (7th Cir. 1996). *See also id.*

at 535 ("When there is an alteration in the components of a sentence, the entire sentence is altered. If the alteration contains within itself potential for permeating the whole sentence, the entire sentence can be revisited."); *United States v. Rodriguez*, 112 F.3d 26, 31 n.2 (1st Cir. 1997) (noting that a successful Section 2255 challenge to some of a movant's convictions may "require[] a reduction in the remaining sentence").

Ryan's convictions on Counts 11-13, the false statements counts, resulted in a maximum sentence of 60 months only because they were grouped for sentencing purposes with the invalid mail fraud and RICO convictions on Counts 1-8. In calculating the Guidelines sentence for the grouped offenses, the Court applied enhancements for the amount of loss, role in the offenses, abuse of a position of public trust, and obstruction of justice. *See U.S. Sentencing Guidelines Manual* §§ 2B1.1(b)(1), 3B1.1(a), 3B1.3, 3C1.1 (2005). These enhancements grew out of the conduct alleged to constitute mail fraud, not on Ryan's alleged false statements. *See Presentence Investigation Report* at 22, Dkt. 916.[16] Without these enhancements, the Guidelines sentence for Ryan's false statements would have been 15-21 months. *See Guidelines Manual* § 2B1.1 (setting a base offense level of 6) & ch. 5, pt. A, Sentencing Table (2005). Even without good time credit, Ryan would have completed this sentence more than a year ago.[17]

This Court should resentence Ryan for his tax offenses as well (Counts 18-22). The Court imposed the statutory maximum sentence of 36 months for these offenses although the Guidelines called for a sentence of only 15-21 months. *See* Judgment at 2, Dkt. 888; *Presentence Investigation Report* at 23-24, Dkt. 916 (calculating the base offense level as 12 and

[16] Ryan's alleged false statements led to an "obstruction of justice" enhancement of his sentence on the mail fraud counts. As the Government recognized at sentencing, an enhancement of the false statements convictions themselves would have constituted double counting. R., Sept. 6, 2006 at 38-39.

[17] Ryan reported to prison on November 7, 2007.

adding a two-level enhancement based on the amount of undisclosed income); *Guidelines Manual* ch. 5, pt. A, Sentencing Table (2005). In accordance with the recommendation of the *Presentence Investigation Report*, this Court disregarded the Guidelines calculation for the tax offenses and based its tax sentence on the levels calculated for the other offenses. *See id*. at 24. The Court plainly would have imposed a less severe sentence in the absence of the mail fraud and RICO convictions. Nevertheless, Ryan now has served more than 33 months, and with good time credit of 54 days per year under 18 U.S.C. § 3624(b), he has completed his 36-month sentence for the tax offenses.

CONCLUSION

Because the evidence was insufficient to support Ryan's mail fraud and RICO convictions under the *Skilling* standard, these convictions must be set aside, and the government may not retry the defendant. *See Burks v. United States*, 437 U.S. 1, 10-11 (1978). If the Court were to find the evidence sufficient on any or all of the mail fraud or RICO counts, however, it should order a retrial of these counts. The Court's instructions were erroneous, and the error was not harmless. Upon setting aside Ryan's mail fraud and RICO convictions, the Court should recalculate his sentences for false statements and various tax offenses.

DATED: August 31, 2010

Respectfully submitted,

s/ Dan K. Webb
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Respondent, v. GEORGE H. RYAN, SR., No. 16627-424 Movant.	)	Case No. 10-cv-5512 Judge Rebecca R. Pallmeyer

MOTION TO SET BAIL

George H. Ryan, Sr., in the custody of the Federal Bureau of Prisons pursuant to a judgment of this Court, by his attorneys, respectfully presents this Motion to Set Bail. In support whereof he states as follows:

1. On August 31, 2010 Mr. Ryan Filed his Petition to Vacate Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum of Law in Support of that motion.
2. Because Mr. Ryan remains in custody on charges that must be vacated for the reasons set out in Mr. Ryan's Petition to Vacate Sentence Pursuant to 28 U.S.C. § 2255, reasonable bond should be set.
3. As set out in the accompanying Memorandum of Law in support of this motion, there are factors to be considered in the request for bail during the pendency post-conviction petition.
4. One factor is the length of time left for the movant to serve during the pendency of his motion. Mr. Ryan has served two and three quarter years in prison. He has thus completed a substantial portion of his sentence, and, moreover, has likely finished the time he would be required to serve based on those convictions which

are undisturbed by *Skilling* and are not the subject of his § 2255 Motion (false statements and tax charges[1]).

5. One factor is the health of the inmate. Mr. Ryan is nearly 76 years old and suffers from Crohns' disease, hypertension, and heart disease.

6. In this case, there is an exceptional circumstance "deserving of special treatment in the interests of justice." Lura Lynn Ryan, George Ryan's wife of 54 years, his high-school sweetheart, and the mother of his six children, is terminally ill. She has been diagnosed with pulmonary fibrosis and also suffers from anterior communicating artery cerebral aneurysm, hypertension, high cholesterol levels, arterial sclerosis, low thyroid function, chronic lung disease, mitral valve prolapse, severe osteoporosis, and lumbar stenosis—conditions that make treatment of the pulmonary fibrosis difficult. Mrs. Ryan requires the administration of oxygen at all times. The stress of being away from her husband exacerbates both her physical condition and her depression. She recently suffered a TIA, or "mini stroke," while on a trip to visit her husband at the Federal Correctional Institution at Terre Haute. Mrs. Ryan's physician declares that she has one to three years to live, suggesting that she very well may not survive her husband's incarceration. For a complete diagnosis and prognosis, see the affidavit from Dr. Stephen A. Hermes, attached as Exhibit 2 to the memorandum in support of this motion.

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[1] While Mr. Ryan was sentenced to 60 months on the false statements charges, had he not been convicted of the other charges, he would likely have been sentenced to much less.

7. Unfortunately, there is a real question whether Mrs. Ryan will be able to survive the balance of her husband's sentence. Dr. Hermes affidavit demonstrates that she is depressed and deteriorating very rapidly. Without the comfort of her husband's presence, her physical condition continues to worsen.

8. Other bond considerations are in Mr. Ryan's favor as well. He has extensive ties to the community, the crimes he was convicted of did not involve violence, and he is not a flight risk.

For all of these reasons, and those in his accompanying Memorandum of Law, Mr. Ryan prays that this Honorable Court grant him a reasonable bail.

DATED: August 31, 2010

Respectfully submitted,

s/ Dan K. Webb
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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Movant George H. Ryan, Sr., hereby certifies that he caused to be served a true and correct copy of the foregoing Motion To Set Bail and the Memorandum of Law in Support of Movant's Motion to Set Bail, via hand-delivery this 31st day of August 2010 on counsel for the Government at the following address:

Patrick Fitzgerald
United States Attorney for the Northern District of Illinois
219 South Dearborn Street
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DATED: August 31, 2010

s/ Dan K. Webb
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Respondent, v. GEORGE H. RYAN, SR., No. 16627-424 Movant.	)	Case No. 10-cv-5512 Judge Rebecca R. Pallmeyer

MEMORANDUM OF LAW IN SUPPORT OF
MOVANT'S MOTION TO SET BAIL

George H. Ryan, Sr., ("Ryan") in the custody of the Federal Bureau of Prisons pursuant to a judgment of this Court, by his attorneys, respectfully presents this Memorandum of Law in support of his Motion to Set Bail.

1. As discussed in the Memorandum of Law in Support of Movant's Motion To Vacate Sentence Pursuant to 28 U.S.C. § 2255 ("Motion to Vacate Sentence"), Ryan was convicted of RICO violations and mail fraud based on conduct that the Supreme Court, in *Skilling v. United States*, has found not to be criminal.

2. 28 U.S.C. Section 2255(b) provides that "[i]f the court finds . . . that the sentence was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

3. As the Seventh Circuit has held, "When there is an alteration in the components of a sentence, the entire sentence is altered. If the alteration contains within itself potential for permeating the whole sentence, the entire sentence can be revisited." *United States v. Smith*, 103 F.3d 531, 535 (7th Cir. 1996). In other words, "when part of a sentence is vacated the entire sentencing package becomes 'unbundled' and the judge is entitled to resentence a defendant on all counts." *Id.* at 533; s*ee also United States v. Rodriguez*, 112 F.3d 26, 31 n. 2 (1st Cir. 1997) (noting that occasions may occur in which a successful § 2255 motion for a portion of interrelated convictions will "require[] a reduction in the remaining sentence").

4. As discussed in Ryan's accompanying Motion to Vacate Sentence, Ryan's mail fraud convictions cannot withstand scrutiny after *Skilling*. After ruling on that motion, the Court will have to unbundle Ryan's sentencing package and impose a new sentence. As a result, the appropriate offense level will be 14 with a Guidelines range of 15-21 months. Ryan has already served this sentence – indeed, he has already served nearly 34 months in prison. In fact, accounting for good time credit of 54 days per year under 18 U.S.C. § 3624(b), Ryan has completed the full 36-month sentence for the tax offenses.

5. Given the time Ryan has already served, and in light of *Skilling*, he should be granted bail pending the adjudication of his Section 2255 motion. The standard for granting bail in this case is unclear. The Government itself, in a case pending in North Carolina, discussed the issue as it relates to the prisoners who were convicted of mail fraud before *Skilling*:

> Ordinarily the release and detention of a federal defendant is governed by 18 U.S.C. §§ 1341-1356. While these statutory sections provide the standards for release and detention during pretrial, trial, immediate post-trial, and appellate stages, they remain silent as to the period of time that a petitioner's habeas corpus motion is pending. In 1964, the Supreme Court suggested that release of a habeas petitioner might be possible, but that "in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice." Aronson v. May, 85 S. Ct. 3, 5 (1964).

> In more recent years, district courts have generally agreed that they have the power to release habeas petitioners, but have set forth different standards that should apply in determining whether release is warranted. See Egger v. Britten, 2005 WL 1377866 at 3 (D. Neb. 2005) (unpublished op.) (district court has the right to grant release to habeas petitioner pending habeas motion); Bader v. Coplan, 2003 WL 163171 at 4 (D. N.H. 2003) (unpublished op.) (acknowledges district court's inherent authority to grant release to habeas to habeas petitioner pending habeas motion), copies attached as Exhibits 4 and 5. It is the Government's position that in deciding whether to release [petitioner] pending the resolution of his § 2241 motion the Court should employ the standard contained in 18 U.S.C. § 3143 for release pending appeal.

Government's Memorandum of Law Regarding Impact of *Skilling v. United States*, Dkt. 146, *Geddings v. United States*, 5:06-CR-136-1D, 5:08-CV-425-1D (E.D.N.C.) (filed 6/29/05) (attached as Exhibit 1 along with the two unpublished opinions mentioned). In *Geddings v. United States*, 2010 U.S. Dist. LEXIS 64229 (E.D.N.C. June 29, 2010), the District Court approved the submission quoted above. It found that a prisoner's claim that his conviction was invalid under *Skilling v. United States*, 130 S. Ct. 2896 (2010), had a high probability of success, and it ordered the prisoner's release on recognizance pending the resolution of his post-conviction petition. *See also United States v. Black*, 07-4080, Dkt. 85 (7th Cir., July 19, 2010) (directing the release on bond of another prisoner serving a sentence for pre-*Skilling* honest services fraud).

6. In 1985, the Seventh Circuit indicated that the standard for release pending a post-conviction proceeding should be more demanding than the standard for release pending appeal. But the Court suggested only that an especially strong showing was necessary, not that different considerations should apply. It said in *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985), that "federal district judges in habeas corpus and section 2255 proceedings have inherent power to admit applicants to bail pending the decision of their cases." It then added that this power should be exercised very sparingly. Because a "defendant whose conviction has been affirmed on appeal . . . is unlikely to have been convicted unjustly," "the case for bail pending

resolution of his postconviction proceeding is even weaker than the case for bail pending appeal." *Id*. at 337.

7. 18 U.S.C. Section 3143(b), which provides the standard for release pending appeal, may not supply the appropriate standard for release pending post-conviction proceedings, but it provides at least a starting point for analysis. Under this provision, cited by the Government in *Geddings*, a defendant is entitled to release if a court finds "by clear and convincing evidence that the person is not likely to flee or pose a special danger to the safety of any other person or the community if released" on conditions and also finds "that the appeal is not for the purpose of delay and raises substantial question of law or fact likely to result in – (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b).

8. A "substantial question" within the meaning of Section 3143(b)(1) "is a close question or one that very well could be decided the other way." *United States v. Molt*, 758 F.2d 1198, 1200 (7th Cir. 1985) (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)). The petitioner need not show that the judgment "probably will be reversed, in order to find that an issue is 'substantial.'" *United States v. Thompson*, 787 F.2d 1084, 1085 (7th Cir. 1986). Rather, the test is whether "the appeal could readily go either way." *United States v. Greenburg*, 772 F.2d 340, 341 (7th Cir. 1985); *see also United States v. Eaken*, 995 F.2d 740, 742-43 (7th Cir. 1993) (affirming release pending appeal because the court was "unsure that the evidence" supported conviction).

9. If a higher standard is appropriate for release pending the resolution of a post-conviction petition than for release pending an appeal, this standard might require a finding that

the court is more likely than not to order a petitioner's release at the conclusion of the proceedings. This is a higher standard than the one proposed by the Government in *Geddings*. A petitioner who can show by clear and convincing evidence that he poses no flight risk or danger to the community and who also shows that his incarceration is more likely than not unlawful ought to be released while the Court considers his case.

10. Ryan can easily make such a showing. He has strong ties to the community and has never missed a court appearance. He poses no risk of flight. He is 75 years old. He was convicted of a nonviolent crime and no longer holds a public office of the sort that led to the charges against him. The chance of his recidivism is essentially none. He poses no "special danger to the safety of any other person or the community if released."

11. Moreover, Ryan's Section 2255 motion was not filed for purposes of delay. In addition, as evidenced by the Memorandum accompanying that Motion, Ryan has a very strong argument that his RICO and mail fraud convictions should be overturned in light of *Skilling*.

12. Moreover, this application is "exceptional and deserving of special treatment." In *Aaronson v. May*, 85 S. Ct. 3 (1964) (cited by the Government in *Geddings*), the Supreme Court denied an application for bail pending the resolution by a circuit court of an appeal of a district court's denial of habeas corpus. The Supreme Court said, "In this kind of case it is . . . necessary to inquire whether, in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice." *Id.* at 5.

13. Here, such exceptional circumstances exist. Lura Lynn Ryan, George Ryan's wife of 54 years, his high-school sweetheart, and the mother of his six children, is terminally ill. She has been diagnosed with pulmonary fibrosis and also suffers from anterior communicating

artery cerebral aneurysm, hypertension, high cholesterol levels, arterial sclerosis, low thyroid function, chronic lung disease, mitral valve prolapse, severe osteoporosis, and lumbar stenosis—conditions that make treatment of the pulmonary fibrosis difficult. Mrs. Ryan requires the administration of oxygen at all times, and the stress of being away from her husband exacerbates both her physical condition and her depression. She recently suffered a TIA or "mini stroke" while on a trip to visit her husband at the Federal Correctional Institution at Terre Haute. Mrs. Ryan's physician declares that she has one to three years to live, suggesting that she very well may not survive her husband's incarceration. Aff. of Dr. Stephen A. Hermes, Aug. 30, 2010 (Ex. 2).

CONCLUSION

Ryan poses no risk of flight and no danger to the community. Releasing him pending the resolution of his Section 2255 motion would not greatly impair any interest of the Government. Keeping Ryan imprisoned while this Court considers his motion, however, would gravely impair his interests and those of his family. If the Court ultimately were to find Ryan's imprisonment lawful, a delay in the completion of his sentence would have produced no notable harm. If the Court ultimately were to find Ryan's imprisonment unlawful, delaying his opportunity to be with his terminally ill wife would be unconscionable. Accordingly, Ryan respectfully requests that this Court grant this Motion.

DATED: August 31, 2010

Respectfully submitted,

s/ Dan K. Webb
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Respondent, v. GEORGE H. RYAN, SR., No. 16627-424 Movant.	)	Case No. Judge Rebecca R. Pallmeyer

INDEX OF EXHIBITS

Exhibit 1: Government's Memorandum of Law Regarding Impact of *Skilling v. United* States, Dkt. 146, Geddings v. United States, 5:06-CR-136-1D, 5:08-CV-425-1D (E.D.N.C.) (filed 6/29/05)

Exhibit 2: Aff. of Dr. Stephen A. Hermes, Aug. 30, 2010

Exhibit

1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Criminal No. 5:06-CR-136-1D
Civil No. 5:08-CV-425-1D

KEVIN LESLIE GEDDINGS,	)	
	)	
Petitioner,	)	
	)	**GOVERNMENT'S MEMORANDUM OF**
v.	)	**OF LAW REGARDING IMPACT**
	)	**OF SKILLING v. UNITED STATES**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this memorandum of law regarding the impact of the Supreme Court's recent ruling in Skilling v. United States, No. 08-1394 (U.S. June 24, 2010) on this case.

SUMMARY OF POSITION

On June 24, 2010, the Supreme Court narrowed the scope of the honest services fraud statute (18 U.S.C. § 1346) to cover "only . . . bribe-and-kickback" schemes of public officials. Skilling, slip. op. at 45. As a result of this ruling, it is no longer a federal crime for state public officials to corrupt their public offices by engaging in undisclosed self-dealing. The new interpretation of Section 1346 does not cover the undisclosed self-dealing that Geddings committed in connection with his service as a North Carolina Lottery Commissioner. Consequently, the Government concedes that Geddings is entitled to have his conviction vacated.

Geddings does not qualify to have conviction vacated pursuant to 18 U.S.C. § 2255 because he has already exercised his right to file a Section 2255 motion. Likewise, Geddings does not qualify to file a second Section 2255 motion under the exception set forth in 28 U.S.C. § 2255(h). However, as discussed below, Geddings has the right to seek relief under 28 U.S.C. § 2241 because "§ 2255 [has] prove[n] 'inadequate or ineffective to test the legality of [his] . . . detention.'" In re Jones, 226 F.3d 328, 332 (4th Cir. 2000), citing 28 U.S.C. 2255(e).

Because it is unclear how long it will take for Geddings to obtain such relief, the Government moves for the Court to release Geddings, as soon as practicable, pending the resolution of the Section 2241 process. In support of this motion, the Government asserts that Geddings does not constitute a flight risk or a risk to the community, that Geddings' Section 2241 motion is not for the purpose of delay, and that his motion raises a substantial question of law likely to result in reversal of his conviction.

FACTS

On September 23, 2005, Geddings was appointed to serve as a North Carolina Lottery Commissioner. United States v. Geddings, 278 Fed. Appx. 281, 283 (4th Cir. 2008). On the date Geddings was appointed Lottery Commissioner, entities under his control had received (or were about to receive) a total of $163,545.00 from Scientific Games International, Inc. ("SGI"), one of the two main

lottery vendors vying for the lucrative contract to run the North Carolina State Lottery.

After accepting his appointment as Lottery Commissioner, Geddings was required to complete a "'Long Form' Statement of Economic Interest" ("Ethics Form"). Geddings, 278 Fed. Appx. at 283. Although Geddings was obligated to "fully disclose any potential conflict of interest or appearance of conflict" on his Ethics Form, Geddings "omitted his financial relationship with Scientific Games." Id. at 283-84. "After becoming a lottery commissioner, Geddings took actions benefitting Scientific Games." Id. at 286. On November 1, 2005, after being informed by SGI's attorney that the company planned on providing the United States Attorney's Office with records detailing SGI's payments to Geddings, Geddings resigned from his position as Lottery Commission. Id. at 285.

Based on the facts set forth above, the Government pursued prosecution of Geddings under the "undisclosed self-dealing" prong of honest services fraud. The concept of "undisclosed self-dealing" is best understood from the following description provided by the Supreme Court in Skilling:

> [U]ndisclosed self-dealing by a public official or private employee — *i.e.*, the taking of official action by employee that furthers his own undisclosed financial interests while purporting to act in the interests of these to whom he owes a fiduciary duty.

Skilling, slip. op. at 45. On May 18, 2006, an Indictment was returned charging Geddings with charges based on the "undisclosed self-dealing" prong of honest services fraud. See Indictment at 35-41. On October 12, 2006, a jury found Geddings guilty of five counts of honest services mail fraud and not guilty as to the remaining count of honest services mail fraud. On May 7, 2007, the Court imposed a sentence of 48 months imprisonment. Geddings is currently serving his sentence.

Geddings appealed his conviction to the Fourth Circuit Court of Appeals, which heard oral argument on January 31, 2008. On May 19, 2008, the Fourth Circuit, in accordance with circuit court precedent, rejected Geddings' argument that the honest services statute was unconstitutional vague. On June 16, 2008, the Fourth Circuit issued an order denying Geddings' petition for rehearing en banc. Geddings filed a writ of certiorari in the Supreme Court of the United States on September 2, 2008. On October 14, 2008, the Supreme Court denied Geddings' writ of certiorari.

On August 25, 2008, Geddings filed a motion pursuant to 28 U.S.C. § 2255 seeking to vacate, set aside, or correct the sentence against him based on a claim of ineffective assistance of counsel. On October 20, 2008, the Government filed a motion to dismiss Geddings' § 2255 motion. On May 15, 2009, the Court issued an Order granting the Government's motion to dismiss Geddings' Section 2255 motion. Geddings did not appeal the Court's dismissal.

LEGAL ANALYSIS

I. The Supreme Court has narrowed the scope of the honest services statute to exclude from its coverage the prosecution of a state official for "undisclosed self-dealing" while in office.

The original mail fraud statute was enacted by Congress in 1872. Skilling, slip. op. at 35. As noted by the Supreme Court, the Fifth Circuit in Shushan v. United States, 117 F.2d 110 (5th Cir. 1941), is generally "credited with first presenting the intangible-rights theory" as a theory of mail fraud prosecution. Skilling, slip. op. at 35. Through the use of the intangible-rights theory, federal prosecutors began to use the mail fraud statute to prosecute corrupt state public official under a theory that their corrupt conduct defrauded the public of its right to honest services from public servants.

On June 24, 1987, after years of successful federal prosecutions of corrupt state officials under an intangible-rights theory, the Supreme Court "stopped the development of the intangible-rights doctrine in its tracks." Skilling, slip. op. at 37. In McNally v. United States, 483 U.S. 350, 360 (1987), the Supreme Court found that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to the honest services from public officials. The Supreme Court noted, however, that "[i]f Congress desires to go further, it must speak more clearly

that it has." Id. at 360.[1]

On November 18, 1988, just 16 months after the Supreme Court's ruling in McNally, Congress reinstated the "intangible-rights theory" by enacting 18 U.S.C. § 1346 with the purpose of restoring the honest services fraud prosecution to its pre-McNally status. 134 Cong. Rec. H11251 (daily ed. Oct. 21, 1988((statement of Rep. Conyers). In the decades since the passage of Section 1346, federal prosecutors have relied on the honest services fraud statute to prosecute numerous corrupt public officials. During such time, Circuit Courts have been unanimous in their unwillingness to "throw out the statute (honest services fraud statute) as irremediably vague." Skilling, slip. op. at 39.

On June 24, 2010, exactly 23 years after its ruling in McNally, the Supreme Court significantly narrowed the scope of the honest services fraud statute. In Skilling, the Supreme Court held that while the honest services statute allowed for federal prosecution of local officials based on bribes and kickbacks, the statute did not cover prosecutions based on undisclosed self-dealings by public officials, the theory used by the Government

[1]It is noteworthy that the Supreme Court's ruling in McNally was retroactively applied notwithstanding the fact that it was a "non-constitutional decision concerning the reach of a federal statute, rather than a substantive decision on the scope of a constitutional guarantee . . . ." United States v. Shelton, 848 F.2d 1485, 1489 (10th Cir. 1988); see also United States v. Mandel, 862 F.2d 1067, 1074-75 (4th Cir. 1988).

against Geddings. Id. at 45-48.[2] Thus, under the current interpretation of Section 1346, Geddings' undisclosed self-dealing in connection with his service on the North Carolina Lottery Commission does not constitute a federal crime.

II. Geddings can neither obtain relief through the filing of a new Section 2255 motion, nor circumvent the successive filing prohibition by filing a Rule 60 (b)(6) to reopen his first Section 2255 motion.

Following the exhaustion of appellate rights, a defendant may collaterally attack a conviction pursuant to 28 U.S.C. § 2255.[3] In the present case, Geddings availed himself of this right and filed a Section 2255 motion in which he alleged ineffective assistance of counsel during his trial. This motion was properly dismissed by the Court on May 15, 2009.

Defendants are not entitled to make unlimited challenges to their criminal convictions through filing serial Section 2255 motions. To help limit serial filings, Congress put a number of gatekeeping requirements in place through the enactment of the

[2]As was the case in McNally, the Supreme Court in Skilling instructed Congress that if it wished honest services fraud to extend beyond bribery and kickback scenarios "it must speak more clearly than it has." Skilling, slip. op. at 47.

[3]Prior to the passage of Section 2255 in 1948, collateral attacks on convictions were filed pursuant to 28 U.S.C. § 2241. Section 2241 requires that such motion be filed in the district of imprisonment, which often leads to cases being filed far away from the district in which the prisoner was convicted. Passage of Section 2255, which requires the filing on the habeas corpus motion in the district of conviction, was aimed, in large part, at easing the administrative burden of having habeas corpus hearings far from the location of relevant records and witnesses. United States v. Hayman, 342 U.S. 205, 213, 219 (1952).

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[4] Under AEDPA, Geddings is only be entitled to file a second Section 2255 motion if he could obtain permission from the applicable Circuit Court that his proposed motion would be supported by either: (i) newly discovered evidence which would change his guilty verdict; **or** (ii) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

As to the first exception, it does not appear that Geddings makes any allegation that he has discovered new evidence that would result in a new verdict. Likewise, Geddings does not fall within the second exception because the Supreme Court in Skilling did not create a new rule of constitutional law or announce that its ruling was retroactive to cases on collateral review.

Any attempt by Geddings to resurrect his original Section 2255 motion through the use of Rule 60(b)(6) of the Federal Rules of Civil Procedure would constitute an unallowable circumvention of the gatekeeping rules imposed by AEDPA. Rule 60(b) provides the Court with the power to relieve a party of a final judgment if any of six factors are present. The first five factors are clearly not present in this case. The sixth factor, which is codified in Rule 60(b)(6), empowers a court to grant relief of a judgment in a

[4]The purpose of the AEDPA statute "was to achieve finality in convictions by barring successive and abusive collateral attacks." Gilbert v. United States, 2010 WL 2473560 at 3 (11th Cir. 2010).

Section 2255 proceeding for "any other reason that justifies relief." Despite the broad language contained in Rule 60(b)(6), courts have ruled against using Rule 60(b)(6) as a vehicle to allow a defendant to file a successive 2255 Motion. See United States v. Mizell, 203 F.3d 828 (4th Cir. 1999)(unpublished op.)("Rule 60(b) cannot be used cannot be used to circumvent restraints on successive habeas petitions"), copy attached as Exhibit 1; Fleker v. Turpin, 101 F.3d 657, 661 (11th Cir. 1996)("Rule 60(b) cannot be used to circumvent restraints on successive habeas petitions"). In the present case, the Supreme Court's recent narrowing of the scope of the honest services statute has absolutely nothing to do with Geddings' previous allegation of ineffective assistance of counsel. Thus, a motion pursuant to Rule 60(b)(6) would not be an appropriate way to address the issue.

III. Geddings is entitled to seek relief from his conviction pursuant to the Section 2255 Savings Clause.

Although Geddings does not qualify to file a second Section 2255 motion challenging his conviction, the "savings clause" contained in Section 2255(e) allows Geddings to seek relief pursuant to Section 2241 if "it also appears that the remedy by [2255] motion is inadequate or ineffective to test the legality of his detention." In re Jones, 226 F.3d at 333; Gilbert v. United States, 2010 WL 2473560 at 3(11th Cir. 2010). If a prisoner's case qualifies under the Section 2255 Savings Clause, the prisoner is allowed to file a Section 2241 habeas corpus motion in the district

of confinement. In re Jones, 226 F.3d at 334.

The Fourth Circuit had set forth the following test to determine if a prisoner qualifies to use the Section 2255 Savings Clause:

> § 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the the legality of a conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

Id. at 333-34.

The Eleventh Circuit, which governs the district court where Geddings would need to file his Section 2241 Motion if filed while he remains incarcerated, has held that the 2255 Savings Clause applies to an otherwise barred claims if:

> 1) That claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion.

Gilbert, 2010 WL 2473560 at 3-4.

It is the Government's position that Geddings qualifies for relief under the 2255 Saving Clause as interpreted by both the

Fourth and the Eleventh Circuits.[5] As a result, Geddings should proceed to file a Section 2241 motion in the district court in the district where he is incarcerated, i.e., the Southern District of Georgia.[6]

Because the 2255 Savings Clause provides Geddings with a clear path to challenge his conviction in light of Skilling, the Court need not resort to its inherent power under 28 U.S.C. 1651 in order to fashion some type of relief for Geddings. Section 1651 provides that "[a]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

---

[5]The 2255 Savings Clause, as shown from the standards applied in the Fourth and Eleventh Circuits, essentially incorporates the concept of "actual innocence" set forth in Bousley v. United States, 118 S.Ct. 1604 (1998). In Bousley, the Supreme Court held that a petitioner should not be prevented from making a claim of "actual innocent" merely because the petitioner claim was procedurally defaulted. Id. at 1611. This concern is remedied by the application of the 2255 Savings Clause in this case. See In re Jones, 226 F.2d at 330, 333 (Fourth Circuit rejects petitioner's request for authorization to file a successive 2255 motion based on "actual innocence," but notes that the § 2255 Savings Clause would be available if the three-prong standard is satisfied).

[6]A petition for writ of habeas corpus pursuant to § 2255 attacks the validity of a petitioner's criminal conviction and is, therefore, filed in the district court of conviction. A petition filed under § 2241, however, "attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined." Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). However, a number of courts have allowed transfer of the § 2241 to the district of conviction after the motion is filed in the district of confinement. See Alamin v. Gerlinski, 30 F.Supp.2d 464 (M.D.Pa. 1998); Conley v. Crabree, 14 F.Supp.2d 1203, 1206-07 (D.Or. 1998); but see Belcher v. Dewalt, 2008 WL 4280137 (E.D.Ky. Sept. 15, 2008)(unpublished op.), copy attached as Exhibit 2. The Government would not be opposed to a transfer of the Geddings' § 2241 petitioner to the Eastern District of North Carolina.

However, the Fourth Circuit, in an unpublished opinion, has made it clear that use of Section 1651 to circumvent the gatekeeping provisions of AEDPA is improper. United States v. Valdez, 73 Fed.Appx. 633 (4th Cir. 2003)(unpublished op.), copy attached as Exhibit 3.

IV. Geddings is entitled to be released pending the resolution of his motion for relief pursuant to 28 U.S.C. § 2241.

Ordinarily the release and detention of a federal defendant is governed by 18 U.S.C. §§ 1341-1356. While these statutory sections provide the standards for release and detention during pretrial, trial, immediate post-trial, and appellate stages, they remain silent as to the period of time that a petitioner's habeas corpus motion is pending. In 1964, the Supreme Court suggested that release of a habeas petitioner might be possible, but that "in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice." Aronson v. May, 85 S.Ct. 3, 5 (1964). In more recent years, district courts have generally agreed that they have the power to release habeas petitioners, but have set forth different standards that should apply in determining whether release is warranted. See Egger v. Britten, 2005 WL 1377866 at 3 (D. Neb. 2005)(unpublished op.)(district court has the right to grant release to habeas petitioner pending habeas motion); Bader v.

Coplan, 2003 WL 163171 at 4 (D. N.H. 2003)(unpublished op.)(acknowledges district court's inherent authority to grant release to habeas to habeas petitioner pending habeas motion), copies attached as Exhibits 4 and 5.

It is the Government's position that in deciding whether to release Geddings pending the resolution of his § 2241 motion the Court should employ the standard contained in 18 U.S.C. § 3143 for release pending appeal. As applied in the present case, Geddings would be entitled to release because he would be able to meet following requirements: (a) that the evidence establishes, by clear and convincing evidence, that Geddings "is not likely to flee or pose a danger to the safety of any other person or the community"; (b) that Geddings' habeas motion would not be filed for the purpose of delay; and (c) that the habeas motion raised a substantial question of law likely to result in a reversal of Geddings' conviction.[7]

CONCLUSION

Thus, for all the reasons discussed above, the Government submits that as a result of the Supreme Court's ruling in Skilling, Section 1346 does not cover the undisclosed self-dealing engaged in by Geddings while he served as a Lottery Commissioner. Thus, the Government concedes that Geddings is entitled to have his

[7]The only condition of release necessary would be that Geddings keep the United States Probation Office of the Eastern District of North Carolina advised of his current address and telephone number.

conviction vacated. It is the Government's position that Geddings should seek such relief through the filing of a habeas petition pursuant to 28 U.S.C. § 2241. Finally, the Government moves the Court to release Geddings, as soon as practicable, pending the resolution of his habeas filing.

Respectfully submitted, this 29th day of June, 2010.

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CERTIFICATE OF SERVICE

This is to certify that I have this 29th day of June, 2010, served a copy of the foregoing upon the undersigned in this action either electronically or by depositing a copy of the same in the United States mail in a postpaid envelope addressed as follows:

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(Cite as: 2005 WL 1377866 (D.Neb.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Nebraska.
Ronald Lee EGGER, Petitioner,
v.
Fred BRITTEN, Respondent.
No. 4:04CV3314.

June 8, 2005.

Ronald Lee Egger, Tecumseh, NE, pro se.

George R. Love, Jon C. Bruning, Attorney General's Office, Lincoln, NE, for Respondents.

ORDER ASSESSING APPELLATE FILING FEE

BATAILLON, Chief J.

***1** This matter is before the court on filing no. 21, the Notice of Appeal filed by the petitioner, Ronald Lee Egger, who appeals the Memorandum and Order (filing no. 19) and Judgment (filing no. 20), dismissing his Petition for Writ of Habeas Corpus (" § 2254 petition") as untimely. Also before the court are: (1) filing no. 22, the petitioner's Motion for Leave to Proceed in Forma Pauperis ("IFP") on appeal and Motion for a Certificate of Appealability; (2) filing no. 23, the petitioner's Motion for Appointment of Counsel on appeal; and (3) filing no. 24, the petitioner's Motion for Release on Bail pending appeal.

In Forma Pauperis

Because the petitioner has previously been granted leave to proceed in forma pauperis ("IFP") in the district court, and because this appeal is taken in good faith, the petitioner may continue to proceed IFP on appeal pursuant to Fed. R.App. P. 24(a)(3). [FN1] However, to calculate the plaintiff's initial partial appellate filing fee and issue a Collection Order, the court requires certified trust account information from the plaintiff's institution for the last six (6) months. Until such documents are received, the court will grant the plaintiff provisional leave to proceed IFP on appeal, and the Clerk of Court shall request the necessary statements from the appropriate official for the plaintiff's institution. The Clerk of Court shall not process the appeal to the Eighth Circuit until this court issues a Collection Order regarding the amount of the initial partial appellate filing fee.

FN1. Fed. R.App. P. 24(a)(3) states:

> (a) Leave to Proceed in Forma Pauperis....
>
> (3) Prior Approval. A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court-before or after the notice of appeal is filed-certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court must state in writing its reasons for the certification or finding.

Exhibit 4

The plaintiff is hereby notified that leave to proceed IFP on appeal does not exempt him from liability for payment of the full $255 appellate filing fee in installments regardless of the outcome of the appeal. In addition, by filing a notice of appeal, the plaintiff consents to the deduction by prison officials of the filing fee from the plaintiff's inmate prison account. Absence of the required prison account information will result in the assessment of an initial partial appellate filing fee of $35 or such other amount as is reasonable, based on whatever information the court has about the plaintiff's finances.

After payment of the initial partial appellate filing fee, the remaining balance of the appellate filing fee shall be collected by the plaintiff's institution in accordance with 28 U.S.C. § 1915(b)(2), which states:

(b)(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

Certificate of Appealability

However, before the petitioner may appeal the denial of his § 2254 petition, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the right to appeal the denial of a § 2254 petition is governed by the certificate of appealability requirements of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c) states:

***2** (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

....

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Similarly, Fed. R.App. P. 22(b) indicates that in an action pursuant to 28 U.S.C. § 2254 by a prisoner in state custody, a notice of appeal triggers the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state the reasons why such a certificate should not issue. See generally *Tiedeman v. Benson,* 122 F.3d 518 (8th Cir.1997).

28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. A substantial showing of the denial of a constitutional right requires a demonstration "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d

542 (2000) (internal quotation marks omitted), *citing Barefoot v. Estelle,* 463 U.S. 894 (1983) (which defined the pre-AEDPA standard for a certificate of probable cause to appeal).

"Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack,* 529 U.S. at 484. Similarly, if the district court denies a § 2254 motion on procedural grounds without reaching the underlying constitutional claims on the merits, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and ... would find it debatable whether the district court was correct in its procedural ruling.... Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted." *Id.*

In this case, the petitioner filed his § 2254 petition after expiration of the statute of limitations. See 28 U.S.C. § 2244(d). On review and consideration of the record and the applicable law, and for the reasons stated in filing no. 19, I conclude that the petitioner has failed to demonstrate that reasonable jurists would find this court's ruling debatable or wrong. Therefore, a certificate of appealablity will not issue under 28 U.S.C. § 2253(c).

Counsel

***3** The plaintiff's motion for appointment of counsel on appeal should be addressed to the Eighth Circuit Court of Appeals. Therefore, filing no. 23, the plaintiff's pending motion for appointment of counsel, will be denied, without prejudice to reassertion of a similar motion before the Eighth Circuit Court of Appeals.

Bail

This court has the inherent power to grant bail pending resolution of a habeas corpus case, but only in limited circumstances. "Release on bail pending disposition of [a] habeas petition, or pending appeal, requires the habeas petitioner to show not only a substantial federal constitutional claim that 'presents not merely a clear case on the law, but a clear, and readily evident, case on the facts,'... but also the existence of 'some circumstance making [the request] exceptional and deserving of special treatment in the interests of justice.'... Habeas petitioners are rarely granted release on bail pending disposition or pending appeal." *Martin v. Solem,* 801 F.2d 324, 329 (8th Cir.1986) (citations omitted). See also *Mapp v. Reno,* 241 F.3d 221, 226 (2d Cir.2001):

Even as we have acknowledged the authority of the federal courts to grant bail to habeas petitioners, however, we have also, and consistently, emphasized that this power is a limited one, to be exercised in special cases only. As we noted ... "a habeas petitioner should be granted bail only in unusual cases, or when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective."... "[t]he standard for bail pending habeas lit-

igation is a difficult one to meet: The petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[ ] that make the grant of bail necessary to make the habeas remedy effective."

At a minimum, this case lacks the traditionally recognized kind of extraordinary or exceptional circumstance, such as a medical emergency, which would qualify the petitioner for release on bail pending disposition of his habeas corpus case.

THEREFORE, IT IS ORDERED:

1. That filing no. 22, the petitioner's Motion for Leave to Proceed in Forma Pauperis ("IFP") on appeal and Motion for a Certificate of Appealability, is granted in part and denied in part, as follows:

a. Leave to proceed IFP on appeal is provisionally granted, subject to calculation of the initial partial appellate filing fee after receipt of the plaintiff's certified inmate trust account information;

b. An appellate filing fee of $255 is assessed for this appeal, to be paid in accordance with 28 U.S.C. § 1915(b);

c. The Clerk of Court shall request a certified copy of the plaintiff's trust account information from the financial officer for the plaintiff's institution;

d. Upon receipt of the trust account information, the Clerk shall bring this matter to the attention of the court so that the court may issue a Collection Order specifying the amount of the initial partial appellate filing fee;

***4** e. After receipt of the plaintiff's trust account information and the court's entry of a Collection Order stating the amount of the initial partial appellate filing fee, the Clerk shall notify the plaintiff and the plaintiff's institution accordingly, and the Clerk shall process the appeal to the Eighth Circuit;

f. After payment of the initial partial appellate filing fee, the remaining balance of the appellate filing fee shall be collected by the plaintiff's institution in accordance with 28 U.S.C. § 1915(b)(2);

g. A Certificate of Appealability is denied;

2. That filing no. 23, the petitioner's Motion for Appointment of Counsel on appeal, is denied, without prejudice to reassertion of a similar motion directly to the Eighth Circuit Court of Appeals; and

3. That filing no. 24, the petitioner's Motion for Release on Bail pending appeal, is denied.

D.Neb.,2005.
Egger v. Britten
Not Reported in F.Supp.2d, 2005 WL 1377866 (D.Neb.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2003 WL 163171 (D.N.H.), 2003 DNH 015
(Cite as: 2003 WL 163171 (D.N.H.))

H

NOT FOR PUBLICATION

United States District Court,
D. New Hampshire.
Seth BADER
v.
Jane COPLAN, Warden, New Hampshire State Prison
No. Civ. 02-508-JD.

Jan. 23, 2003.

REPORT AND RECOMMENDATION

MUIRHEAD, Magistrate J.

***1** The Petitioner, Seth Bader, is an inmate at the New Hampshire State Prison for Men ("NHSP"). He commenced this action by filing a petition for a federal writ of habeas corpus. *See* Document No. 1. Before the Court for consideration is the Petitioner's motion for a preliminary injunction seeking an order granting him release from prison during the pendency of this Court's habeas corpus proceedings. *See* Document No. 6. The Respondent, NHSP Warden Jane Coplan, filed an objection.

The motion was referred to me for review and to prepare a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). *See* Document No. 8. On January 7, 2003, the Court held a hearing limited to counsel's arguments as to the availability of bail during the pendency of habeas corpus proceedings. At the conclusion of that hearing, the Court allowed the parties two additional weeks to submit supplemental memoranda of law. After reviewing the parties' submissions, and the relevant authorities, I find that the Petitioner has not made the extraordinary showing required for this Court to grant bail during the pendency of post-conviction habeas corpus proceedings. Accordingly, I recommend that the motion be denied.

BACKGROUND

On May 8, 1998, the Petitioner was convicted in the Rockingham County Superior Court of first degree murder, and conspiracy to commit first degree murder. His convictions were affirmed by the New Hampshire Supreme Court on September 13, 2002. In this habeas proceeding, the Petitioner raises five grounds of constitutional error in the state court proceedings. [FN1]

> FN1. He challenges his convictions based on the trial court justice's refusal to recuse himself, the prosecution's failure to disclose exculpatory evidence, the trial court's admission of hearsay evidence at trial, jury misconduct, and witness perjury.

The Petitioner contends in his motion for a preliminary injunction that his petition presents substantial questions of constitutional errors in the state courts because three of the rulings in the state courts were "diametrically opposed" to Supreme Court precedent. In this regard, he challenges the state court rulings with respect to the trial court justice's refusal to recuse himself, the trial court's admission of hearsay evidence at trial, and the trial court's response to the jury misconduct issue. *See* Mot. for Prel. Injunction at 4.

The Petitioner further contends that his

Exhibit 5

evidence of actual innocence presents an exceptional circumstance justifying his release on bail during the pendency of this Court's habeas proceedings. *See* Pet. Reply Mem. at 3. The Petitioner seeks an evidentiary hearing with respect to his innocence claim. By offer of proof, the Petitioner contends that he has credible evidence that Sandro Stuto, one of the State's witnesses, told "John Doe," an NHSP inmate, that the Petitioner was not involved in the murder. The Petitioner contends that John Doe is willing to testify at an evidentiary hearing. The Petitioner supposes that if confronted with this evidence, Stuto would admit that he perjured himself if granted immunity. The Petitioner further supposes that an evidentiary hearing would show that another State's witness, Mary Jean Martin, instigated and organized the murder for which the Petitioner has been convicted. He suggests that Martin should be granted immunity from further prosecution and ordered to testify.

***2** In her objection, the Respondent characterizes the Petitioner's motion as a motion for release on bail. *See* Document No. 10. The Respondent questions whether this Court has the authority to grant bail during the pendency of a habeas proceeding. Notwithstanding her doubt regarding the Court's authority, the Respondent contends that under First Circuit law the Petitioner is not entitled to bail because he has not demonstrated that any extraordinary circumstances exist that warrant his release on bail.

STANDARD OF REVIEW

I. *Standard for Reviewing Motions for Preliminary Injunctions*

"The purpose of a preliminary injunction is to preserve the status quo, freezing an existing situation so as to permit the trial court, upon full adjudication of the case's merits, more effectively to remedy discerned wrongs." *CMM Cable Rep., Inc. v. Ocean Coast Prop., Inc.,* 48 F.3d 618, 620 (1st Cir.1995) (citing *Chalk v. U .S. Dist. Ct. Cent. Dist. of Cal.,* 840 F.2d 701, 704 (9th Cir.1988); *Am. Hosp. Ass'n v. Harris,* 625 F.2d 1328, 1330 (7th Cir.1980)). Thus, if the court ultimately finds for the movant, a preliminary injunction provides the court with a method for preventing or minimizing any current or future wrongs caused by the defendant. *CMM Cable Rep.,* 48 F.3d at 620.

The courts typically employ a four-part test in determining whether a plaintiff has made a sufficient demonstration that interim injunctive relief is warranted.[FN2] The Respondent contends that the Petitioner's motion is in fact a motion for release on bail, not a motion for a for a preliminary injunction. I agree.

FN2. A district court may grant a plaintiff's request for a preliminary injunction if the plaintiff satisfies a four-part test: (1) the plaintiff is likely to succeed on the merits; (2) the plaintiff will suffer irreparable harm if the injunction is not granted; (3) the injury to the plaintiff outweighs any harm which granting the injunction would inflict on the defendant; and (4) the public interest will not be adversely affected by the granting of the injunction. *See Langlois v. Abington Hous. Auth.,* 207 F.3d 43, 47 (1st Cir.2000); *Public Serv. Co. of N.H. v. Patch,* 167 F.3d 15, 25 (1st Cir.1998). In the First Circuit, the key issue in

> determining whether injunctive relief should be granted is whether the plaintiff can demonstrate a likelihood of success on the merits. *See Philip Morris, Inc. v. Harshbarger,* 159 F.3d 670, 674 (1st Cir.1998); *Weaver v. Henderson,* 984 F.2d 11, 12 (1st Cir.1993).

"It is clear ... that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez,* 411 U.S. 475, 484 (1973). Habeas corpus proceedings are characterized as civil in nature. *Fisher v. Baker,* 203 U.S. 174, 181 (1906). But that characterization is inexact because habeas corpus proceedings are essentially unique. *Harris v. Nelson,* 394 U.S. 286, 293-294 (1969). Federal habeas corpus proceedings are governed by a distinct set of statutes and procedural rules. *See* 28 U.S.C. §§ 2241-55 and Rules Governing Section 2254 Cases in the United States District Courts ("Rules Governing § 2254 Cases"). Rule 11 of the Rules Governing § 2254 Cases provides that: "The Federal Rules of Civil Procedure, *to the extent that they are not inconsistent with these rules,* may be applied, when appropriate, to petitions filed under these rules" (emphasis added). Thus, a petitioner in a habeas corpus proceeding does not have an absolute right to use of the procedures available in the Federal Rules of Civil Procedure. *See e.g., Harris,* 394 U.S. at 297-298 (finding that the broad ranging discovery permitted under the Federal Rules of Civil Procedure is neither necessary or appropriate in the context of a habeas corpus proceeding). "Rule 11 permits application of the civil rules only when it would be appropriate to do so." *See* Advisory Committee Note to Rule 11 Governing § 2254 Cases. In *Pitchess v. Davis,* 421 U.S. 482, 489 (1975), the Supreme Court held that Fed.R.Civ.P. 60(b) should not be applied in a habeas case when it would have the effect of altering the statutory exhaustion requirement of 28 U.S.C. § 2254.

***3** The Petitioner's motion for a preliminary injunction is inconsistent with the overall framework of a post-conviction habeas corpus proceeding. That framework requires the district court to give preliminary consideration to a habeas petition to determine whether the petition ought to be summarily dismissed. *See* Rule 4 of the Rules Governing § 2254 Cases (providing for summary dismissal of a petition which "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court"). The respondent need not file an answer to the petition unless ordered to do so by the court after the preliminary review. *See* Rule 3 of the Rules Governing § 2254 Cases. The Petitioner acknowledges in his motion that he cannot establish his claim of innocence without favorable findings of fact at an evidentiary hearing. *See* Mot. for Preliminary Injunction at 5. However, Rule 8 of the Rules Governing § 2254 Cases contemplates that an evidentiary hearing will not be held until after the district court has completed the preliminary review, reviewed the respondent's answer or other pleading in response to the petition, and reviewed the record of the state court proceedings. In the instant case, the Court has only completed the preliminary review. *See* Document No. 22. The mechanism that Petitioner seeks to use to obtain an immediate evidentiary hearing, Rule 65 of the Federal Rules of Civil Procedure, is contrary to the procedure set forth in the Rules Governing § 2254 Cases. I recom-

mend, therefore, that the Court consider the Petitioner's motion as a motion for bail, which has federal court precedent, rather than as a motion for a preliminary injunction.

II. *District Court's Authority to Grant a State Prisoner Bail During the Pendency of a Habeas Corpus Proceeding*

There is no federal statute or court rule that addresses the district court's authority to grant a state prisoner bail during the pendency of federal habeas corpus proceedings.[FN3] However, nearly every federal circuit court of appeal that has considered the issue has found that the federal district courts have the inherent authority to grant a state prisoner bail during the pendency of habeas proceedings. *See e.g., Woodcock v. Donnelly,* 470 F.2d 93, 94 (1st Cir.1972); *Mapp v. Reno,* 241 F.3d 221, 226 (2d Cir.2001); *Landano v. Rafferty,* 970 F.2d 1230, 1239-40 (3d Cir.1991), *cert. denied,* 506 U.S. 955 (1992); *In re Wainwright,* 518 F.2d 173, 174 (5th Cir.1975) (per curiam); *Dotson v. Clark,* 900 F.2d 77, 79 (6th Cir.1990); *Cherek v. United States,* 767 F.2d 335, 337 (7th Cir.1985); *Martin v. Solem,* 801 F.2d 324, 329 (8th Cir.1986); *Pfaff v. Wells,* 648 F.2d 689, 693 (10th Cir.1981); *Baker v. Sard,* 420 F.2d 1342, 1343-44 (D.C.Cir.1969) (per curiam); [FN4] *but see In re Roe,* 257 F.3d 1077 (9th Cir.2001) (declining to decide the issue, but raising doubt as to the court's authority). This inherent authority has been described as incident to the power to hear and determine the case. *Mapp,* 241 F.3d at 225; *see also, Baker,* 420 F.2d at 1343 ("When an action pending in a United States court seeks release from what is claimed to be illegal detention, the court's jurisdiction to order release as a final disposition of the action includes an inherent power to grant relief pendente lite, to grant bail or release, pending determination of the merits); *Johnston v. Marsh,* 227 F.2d 528, 530 (3d Cir.1955) (courts have very wide authority over the persons and business before it, which includes the discretion to grant bail).

FN3. By contrast, Rule 23 of the Federal Rules of Appellate Procedure sets forth conditions for release on bail pending review of a district court's decision on a petition for a writ of habeas corpus. *See* Fed. R.App. P. 23. But that Rule does not specifically address the possibility of release on bail pending a district court's decision on the petition.

FN4. *See also, In re Shuttlesworth,* 369 U.S. 35, 35 (1962) (per curiam) (vacating an order by a court of appeals in a habeas case and suggesting that the district court may hear an application for bail pending that court's final disposition of the matter).

***4** Respondent argues that any authority that the district courts may have had to grant a state prisoner bail during the pendency of a habeas proceeding was terminated by implication after the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. No. 104-132, 110 Stat. 1214 (1996).[FN5] *See* Document No. 31. The Respondent has not directed the Court to any authority that supports the view that Congress sought to strip the federal courts of this particular aspect of its judicial power when it passed the AEDPA. Therefore, I consider the merits of Petitioner's bail motion based on the established judicial precedents.

FN5. Under the AEDPA, the federal

> courts are required to give deference to state court judgments. The federal courts may not grant a writ of habeas corpus to a state prisoner with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d) (West 2002).

DISCUSSION

I. *First Circuit Standard For Bail During a Habeas Proceeding*

The lower federal courts have often cited the reasoning in *Aronson v. May,* 85 S.Ct. 3, 5 (Douglas, Circuit Justice 1964), when considering the propriety of bail during the pendency of a habeas corpus proceeding. In *Aronson,* a petitioner requested bail pending a decision by the Court of Appeals on an appeal from the denial of his petition for a writ of habeas corpus. Justice Douglas stated in the opinion:

> This applicant is incarcerated because he has been tried, convicted, and sentenced by a court of law. He now attacks his sentence in a collateral proceeding. It is obvious that a greater showing of special reasons for admission to bail pending review should be required in a case where [an] applicant had sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt.

85 S.Ct. at 5. Justice Douglas found that where a bail applicant is a convicted prisoner it is necessary "to inquire whether, in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice." *Id.* (citing *Benson v. State of Cal.,* 328 F.2d 159, 162 (9th Cir.1964)).

The First Circuit discussed the *Aronson* and *Benson* opinions when it considered the standards that courts in the First Circuit should use for determining whether to grant a convicted and sentenced prisoner's bail application. *See Glynn v. Donnelly,* 470 F.2d 95, 97-98 (1st Cir.1972). The court in *Glynn* found:

> Both in the district court, and on appeal, in the absence of exceptional circumstances-whatever that may include-the court will not grant bail prior to the ultimate final decision unless petitioner presents not merely a clear case on the law, ..., but a clear, and readily evident, case on the facts. Merely to find that there is a substantial question is far from enough.

Id. at 98. The *Glynn* court's finding establishes two possible tests for deciding a state prisoner's application for bail during the pendency of a post-conviction habeas corpus proceeding. Under the first test, the prisoner must show that there is a substantial question of constitutional error, and that exceptional circumstances exists for granting bail in the particular case before the court. In the alternative, under the second test, the prisoner must show that

there is a clear case in the prisoner's favor on both the law and the facts. Under either test, the prisoner's ability to raise a substantial question of constitutional error, standing alone, is insufficient. *Glynn,* 470 F.2d at 98.[FN6] The First Circuit reaffirmed the bail standard that it enunciated in *Glynn* in *Eaton v. Holbrook,* 671 F.2d 670, 670 (1st Cir.1982).

> FN6. The court in *Glynn* was mindful of a point made by the court in *Benson* that:
>
> > There are thousands of prisoners confined in state prisons, any of whom, with a little assistance from their cell mates, would have little difficulty in drafting a petition for writ of habeas corpus which would allege substantial violations of constitutional rights. We do not propose, by ruling in this case, to open the door to the release of those thousands of prisoners on the basis of mere allegations in their petitions.
>
> 470 F.2d at 98 n. 2 (quoting *Benson,* 328 F.2d at 162 n. 2).

II. *Application of Glynn Standards to the Petitioner's Motion*

***5** The Petitioner does not have a clear and readily evident case in his favor on the law and the facts. Each of his claims of error, including the three state court rulings that the Petitioner contends are diametrically opposed to Supreme Court precedent, were considered and rejected by the New Hampshire Supreme Court. *See State v. Bader,* 808 A.2d 12 (N.H.2002). In that decision, the court addressed the Petitioner's claims under both federal and state law. *Id.* Petitioner has submitted an 81-page legal memorandum with his petition supporting his claims of constitutional error, *see* Attachment to Document No. 1, which will require careful review before the merits may be decided. I find, therefore, that the Petitioner does not meet the "clear case on the law and the facts" standard for bail under *Glynn.*

Even if the Petitioner has raised substantial questions of constitutional error in the state court proceedings, he has not shown that extraordinary circumstances exist warranting bail pending a determination of the merits of his habeas petition. The Petitioner's claim of actual innocence is dependent on anticipated factual findings in his favor after an evidentiary hearing. Such findings are not certain as his argument regarding the significance of the alleged Stuto recantation has been considered and rejected in the state courts. *See State v. Bader,* 808 A.2d at 29-33. Moreover, Petitioner acknowledges that his innocence claim is contingent at least in part on grants of immunity to Stuto and Martin.[FN7] Petitioner supposes that upon confrontation with the John Doe testimony, either Stuto will admit that he perjured himself in the state court proceedings or it will be clear to the finder of fact that Stuto's trial testimony should not be believed. Petitioner further supposes that if granted immunity from further prosecution, Martin would recant her testimony. Petitioner's claim rests on speculation, which does not present the extraordinary circumstances required to grant a state prisoner bail during the pendency of a habeas proceeding.

> FN7. Petitioner has not provided any evidence that the State is inclined to provide any such grants of immunity.

The district court's inherent authority to

grant bail to a habeas petitioner must be exercised very sparingly because a defendant whose conviction has been affirmed on appeal is unlikely to have been convicted unjustly. *Cherek,* 767 F.2d at 337. The types of exceptional circumstances that some courts have discussed as potentially applicable include cases where the remaining time that the petitioner has to serve is short and the merits of petitioner's constitutional claim is clear. *See e.g., Boyer v. City of Orlando,* 402 F.2d 966 (5th Cir.1968) (release on bail may be required in order to make the writ of habeas corpus an effective remedy). In other cases where the courts have found exceptional circumstances warranting bail, the courts have found that the petitioner suffers from a severe medical illness that requires treatment outside of prison. *See e.g., Johnston v. Marsh,* 227 F.2d 528, 529 (3d Cir.1955) (petitioner granted bail allowing him to go to a private hospital pending review of his habeas petition). Neither of these examples of exceptional circumstances apply to the instant case.

***6** The Petitioner relies on *Ouimette v. Moran,* 942 F.2d 1 (1st Cir.1991), in support of his argument that he should be granted bail pending consideration of his habeas petition. In *Ouimette,* the First Circuit affirmed a district court's order issuing a writ of habeas corpus and unconditionally releasing from prison a petitioner who had been sentenced to life imprisonment. *Id.* at 13. The court noted while discussing the case chronology that the petitioner was released on bail before the district court granted the petitioner's habeas petition and ordered his unconditional release. *Id.* at 3. There is no discussion in the court's opinion of the propriety of the district court's bail decision.

Setting aside the question of whether the district court correctly decided the petitioner's bail application in *Ouimette,* which is suspect, the procedural posture of that case when the court granted bail differs from the circumstances here. In *Ouimette,* the petitioner moved for release on bail *after* the district court denied the state's motion to dismiss the petition for a writ of habeas corpus. *See Ouimette v. Moran,* 762 F.Supp. 468, 470 (D.R.I.1991). Due to the difficult standard that petitioners must meet in a post-conviction habeas proceeding, the denial of a state's motion to dismiss may be viewed as a determination by the court that the petitioner has at least raised a substantial question of constitutional error.[FN8] In contrast to the procedural posture of *Ouimette,* this Court has only performed a preliminary review of Bader's petition. *See* Rule 4 of the Rules Governing § 2254 Cases. The Petitioner's ability to survive preliminary review does not constitute a finding that he has raised a substantial question, and certainly does not indicate that he has presented a clear case on the law and the facts. Given these differences between *Ouimette* and the instant case, I find that *Ouimette* does not support the Petitioner's request for bail.

FN8. As discussed above, however, raising a substantial question, standing alone, does not support a finding that release on bail pending a final determination of the merits of a habeas petition is warranted. Under *Glynn,* the petitioner must still demonstrate that exceptional circumstances exist in the case. 470 F.2d at 98. It is unclear from the published opinions in the *Ouimette* case whether exceptional circumstances existed in that case. *See Ouimette,* 762 F.Supp. at 470 n. 2 (listing the bail conditions that were

set without discussion of the reasons why bail was appropriate).

III. *Standards Under the Federal Bail Statutes*

Viewing this case under the standards that are applied to bail applications by convicted federal prisoners, an analogy that the Petitioner invites in his motion,[FN9] shows that granting the instant bail application would be particularly inappropriate. Under the Federal Bail Reform Act of 1984, codified at 18 U.S.C. §§ 3142-52, there is a statutory presumption that a person who has been found guilty of an offense, and sentenced to serve a term of imprisonment, shall be detained during the pendency of an appeal. *See* 18 U.S.C. § 3143(b). Such a person may be released from detention if the court makes two required findings: (1) that clear and convincing evidence exists that the person is not likely to flee or pose a danger to the safety of any other person or the community, and (2) that the appeal is not for the purpose of delay and raises a substantial question of law or fact requiring any of four enumerated forms of post-conviction relief. *See* 18 U.S.C. § 3143(b)(1). However, under 18 U.S.C. §§ 3143(b)(2) and 3142(f)(1)(B), the district court must order the detention of a person who has been found guilty of an offense for which the maximum sentence is life imprisonment or death during the pendency of an appeal or petition for a writ of certiorari. The statutes provide no exceptions for such a prisoner. New Hampshire state law is consistent with the federal rule. *See* N.H. RSA 597:1-a, I (providing that a defendant convicted for an offense punishable by death or a term of life imprisonment without possibility of parole shall not be allowed bail pending sentence or appeal).

FN9. *See* Mot. for Prel. Injunction at p. 3.

*7 The state's interest in a prisoner's continued custody during appeal is strongest where the remaining portion of the sentence is long. *See Hilton v. Braunskill,* 481 U.S. 770, 777 (1987)). The Petitioner was convicted and sentenced to serve a term of life imprisonment in the state court. The Petitioner collaterally attacks the constitutionality of his state convictions in his petition for a federal writ of habeas corpus. By analogy to the treatment that a federal court must give a federal prisoner's application for bail pending appeal under 18 U.S.C. § 3143(b), bail should not be available in this case because of the nature of the Petitioner's sentence. Since the Petitioner would not be entitled to bail pending appeal if he had been sentenced to life imprisonment in a federal court, it would be incongruous to find that he could be granted bail in federal court while he collaterally attacks his state court convictions.

CONCLUSION

For the reasons set forth above, I recommend that the Petitioner's motion for injunctive relief granting him bail during the pendency of this Court's habeas corpus proceedings be denied.

Any objections to this Report and Recommendation must be filed within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the district court's order. *See Unauthorized Practice of Law Comm. v. Gordon,* 979 F.2d 11, 13-14 (1st Cir.1992); *United States v. Valencia-Copete,* 792 F.2d 4, 6 (1st Cir.1986).

D.N.H.,2003.

Not Reported in F.Supp.2d, 2003 WL 163171 (D.N.H.), 2003 DNH 015
(Cite as: 2003 WL 163171 (D.N.H.))

Bader v. Coplan
Not Reported in F.Supp.2d, 2003 WL 163171 (D.N.H.), 2003 DNH 015

END OF DOCUMENT

Exhibit

2

State of Illinois)
) ss
County of Cook)

Affidavit of Dr. Hermes

I, Dr. Stephen Hermes, do hereby swear and affirm as follows:

1. I am a physician, licensed in the state of Illinois.
2. One of my patients is Lura Lynn Ryan, wife of former Governor George Ryan.
3. Mrs. Ryan has pulmonary fibrosis and also suffers from anterior communicating artery cerebral aneurysm, hypertension, high cholesterol levels, arterial sclerosis, low thyroid function, chronic lung disease, mitral valve prolapse, severe osteoporosis, and lumbar stenosis—conditions that make treatment of the pulmonary fibrosis difficult.
4. Mrs. Ryan was also seen by Dr. Abraham, our premier local pulmonary specialist. Pulmonary functions have shown both low oxygen with exertion and a markedly decreased diffusing capacity (DLCO) which is reflecting her pulmonary fibrosis.
5. In addition her lungs now reveal cellophane rales at both bases, more on the left than the right. This is an ominous finding.
6. Mrs. Ryan requires the administration of oxygen at all times, and the stress of being away from her husband exacerbates both her physical condition and her depression.
7. She recently suffered a TIA or "mini stroke" while on a trip to visit her husband at the Federal Correctional Institution at Terre Haute.

8. In my opinion, Mrs. Ryan has one to three years to live, suggesting that she very well may not survive her husband's incarceration.

Further affiant sayeth not.

Stephen A. Hermes

SUBSRCIRBED and SWORN to
This 30 day of August, 2010

Kendra Curtis
Notary Public

OFFICIAL SEAL
Kendra Curtis
Notary Public, State of Illinois
My Commission Expires 1/31/11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 10 C 5512
v.	)	
	)	Judge Rebecca R. Pallmeyer
GEORGE H. RYAN, SR.	)	

ATTORNEY DESIGNATION

Please take notice that the undersigned Assistant United States Attorney has been designated in the above captioned case.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: s/Laurie J. Barsella
LAURIE J. BARSELLA
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5300

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the

ATTORNEY DESIGNATION

was served on September 2, 2010, in accordance with Fed. R. Crim.P.49, Fed R. Civ.P.5,LR5.5, and the General Order on Electronic Case filing (ECF), pursuant to the district court's system as to ECF filers.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: s/Laurie J. Barsella
LAURIE J. BARSELLA
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5300

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 10-cv-5512
v.	)	
	)	Judge Rebecca R. Pallmeyer
GEORGE H. RYAN, SR.	)	

ATTORNEY DESIGNATION

Please take notice that the undersigned Assistant United States Attorney has been designated in the above captioned case.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s/ Marc Krickbaum
MARC KRICKBAUM
Assistant United States Attorney
United States Attorney's Office
219 South Dearborn Street
Chicago, Illinois 60604
(312) 469-6052

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 5512	**DATE**	9/9/2010
CASE TITLE	George H. Ryan, Sr vs. United States of America		

DOCKET ENTRY TEXT

Motion hearing held Motion pursuant to 28 U.S.C. §2255 to vacate, set aside or correct sentence by a person in federal custody [1] and motion to set bail [8] entered and continued for briefing. Response to be filed by or on 10/7/2010; reply 10/21/2010; hearing set for 11/1/2010 at 10:30 AM. Movant's motion for leave to file, *instanter*, a brief in excess of fifteen pages [7] granted.

Notices mailed by Judicial staff.

00:09

Courtroom Deputy Initials:	ETV

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	Case No. 10 CV 5512
v.	)	
	)	Judge Rebecca R. Pallmeyer
GEORGE H. RYAN, SR.	)	

GOVERNMENT'S MOTION FOR LEAVE TO FILE, *INSTANTER*, A BRIEF IN EXCESS OF FIFTEEN PAGES

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this Motion for Leave to File, *Instanter*, A Brief in Excess of Fifteen Pages.

1. Attached as Exhibit A is the Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. The response is 44 pages long. Defendant's initial Memorandum of Law was 31 pages long. The government's response addresses arguments raised in defendant's Memorandum, as well as additional relevant issues defendant's Memorandum did not raise. More than fifteen pages were necessary to address these matters.

2. Andrea D. Lyon, Counsel for Mr. Ryan, has informed the government that she does not oppose this motion.

WHEREFORE, the government respectfully request that this Court, pursuant to Local Rule 7.1, grant the government leave to file, *instanter*, the Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255.

Dated: October 7, 2010

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s/ Marc Krickbaum

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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	Case No. 10 CV 5512
v.	)	
	)	Judge Rebecca R. Pallmeyer
GEORGE H. RYAN, SR.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this response in opposition to defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255.

INTRODUCTION

Defendant George Ryan challenges his convictions on one count of racketeering and seven counts of mail fraud based on the Supreme Court's recent decision in *Skilling v. United States*, 561 U.S. __, 130 S.Ct. 2896 (2010). Contrary to Ryan's contentions, nothing in *Skilling* undermines Ryan's convictions. The instructions in this case permitted the jury to convict Ryan of honest services fraud only if the jury concluded that Ryan took bribes and kickbacks, the very conduct *Skilling* held is prohibited under the honest services statute. Because there was no instructional error, there was no error at all.

Even if the Court were to conclude that the instructions permitted the jury to convict Ryan for conduct that fell short of taking bribes and kickbacks, any error would be harmless for three reasons. First, even if a jury could have convicted Ryan without finding that he took bribes and kickbacks, no reasonable jury actually would have. Any jury that was properly instructed on honest services fraud would have convicted Ryan of taking bribes and kickbacks because the evidence that

he did so was overwhelming. The evidence showed that over the course of many years, Ryan accepted a stream of benefits from benefactors, and that Ryan awarded state contracts and leases to those benefactors in return. In other words, Ryan took bribes and kickbacks, and any properly instructed jury would have reached that finding.

Second, even if the jury could have convicted Ryan of honest services fraud for conduct that fell short of taking bribes and kickbacks, any reasonable jury that would have convicted Ryan of honest services fraud also would have convicted him of money-property fraud, which the government properly charged. The government alleged a single fraud scheme in which Ryan not only deprived the state of its right to his honest services, but also obtained state money under false pretenses, by steering state money to his benefactors through lucrative state contracts and leases, while actively concealing and lying about the substantial personal and financial benefits his benefactors were giving him in return. In many cases, Ryan's awarding of state money through fraud resulted in a significant loss to the state. This is money-property fraud, and it was so inseparable from Ryan's honest services fraud that no reasonable jury would have convicted on the latter ground without convicting on the former, making any error in the honest services instructions harmless.

Finally, any reasonable jury that was properly instructed only on the money-property fraud theory would have convicted Ryan. The evidence that Ryan committed money-property fraud was overwhelming, and so any error in the honest services instructions could not have prejudiced Ryan.

Because there was no error, and any potential errors were harmless, this Court should deny Ryan's § 2255 motion.

BACKGROUND

I. Second Superseding Indictment

In December 2003, a federal grand jury returned a 22-count second superseding indictment ("indictment") against defendant George Ryan and his co-schemer, Larry Warner. The indictment alleged that over the course of many years as Secretary of State (SOS), and then as Governor of Illinois, Ryan awarded to Warner and others lucrative state property in the form of state contracts and leases in exchange for substantial personal and financial benefits, and that he and his co-schemers concealed these exchanges from the people of Illinois.

Count One of the indictment charged Ryan and Warner with racketeering conspiracy in violation of 18 U.S.C. § 1962(d), alleging that Ryan and Warner conspired to conduct the affairs of the State of Illinois through a pattern of racketeering activity involving multiple acts of mail fraud, money laundering, extortion, obstruction of justice, state-law bribery, and related offenses. R110:1-16.[1] Counts Two through Ten charged that Ryan, in violation of 18 U.S.C. § 1341 and 1346, devised and carried out a scheme to defraud the State of Illinois of money, property, and the right to the honest services of Ryan and other state officials and employees, and used the United States mails and other interstate carriers in furtherance of the scheme. R110:17-67.[2] Counts Eleven through Thirteen charged Ryan with making false statements to the FBI, in violation of 18 U.S.C. § 1001(a)(2). R110:68-71. Counts Eighteen through Twenty-Two charged Ryan with tax crimes. R110:76-88.

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[1] Citations to Ryan's § 2255 motion are to"Mot__." Citations to record documents and trial transcripts are to "R__" and "Tr__," respectively. Citations to the government's trial exhibits are to "Gx__."

[2] Warner was also charged in Counts Two through Five, and Seven through Ten. R110.

II. The Evidence Presented at Trial

The evidence established that, throughout Ryan's tenure in statewide public office, Ryan, his friends, and his family received financial benefits from benefactors, including Larry Warner and other key figures, Harry Klein, Arthur ("Ron") Swanson, and Donald Udstuen, in exchange for state contracts and leases worth millions of dollars, and that Ryan concealed the benefits he received.

A. Official Actions Taken by Ryan in Return for Personal Benefits Provided by Warner and Udstuen

1. The ADM Contract (Count Two)

Shortly after Ryan was elected SOS, Warner told Udstuen, another Ryan friend and political supporter, that Warner was going to capitalize on his relationship with Ryan by entering the lobbying business. Tr11620. Warner said Udstuen "should be part of it" because no one had done more for Ryan than Udstuen, and Udstuen, therefore, "deserved some of this." *Id.*[3] Warner explained that he had talked to Ryan about this plan, and Ryan was "fine" with it. Tr11620-21. Warner added, "I will take care of George." Tr11622.

One of Warner's first clients was ADM, a manufacturer of validation stickers for license plates. Tr11637. Before Ryan became SOS, ADM had won the annual stickers contract, which had specifications calling for a "metallic security mark," which only ADM could provide. Tr8032-33,8064,8067-68,8112-13. From 1991 through 1998, to keep the contract, ADM paid Warner a monthly fee ranging from $2,000 to $5,000. Gx02-004,02-005,02-015,02-500,02-501.

[3] In addition to giving political support to Ryan and assisting on Ryan's political campaigns as a part of a group of supporters providing advice on such things as strategy and fundraising, Tr.11604-10, Udstuen also provided a valuable personal benefit to Ryan in the mid-1980s when, at Ryan's request, he gave a job to Ryan's daughter, who was recuperating from a very serious car accident. The daughter's employment at the Illinois State Medical Society, where Udstuen worked as a lobbyist and administrator for many years, continued through the period in which Ryan was SOS and governor. Tr11593,11600-01,11612-13.

In early 1993, an official in the SOS office decided to change the contract's specifications by eliminating the metallic security mark. Tr8120-26,8135-36. An upset Warner told the SOS official that Warner would "take care of it," and a day or two later, Ryan sternly told the official to quietly retract the revised specifications. Tr8140-45. The official did so, even though he believed the new specifications were in the State's best interests. Tr8146. As a result, ADM continued to be awarded the contract, and from 1991 to 1999, ADM paid Warner $399,000. Tr2801,8146-47. Warner funneled $122,000 of this money to Udstuen, who did nothing to assist ADM. Tr16905,16916;Gx02-500,02-501. Neither Warner nor Udstuen were ever registered as lobbyists for ADM. Tr13755-56;Gx02-093.

2. The IBM Mainframe Computer Contract (Counts Four and Five)

Ryan chose Warner and Udstuen to search for a director of the SOS department that dealt with mainframe computer issues, and then hired Warner and Udstuen's hand-picked candidate for the job. Tr12526. Warner and Udstuen chose the candidate because he said he would support a transition to IBM, one of Warner's clients. Tr12528-29. In 1996, as planned, the SOS office awarded IBM a $26 million mainframe computer contract. Tr3125,12541;Gx04–043. Warner received lobbying fees calculated as 3.5 percent of SOS revenues received by IBM. Tr12931. In total, Warner received almost $1 million from IBM, most of which came as a result of the award of the mainframe contract. Tr12981-87; GX04-014,04-021. Warner funneled $298,371 of this money to Udstuen, although Udstuen's interest was never disclosed to IBM or to the public through lobbyist disclosure documents. Tr16918,16923;Gx04-500,04-501.

3. The Viisage Digital Licensing Contract (Count Seven)

In July 1996, when the SOS office was considering switching to digital driver's licenses,

several companies, including a company called Viisage, made presentations to Ryan. Tr3091-94. Shortly after the presentations, Warner entered into an arrangement with Viisage which provided that he would receive 5 percent of Viisage's revenues on the licensing contract in return for his help in landing it. Gx03-015,03-016. A businessman named Irwin Jann served as a front man in this arrangement. Jann's name was on the original lobbying agreement with Viisage, and Jann was registered as Viisage's lobbyist, even though Jann did no actual work for Viisage. Tr13178,13188-206;Gx03-020, 03-023, 04-045.

In December 1996, months before the bidding process for the contract began, Ryan directed Warner to cut another Ryan friend and supporter, Swanson, in on the Viisage deal, and Warner did so, guaranteeing Swanson $36,000 for his non-existent "lobbying efforts." Tr3102-04;Gx03-009. After the State awarded the $20 million contract to Viisage in June 1997, Tr13195, Warner removed Jann as the front man and had the Viisage lobbying arrangement transferred to Warner's company. Tr13202-05; Gx03-028. Warner never registered as Viisage's lobbyist, and only in 2001 did Viisage file a record showing that the lobbying arrangement had been transferred to Warner's company in 1997. Tr13756-63. Warner received fees totaling $834,000 on the Viisage contract, of which he provided Swanson $36,000, as Ryan had directed, even though Swanson did no work for Viisage, and Swanson never registered as Viisage's lobbyist. Tr3103-04,16923-25;Gx03-023,03-500,03-501. Five days after landing the Viisage contract, Warner wrote Ryan a blank check, which Ryan used to pay over $3,000 to a band for playing at his daughter's wedding. Gx23-003.

4. The Bellwood and Joliet Leases (Counts Three and Eight)

Ryan steered two SOS leases to Warner, costing the state hundreds of thousands of dollars. In 1992, Warner told Ryan that Warner had found a building in Bellwood to house the SOS Police.

Tr2771-73. When Ryan's chief of staff, Scott Fawell, expressed concern that the press might discover Warner's involvement, Warner told Ryan and Fawell not to worry because Warner's ownership interest in the building was "buried in the paperwork." Tr2774. Indeed, before the lease was signed, Warner's interest in the property was hidden behind front men, whose names were put on the real estate trust documents. Tr16939-40; Gx07-500. Ryan approved the Bellwood lease, and after the lease was signed, Warner's ownership interest in the property surfaced through a series of transactions, and Warner went on to receive about $171,000 in profits. Tr16950-51, 16954;Gx07–011,07-501,07-502. The state overpaid on the Bellwood property by about $246,583 for the first five years. Tr11045,11399.

In about 1994, Warner told Ryan that Warner was looking for property in Joliet for the SOS Office to lease, and Ryan directed an SOS official to deal with Warner on the lease. Tr. 7822-24, 2804-05,10463. Warner bought property in Joliet for $200,000, but as with the Bellwood lease, Warner used front men to hide his ownership interest. Tr16954-58; Gx06-500. Warner again told Fawell that Warner's ownership in the property was buried in paperwork. Tr2812,3005. After Ryan personally signed a four-year SOS lease, Warner's 90% ownership interest in the property emerged through various transactions, and Warner ultimately received about $854,258 in rental payments. Tr16959-62; Gx06-016,06-028,06-501,06-502.[4] The state overpaid for the lease by $296,485. Tr11021. When Warner's role in the lease came to light publicly, Warner told Udstuen that he never should have done the Joliet lease because it was "too good a deal." Tr11727.

5. Financial Benefits Provided by Udstuen and Warner

In return for the state contracts and leases Ryan steered to Warner, Warner gave Ryan a

[4] It was unusual for Ryan to personally sign a lease. The evidence showed he signed only two as SOS: the Joliet lease (for Warner) and the South Holland lease (for Klein). Tr6289-91.

stream of benefits to Ryan and to Ryan's family members and associates. Warner provided over $400,000 in payments to Udstuen relating to the ADM and IBM contracts; $145,000 in loans and financial support to Comguard, a financially distressed company partly owned by Ryan's brother, Gx09-001,09-002,09-020,09-500; $36,000 to Swanson relating to the Viisage contract; and provided Ryan and Ryan's family members with approximately $25,000 in loans, gifts, insurance services, investments and payments. *E.g.*,Gx08-087,08-088,08-089,22-004. Udstuen, in addition to getting Ryan's daughter a job at the Illinois State Medical Society, also arranged, at Ryan's request, for Ryan's son-in-law to work for the Medical Society beginning in 1994. Tr11678-83. When, in early 1997, Udstuen told Ryan's son-in-law that the Medical Society was contemplating terminating his services, Ryan called Udstuen and insisted that the Medical Society retain the son-in-law and also give him a raise. Tr11690-91. Ryan told Udstuen, "John needs the help, and you should continue to help. And he could use a little more help." T11691. Ryan added, "Look, this is important." *Id.* Udstuen gave in to Ryan, and the Medical Society not only did not terminate Ryan's son-in-law, but also gave him a raise, as Ryan had asked. Tr11691-96.

B. Official Actions Taken by Ryan in Return for Personal Benefits Provided by Harry Klein (Count Six)

Beginning in the 1990s, Ryan and Fawell made trips to a Jamaican villa owned by Harry Klein, an Illinois currency exchange owner. Tr2832-34,9421-23;Gx01-044. On Fawell's first trip, Ryan said that because Klein's business was regulated by SOS, they should each give Klein a check for the $1,000 lodging fee, and have Klein return to them the same amount in cash. Tr2838-42. In this way, they would create a false paper trail giving the appearance that Ryan and Fawell were paying for their lodging, whereas, in truth, the transaction was actually a "wash"; in other words, Klein was actually providing free lodging. *See id.* This is what happened every year from 1993 to

2001. Tr2844,9432-33;Gx10-001-10-009. Ryan later falsely represented to FBI agents that he paid his own way at Klein's villa, and went so far as to produce negotiated checks reflecting annual lodging payments, while concealing the cash-back arrangement. Tr18143-49;Gx10-013.

Throughout Ryan's first SOS term, currency exchanges repeatedly requested a fee increase, but Ryan opposed it. Tr. 2843-44. In January 1995, however, during one of Ryan's and Fawell's complimentary stays at Klein's villa in Jamaica, Klein asked Ryan to approve a fee increase. Tr2851. Having been treated to lodging at Klein's Jamaica for several years, Ryan subsequently agreed, and the increase was implemented. Tr. 2852-53.

In late 1996 or early 1997, while Ryan, Fawell and Klein were relaxing around a picnic table during another free stay at Klein's Jamaican villa, Klein said that he wanted to lease his building in South Holland to the SOS. Tr2858-59. Upon returning from his free Jamaican vacation, Ryan ordered an SOS director to work out a lease for the Klein property. Tr6552. Without reviewing other sites, the director cancelled a less-expensive lease in order to move an SOS office to Klein's property, even though, according to the head of SOS's property management division, the building was not in an ideal location. Tr3010-11, 6263, 6266-67, 6557-6560;Gx01-062. When the SOS director asked Ryan's view about certain disputed lease terms, Ryan responded, "What does Harry want?" and then approved Klein's terms, telling Fawell he wanted "Harry to be happy." Tr 2870, 6578-80;Gx01-006. In June 1997, Ryan personally signed the South Holland lease, authorizing $600,000 in payments to Klein over five years. Tr6289-91; Gx11-001. Over a two-and-a-half year period, the state paid significantly more for the South Holland lease than it had for the previous lease, for a total difference of over $170,000. Tr11036.

C. Official Actions Taken by Ryan In Return for Personal Benefits Provided by Arthur Swanson

Swanson gave many benefits to Ryan and his family, including a trip to Cancun and a trip to Lake Tahoe in 1995, Tr15262-77,15333, as well as a figurine worth over $1200, which he gave the Ryans for their anniversary in 1996. Tr15275-77;Gx16-045. In early 1995, around the time Swanson gave Ryan a free vacation at a timeshare in Mexico, Ryan steered an SOS lease to Swanson (the Lincoln Towers lease). Tr15261-71, 2910-20;Gx34-004. Ryan told Fawell to work out the Lincoln Towers lease, even after Swanson proposed a rental figure well above market rate. Tr2914-16. By including non-useable space in the cost figures, Fawell manipulated the cost per square foot to make it appear lower than it actually was. Tr2919;Gx01-036. The Lincoln Towers lease cost $97,000 more than the SOS office paid at its former location, and Swanson made over $21,000 on the deal. Tr15345;Gx15-027, 15-029, 16-002,01-036.

In about August 1999, Swanson paid $2,200 for Ryan's daughter to take a family trip to Disney World. Tr1665-66, 16880-81;Gx28-009. Shortly thereafter, Ryan told Fawell to hire Swanson as a lobbyist for the Metropolitan Pier & Exposition Authority (MPEA). Tr2929-30(JA791). When, after several weeks, Fawell had not yet hired Swanson, an agitated Ryan repeated his directive, adding that Swanson should receive $5,000 per month. Tr2934. Fawell then hired Swanson on Ryan's terms. Tr2937-38. As a result, Swanson's firm was paid $180,000 in state money over three years, even though it did virtually no meaningful work. Tr17238;Gx16-503.

D. False Statements of Economic Interest

Every year from 1991 to 2002, Ryan, as SOS and then governor, filed statement of economic interest forms, as state law required. Gx28-012. The forms required Ryan to list the source of all gifts over $500 that he received during the previous calendar year. *Id*. Ryan's forms for 1991

through 2002 listed none of the payments or other benefits he and his family received from Warner, Klein, or Swanson. *Id.* Ryan signed each form, declaring it to be "a true, correct, and complete statement of my economic interests," and filed or caused the forms to be filed with the SOS. *Id.*

III. Conviction, Sentencing, and Appeal

After a seven-month trial, on April 17, 2006, the jury convicted Ryan and Warner on all counts. R770,771. This Court granted Ryan's motions for acquittal on Counts Nine and Ten (mail fraud counts relating to one of Warner's leases and one of Swanson's lobbying deals). R867:20-23. The Court otherwise denied Ryan's motions for acquittal and a new trial. R867.

On September 6, 2006, this Court sentenced Ryan to the low end of the guideline range, 78 months' imprisonment on Count One, the racketeering conspiracy. The Court ordered this sentence to be served concurrently with sentences of 60 months on each mail fraud and false statement count, and 36 months on each of the tax counts. R888. Ryan appealed, and the Seventh Circuit affirmed his conviction and sentence on direct appeal. *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007).

IV. Section 2255 Motion

On August 31, 2010, Ryan filed the instant motion pursuant to 28 U.S.C. § 2255, arguing that the Supreme Court's decision in *Skilling* invalidated his convictions and sentences on Counts One through Eight, the racketeering and mail fraud counts.[5] Ryan does not challenge his convictions and sentences on the remaining counts, but asks the Court to re-sentence him on those counts if the Court vacates his racketeering and mail fraud convictions.[6]

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[5] *Skilling* applies retroactively because it "narrow[s] the scope of a criminal statute by interpreting its terms," and therefore announces a new substantive rule of criminal law. *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

[6] The government disagrees with Ryan's analysis of this Court's reasoning in imposing sentence on the false statement and tax counts. Since the Court will not need to reach the issue if

ARGUMENT

THE SUPREME COURT'S DECISION IN *SKILLING* DOES NOT UNDERMINE THE VALIDITY OF RYAN'S CONVICTIONS ON COUNTS ONE THROUGH EIGHT.

As the Seventh Circuit stated in the direct appeal of this case,"[a]lthough the intangible rights theory of federal mail fraud may have its problems when applied to other fact settings, it is not unconstitutionally vague as applied here," and "the evidence supporting the jury's verdict was overwhelming." *Warner*, 498 F.3d at 698-99, 675. Nothing in the Supreme Court's decision in *Skilling* changes that analysis. The mail fraud offenses of which Ryan was convicted involved bribes and kickbacks, and therefore fell squarely within the definition of "core" honest services fraud under the Supreme Court's decision in *Skilling*. Even before *Skilling*, the Seventh Circuit described Ryan's convictions as arising from his "channel[ing of] state contracts and leases to a friend *in return for* paid vacations." *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (emphasis added).

Moreover, the jury's verdict may be supported by the alternative valid theory of guilt—money-property fraud—which was properly presented to the jury and is unaffected by *Skilling*. For both of these reasons, the *Skilling* decision does not undermine the validity of Ryan's convictions on Counts One through Eight, and Ryan's motion should be denied.

I. Standard of Review

A prisoner is entitled to relief pursuant to 28 U.S.C. § 2255 only if his "sentence was imposed in violation of the Constitution or laws of the United States," the Court lacked jurisdiction, the sentence exceeded the maximum authorized by law, or the sentence is otherwise subject to

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it denies Ryan's motion, the government has deferred any discussion of re-sentencing at this time.

collateral attack. 28 U.S.C. § 2255(a). In considering a motion under § 2255, the Court must "review evidence and draw all reasonable inferences from it in a light most favorable to the government." *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir.1992). This standard requires that the Court uphold the jury's verdict unless "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Blanchard*, 542 F.3d 1133, 1154 (7th Cir. 2008) (quotations omitted).

This Court reviews *de novo* the legal correctness of the instructions provided to the jury. *United States v. Cote*, 504 F.3d 682, 687 (7th Cir. 2007). The Court reviews the instructions as a whole, and finds error "only if the instructions, viewed as a whole, misguide the jury to the litigant's prejudice . . . ." *Id.* (quoting *United States v. Palivos*, 486 F.3d 250, 257 (7th Cir. 2007).

Where an instructional error has occurred, this Court reviews for harmless error. *Neder v. United States*, 527 U.S. 1, 19 (1999). As the Supreme Court made clear in *Skilling*, harmless error review applies where, although the jury has rendered a general verdict after having been instructed on a legally invalid theory of guilt, the verdict may be supported by an alternative, valid legal theory. *Skilling*, 130 S. Ct. at 2934 (citing *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (*per curiam*) (citing *Neder*, 527 U.S. at 19)). On collateral review, an instructional error will result in reversal only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S.750, 776 (1946)); *Carter v. DeTella*, 36 F.3d 1385, 1392 n.14 (7th Cir. 1994).[7]

[7] Ryan argues that *Brecht* may not apply because it was decided in the context of a post-conviction challenge to a state conviction under 28 U.S.C. § 2254. Mot26-27. Most Circuits have held that the *Brecht* standard applies to a post-conviction challenge to a federal conviction under 28 U.S.C. § 2255. *See, e.g.*, *United States v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006); *United States v. Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003); *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000).

The *Brecht* standard requires more than "a reasonable possibility" that the error contributed to the verdict. *Brecht*, 507 U.S. at 637; *Carter*, 36 F.3d at 1392 (quotations omitted). Instead, on habeas review, a court may reverse a conviction only if after looking at the record as a whole, the court concludes—or has a "grave doubt" about whether—the error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637-38; *O'Neal v. McAninich*, 513 U.S. 432, 435 (1995); *Carter*, 36 F.3d at 1392.

II. The Supreme Court's Decision in *Skilling*

In *Skilling v. United States*, the Supreme Court held that the honest services statute, 18 U.S.C. § 1346, is constitutional when limited to mail fraud schemes involving bribes and kickbacks. *Skilling*, 130 S. Ct. at 2905. *Skilling* noted that after the Supreme Court invalidated the honest services theory in *McNally v. United States*, 483 U.S. 550 (1987), Congress passed § 1346 "to reinstate the body of pre-*McNally* honest-services law," which "dominantly and consistently applied the fraud statute to bribery and kickback schemes." *Skilling*, 130 S. Ct. at 2929. In light of this history, the Court in *Skilling* held that schemes involving bribes and kickbacks form the "core" of honest services fraud, and that "[a] criminal defendant who participated in a bribery or kickback scheme . . . cannot tenably complain about prosecution under § 1346 on vagueness grounds." *Id.* at 2929-31. The Court went on to conclude that cases involving convictions for mere undisclosed conflicts of interest are both rarer and less clear than cases involving bribe and kickback schemes,

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The Seventh Circuit has not specifically addressed the issue. In *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000), the Seventh Circuit applied a more stringent standard on collateral review, requiring the government to show the error was harmless beyond a reasonable doubt. *Lanier* applied the heightened standard without analysis, however, and the issue does not appear to have been raised by the parties. Accordingly, *Lanier* is not controlling. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952). No Circuit that has specifically considered the issue has concluded that the heightened standard applies to § 2255 motions.

and the Court declined to extend the reach of the honest services statute to schemes involving "undisclosed self-dealing" in the absence of a bribe or kickback, that is, to the mere "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id*. at 2932 (quotations omitted).

Although the Court in *Skilling* confined honest services fraud to bribes and kickbacks, it did nothing to change the elements of proof required to establish a mail fraud violation based on money-property fraud. *Id.* at 2933-34.

III. Because the Jury Instructions on Honest Services Fraud Required the Jury to Find that Ryan Took Bribes or Kickbacks, There Was No Instructional Error.

A. Bribes and Kickbacks as Described in *Skilling*

Skilling did not redefine bribes and kickbacks, but rather explained that those terms draw content from pre-*McNally* case law involving bribe and kickback schemes, as well as from federal statutes prohibiting bribes and kickbacks. *Skilling*, 130 S. Ct. 2933-34.[8] Cases cited as examples in *Skilling* , as well as recent federal bribery and kickback cases, reveal three essential points. First, to take a bribe, a public official must receive a benefit and perform or promise to perform official acts in return. *See United States v. Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009), *cert. denied*, ___ S. Ct. ___ (Oct. 4, 2010); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir. 2009); *United States v. Ganim*, 510 F.3d 134, 141 (2d Cir. 2007) (Sotomayor, J.); *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007); *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001); *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998). This requirement ensures that the bribe

[8] *Skilling* cited two federal bribery statutes, 18 U.S.C. § 201(b) and 666(a)(2), and one kickback statute, 41 U.S.C. § 52(2). *Skilling* also singled out three post-*McNally* decisions about bribes and kickbacks. *United States v. Ganim*, 519 F.3d 134 (2d Cir. 2007), *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009), *cert. denied*, ___ S. Ct. ___ (Oct. 4, 2010), and *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007). *See Skilling*, 130 S. Ct. at 2934.

payer must get more for his money than mere access or general goodwill; he must get the promise of an official act or acts. *See Kemp*, 500 F.3d at 281.

Second, it is not necessary that the bribe payer and the official express their agreement to exchange benefits for official acts in so many words. "The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." *United States v. Evans*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring); *accord Giles*, 246 F.3d at 972; *Kemp*, 500 F.3d at 284. Instead, an agreement may be "implied from [the official's] words and actions." *Evans*, 504 U.S. at 274; *Giles*, 246 F.3d at 972.

Third, one form of bribery occurs when an official accepts a benefit and agrees in exchange to take official actions to benefit the bribe payer in the future, and in such cases the official does not need to specify those future acts at the time he takes the bribe. *See, e.g.*, *Whitfield*, 590 F.3d at 349-50; *Ganim*, 510 F.3d at 147; *Kemp*, 500 F.3d at 281. In other words, there is bribery as long as there is "a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor." *Jennings*, 160 F.3d at 1014 (quotations omitted); *accord Whitfield*, 590 F.3d at 352-53; *Ganim*, 510 F.3d 147, 149; *Kincaid-Chauncey*, 556 F.3d at 943; *Kemp*, 500 F.3d at 282.[9] Indeed, such schemes have been described as "some of the most pervasive and entrenched corruption in existence." *See, e.g.*, *Ganim*, 510 F.3d at 147. This "stream of benefits" theory is what the government charged and proved in Ryan's case.

Ryan's motion devotes much attention to the argument that bribery requires a "*quid pro quo*." The case law on this issue depends on how courts define that term. In *United States v. McNair*, 605 F.3d 1152, 1187-88 (11th Cir. 2010), for instance, the Eleventh Circuit defined "*quid*

[9] *Skilling* cites *Whitfield*, *Ganim* and *Kemp* approvingly, including the specific portions of those decisions cited here. *Skilling*, 130 S. Ct. at 2934.

pro quo" narrowly to mean "a specific payment given . . . in exchange for a specific official act," *id.* at 1187, and held that because bribery does not require that each specific payment be linked to a specific official act, it does not require a "*quid pro quo*." *See also United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005) (bribery under § 666 does not require a specific "*quid pro quo*"); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997) (same). Similarly in *Ganim*, the Second Circuit held that each specific payment need not be linked to a specific official act, so long as there is an exchange of benefits for official action. *Ganim*, 510 F.3d at 147. However, because *Ganim* defined "*quid pro quo*" more broadly to include "an ongoing course of conduct" where "favors and gifts flow[ ] to a public official . . . *in exchange* for a pattern of official actions . . . ," *id*. at 149, the court said that bribery requires a "*quid pro quo*." The point is that, regardless of the label, bribery simply requires an exchange of benefits for official action.

In the present case, the evidence showed that Ryan agreed to exchange benefits for official action, and such conduct clearly constitutes bribery, as that term is used in *Skilling*.[10]

B. The Jury Instructions on Honest Services Fraud Required That the Jury Find Bribes or Kickbacks.

In the context of this case, the instructions provided to the jury permitted a conviction of honest services fraud *only* if the jury found that Ryan took bribes or kickbacks. The first relevant

[10] Ryan's motion says little about kickbacks, but the Supreme Court used the term broadly in *Skilling*, citing a federal statute that defines a kickback as "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances]." *Skilling*, 130 S. Ct. at 2933-34 (quoting 41 U.S.C. § 52(2)). This definition—focusing on payments made to get favorable treatment from a person who controls a source of income—is consistent with the way the Seventh Circuit has defined kickbacks. *See United States v. Hickok*, 77 F.3d 992, 1005 n.12 (7th Cir. 1996); *United States v. Hancock*, 604 F.2d 999, 1002 (7th Cir. 1979). If anything, the definition of kickbacks is broader than that of bribes.

instruction stated:

> A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest (also known as a conflict of interest) in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services, if the other elements of the mail fraud offense are met.

Tr23905.

On the facts of this case, this instruction is consistent with *Skilling* because it permitted the jury to convict Ryan for failing to disclose a conflict of interest *only* if the conflict took the form of a "material personal or financial interest . . . in a matter over which [the official] has decision-making power"—which in this case, included only a bribe or kickback. For purposes of the mail fraud counts of which Ryan was convicted, the matters over which Ryan had decision-making power were the state contracts and leases he awarded to Warner, Klein, and Swanson. And the only "material personal or financial interest" the jury heard that Ryan had in those matters was the stream of benefits he received in return for awarding Warner, Klein, and Swanson those contracts and leases. Ryan did not own or have any other interest in buildings leased by the state or the companies that received state contracts, nor did he steer state business directly to himself or his own family. Instead, the only conflict of interest a reasonable jury could have found that Ryan failed to disclose was his agreement to receive personal and financial benefits in exchange for official action—in other words, his receipt of bribes and kickbacks—and not the type of conflicts of interest that *Skilling* excluded from the ambit of the honest services fraud statute.

Just as importantly, the Court's instructions to the jury required that to convict Ryan for undisclosed conflicts of interest, the jury had to find that all of the other elements of the mail fraud statute were met. The Seventh Circuit emphasized this point on direct appeal when it rejected

Ryan's attack on the portion of the instructions that related to conflicts of interest, explaining that:

> The portion of the jury instructions quoted by the defendants about "conflict of interest" is taken out of context, as the jury instructions explicitly stated that a conflict of interest violated the statute only "if the other elements of the mail fraud statute are met." The district court explained that the government must also show that the public official allowed or accepted the conflict of interest with the understanding or intent that she would perform acts within her official capacity in return.

Warner, 498 F.3d at 698.

Accepting a conflict of interest or benefit with the understanding or intent to perform official acts in return constitutes taking a bribe. *See supra* at 15-17. Thus, in context, the conflict of interest instruction permitted the jury to find honest services fraud only if it found that Ryan took a bribe or kickback. There was no error under *Skilling*.

The three instructions that followed[11] properly defined bribes and kickbacks and, as the Seventh Circuit made clear on direct review, correctly informed the jury about the "exchange" element at the heart of a bribe and kickback scheme. Ryan waived or forfeited his right to challenge any of these instructions,[12] however, even if he had not, there would be no error because individually and collectively they correctly emphasized the need to find that the scheme involved the performance of official acts in return for personal benefits. First, in an instruction that Ryan proposed, the Court instructed the jury:

> The law does not require that the government identify a specific official act given in

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[11] There was a fourth instruction that addressed bribery in the context of campaign contributions, but it is not relevant to this discussion. Tr23907-08.

[12] Of the three instructions discussed below, Ryan proposed the first and third instructions, them.R703:6; R703:5 (modified in court), and thus waived any challenge to them. *E.g., United States v. Yu Tian Li*, 615 F.3d 752 (7th Cir. 2010). Ryan failed to challenge the second instruction on direct appeal, and so any challenge is procedurally defaulted. *E.g., United States v.* Podhorn, 549 F.3d 552, 558 (7th Cir. 2008).

> exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the public official accepted the personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return.

Tr23905-06 (quoted in part by the Seventh Circuit, *Warner*, 498 F.3d at 698.). This instruction was accurate, and numerous courts, including three cited in *Skilling*, have approved similar language. *See, e.g.*, *Whitfield*, 590 F.3d at 353; *Ganim*, 510 F.3d at 144; *Kemp*, 500 F.3d at 281-82. Ryan's only quibble with the instruction is that it focuses on the understanding of the public official, not on "whether two parties had agreed to an exchange." Mot23. But his § 2255 motion omits the second half of the instruction, which requires the same understanding on the part of the bribe-payer. *See* Tr23906.[13] More importantly, the law is clear that a public official's "intent to perform an act in exchange for a benefit" is sufficient to show the official took a bribe. *Ganim*, 510 F.3d at 147. For example, the solicitation of a bribe from an unwilling payer or from an undercover agent, neither of whom "agreed" to the exchange, would constitute a bribery scheme.

The next instruction stated:

> A benefit or benefits received by a defendant or given by a defendant with the intent that such benefit or benefits would ensure favorable official action when necessary can be sufficient to establish the defendant's intent to defraud the public of its right to honest services. You need not find that such a benefit was conferred or received in exchange for a specific official action.

Tr23906. This instruction also accurately states the law—before and after *Skilling*. Ryan asserts, without authority, that "[a]n intent to ensure favorable action when necessary is not enough." Mot24n.15. For decades, courts, including courts cited as paradigmatic bribery and kickback cases

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[13] The second half of the instruction provided: "Likewise, the law does not require that the government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the personal and financial benefits were given with the understanding that the public official would perform or not perform acts in his official capacity in return."

in *Skilling*, have held otherwise. *See United States v. Isaacs*, 493 F.2d 1124, 1145 (7th Cir. 1974) ("There is bribery if the offer is made with intent that the offeree act favorably to the offeror when necessary."); *accord United States v. Abbey*, 560 F.3d 513, 518 (6th Cir. 2009); *Kinkaid-Chauncey*, 556 F.3d at 943 & n.943; *Kemp*, 500 F.3d at 282; *Jennings*, 160 F.3d at 1014; *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976).

The third instruction—another of Ryan's proposals—stated that to prove a mail fraud violation, it is not enough that a public official received benefits from a person who has business with the state and that, instead, "that receipt violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making." Tr23906-07. Ryan does not explain why this instruction is incorrect, especially when read in light of the instruction cited above requiring that the "public official accepted the personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." Tr23906. Contrary to Ryan's contentions, this instruction passes muster under *Skilling*.

Finally, the Court instructed the jury about certain provisions of Illinois law. Tr23908-11. Ryan claims a violation of state law can never form the basis for an honest services fraud conviction, Mot25, but *Skilling* did not so hold. *Skilling* acknowledged a circuit conflict on the issue, and did not resolve the conflict. 130 S. Ct. at 2928 n.37. In any event, this is a non-issue for several reasons. First, as the Seventh Circuit noted on direct appeal, the instructions made clear that "[n]ot every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation," Tr23908, 23911, and that, to the contrary, an official or employee defrauds the public of his honest services only "[w]here a public official or employee misuses his

official position . . . *for private gain for himself or another*," "*and* the other elements of the mail fraud offense have been met," Tr23911 (emphasis added). And, in discussing the conflict-of-interest provision, the Seventh Circuit explained, the required showing that "the other elements of the mail fraud statute have been met" meant that the official must accept a benefit for private gain "with the understanding or intent that [he will] perform acts within [his] official capacity in return." *Warner*, 498 F.3d at 698. In other words, the instructions required a bribe, particularly in the context of the evidence, which established that the private gain at issue was limited to benefits given to Ryan in exchange for Ryan's steering of valuable contracts and leases. Moreover, as the Seventh Circuit noted:

> [m]any of the state law provisions in the instructions explained what kinds of financial transactions are not prohibited for state officials. This explanation was more likely to undermine than to assist the prosecution in showing the defendants' intent to deprive Illinois citizens of Ryan's honest services.

Warner, 498 F.3d at 698. Thus, the instructions emphatically did not permit the jury to convict based on something other than a bribe or kickback scheme.

Accordingly, in order to find that Ryan committed honest services fraud in this case, the instructions, read as a whole and in the context of the evidence, required the jury to find that Ryan took bribes and kickbacks. There is no instructional error here, and therefore no error at all.

IV. Even if There Were Instructional Error Here, a Properly Instructed Jury Would Have Reached the Same Result, In Light of the Overwhelming Evidence Showing that Ryan Took Bribes and Kickbacks.

Even if this Court were to conclude that the honest services instructions permitted the jury to convict Ryan for actions that did not involve the taking of bribes and kickbacks, the instructional error would be harmless. In light of the evidence, a properly instructed jury would have found that Ryan took bribes and kickbacks because the evidence that he did so was overwhelming. Thus, Ryan

suffered no actual prejudice. *See Brecht*, 507 U.S. at 637-38.

A. The Evidence Established Bribes and Kickbacks.

The indictment charged, and the evidence proved, that Ryan took bribes in the form of a stream of benefits from Warner, Klein and Swanson with respect to each count of honest services mail fraud of which Ryan was convicted. In the face of this evidence, Ryan attempts to define bribes and kickbacks so narrowly that little more than an express agreement to trade a particular sum of cash for a particular official action would ever qualify. The law provides no support for Ryan's cramped definition of bribery.

1. The Currency Exchange and South Holland Bribes

For years, Ryan enjoyed free lodging at Klein's Jamaican villa, gifts Ryan lied about on his disclosure forms and actively concealed through the secret cash-back arrangement. In 1995, while Klein and Ryan were relaxing at Klein's villa in Jamaica, Klein asked Ryan for favorable official action in the form of a fee increase for currency exchanges. Ryan later agreed, even though he had opposed a fee increase for years. As the government reminded the jury in its rebuttal argument, Ryan's change of heart occurred "right after a trip to Jamaica." Tr23714.

During a later vacation at Klein's villa in Jamaica, Klein told Ryan that Klein wanted to lease his building in South Holland to the SOS, and when Ryan returned from the trip, he made that happen. Ryan caused the SOS to cancel a less-expensive lease and move to Klein's ill-suited property without considering other locations, directed his subordinate to agree to Klein's lease terms, and told his chief of staff he wanted to make Klein "happy." Ryan personally signed the lease, giving Klein $600,000 in lease payments over five years. As the government argued to the jury, the $13,000 in cash-back that Klein paid Ryan in Jamaica over the years was a striking example

of the "corrupt payments" that Ryan took in return for state action. Tr23085; *see also* Tr23708.

Ryan's motion argues there was no bribe because four years passed between Ryan's first vacation in Jamaica and the lease signing, Mot18, but Klein's benefits to Ryan were ongoing—Ryan vacationed in Jamaica for free every year, including the year he awarded Klein the lease. And contrary to Ryan's assertion, there is nothing "extraordinary" about years passing between a bribe and the payoff. In *Whitfield*, a case the Supreme Court cited favorably in *Skilling*, an attorney secured a state court judge a favorable loan, which the judge did not list on his disclosure forms. *Whitfield*, 590 F.3d at 336. After the attorney arranged the loan, he filed a personal injury lawsuit, and over a year later, the judge assigned the case to himself. *Id.* Nearly a year and a half after that, the judge ruled for the lawyer's client, awarding him millions of dollars in damages. *Id.* The Fifth Circuit affirmed the honest-services bribery convictions of both defendants without hesitation, despite the passage of time, and even though the lawyer and the judge never expressly agreed to trade the loan for the legal ruling at the time the loan was made. *Id.* at 373. S*ee also Abbey*, 560 F.3d at 515-16 (affirming bribery conviction of developer who gave city administrator a free subdivision lot in exchange for favorable consideration in the future; one year later the administrator pushed for developer to receive funding through municipal bonds, resulting in hundreds of thousands of dollars in payments).

2. The Warner Bribes and Kickbacks

Ryan awarded Warner contracts and leases in return for the many times Warner "took care" of Ryan through financial favors to Ryan, his family, and friends. Warner's relationship with Ryan epitomizes a stream of benefits given in exchange for a serious of favorable official acts. Warner usually was not buying any one specific action; the benefits Warner gave Ryan, his family, and

friends, served to keep Ryan on "retainer," so that when opportunities arose, Ryan used his influence to favor Warner. *See Kincaid-Chauncey*, 556 F.3d at 943& n.15; *Abbey*, 560 F.3d at 518.

In this respect, Ryan's relationship with Warner was similar to that between the defendants in *Kemp*, a case *Skilling* cited with approval. In *Kemp*, the Third Circuit affirmed the defendants' convictions of honest services fraud based on bribery, concluding that bank executives gave a city treasurer benefits such as loans to the treasurer's friends and family members who had "shaky credit." *Kemp*, 500 F.3d at 284-85. This was similar to the way Warner, among other benefits, loaned $145,000 to Ryan's brother's financially unstable company, Comguard, and invested $6,000 to Ryan's son's company. Gx08-087-89,09-001,09-002,09-020,09-500. In *Kemp*, the city treasurer, in exchange for the loans, rigged bids to ensure that the executives' bank got a lucrative government contract, *Kemp*, 500 F.3d at 269, much as Ryan overruled his subordinate to make sure Warner's client ADM kept the lucrative sticker contract, Tr8140-46, steered a state contract to Viisage because Warner was its lobbyist (though Warner concealed that fact), Tr13206, Tr3102-04; Gx03-020, 03-023, 03-009, and caused the SOS to relocate to buildings Warner owned in order to benefit Warner. Tr16954, 7822-24, 2804-05, 10463; Gx07-011, 07-500, 07-501, 07-502.

The court in *Kemp* had no difficulty finding that the city treasurer took bribes, relying on the same stream of benefits theory the government pursued at Ryan's trial. 500 F.3d at 281-82. Among other things, the court noted that on one occasion when a bank executive agreed to waive an appraisal fee for a loan the treasurer wanted approved, the treasurer told the executive, "you are my f–king guy. . . . So you get special treatment." *Id.* at 286. Similarly, when Warner recruited Ryan's friend Udstuen to join Warner's effort to make money from their relationship with Ryan by entering the lobbying business, Warner told Udstuen that no one had done more for Ryan than Udstuen, and

that Warner would "take care of George," Tr11620-22, thereby drawing a direct link between the benefits Warner and Udstuen gave Ryan, and the money Warner and Udstuen would make after Ryan steered them state business.[14] The court in *Kemp* emphasized that the bank executives, like Warner, did in fact get special treatment, with the treasurer rigging bids for a city contract to ensure the bank got it. *Id.* at 286. From this "course of conduct," the court held, the jury could conclude that the treasurer, like Ryan, agreed to take official action in exchange for the benefits he received. *Id.*

In addition to bribes, Warner's Viisage contract also involved at least two instances of kickbacks. Months before the bidding process began, Ryan told Warner to cut Ryan's friend Swanson in on the deal, and Warner eventually paid Swanson $36,000 for no work. The government highlighted this as another example of Ryan's "corrupt payments," telling the jury, "When George Ryan directed Warner to give a piece of the Viisage lobbying fee to [Ryan's] good friend Ron Swanson, that was the equivalent of him claiming a piece of those fees for himself." Tr23085.

In addition, five days after landing the Viisage contract, which earned him over $800,000, Warner wrote Ryan a blank check, which Ryan used to pay the band at his daughter's wedding. The proximity between the award of the contract and Warner's payment to Ryan is evidence the two were linked, *see Giles*, 246 F.3d at 973; *Jennings*, 160 F.3d at 1018, as is Warner's use of a front man to conceal that he was the one getting paid as Viisage's lobbyist. *See Jennings*, 160 F.3d at 1018.

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[14] To take another example, when Ryan was asked about disputed terms in the lease with Klein, he replied, "What does Harry want?" and told Fawell he wanted "Harry to be happy." Tr2870,6578-80.

The ADM and IBM contracts also involved kickbacks—this time to Ryan's friend Udstuen. With Ryan's approval, Warner gave Udsteun a cut of Warner's fees on the contracts, totaling about a third of the money Warner made, even though Udsteun did little or no work. These kickbacks to Ryan's friend are no different than kickbacks to Ryan himself. *Cf. Ganim*, 510 F.3d at 138-39 (affirming honest services conviction of mayor who agreed to kickback of one-third of fees earned on city contracts he awarded).

3. The Swanson Bribes

Swanson's bribes were similar—Ryan awarded Swanson lucrative leases and contracts soon after Swanson paid for vacations for Ryan and his daughter. The $2,200 Swanson paid so Ryan's daughter could go to Disney World netted Swanson a lobbying contract worth $180,000 for no work, showing, as the government explained to the jury, that "Ryan is willing to sell his office in order to give a government benefit to the friend who buys that vacation." Tr23805, 23807-08. After Swanson paid for Ryan's vacation in Cancun, Ryan ordered his subordinates to give Swanson the Lincoln Towers lease for which the state paid well above market rate. As the government told the jury, the state paid Swanson "for one reason: Because Ron Swanson got in George Ryan's office, and George Ryan just got back from Cancun with Ron Swanson." Tr23783.

Ryan does not dispute that over the course of many years, his benefactors gave him a stream of benefits, or that Ryan gave a stream of state business to his benefactors. Nevertheless, Ryan argues he did not take bribes and kickbacks because, he claims, he and his benefactors never agreed that the benefits were *in exchange for* state business. The jury heard ample evidence permitting it to reject this claim. Viewing the evidence in a light most favorable to the government, as is required, the evidence clearly showed that Ryan's relationship with Warner, Klein, and Swanson was a classic

arrangement of "I'll scratch your back if you scratch mine," *see Jennings*, 160 F.3d at 1014, in which people "with continuing and long-term interests" in matters under Ryan's control, gave Ryan numerous benefits "to coax ongoing favorable official action." *United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996). S*ee also United States v. Woodward*, 149 F.3d 46, 55 (1st Cir. 1998) (affirming honest services bribery conviction of state representative who took years worth of undisclosed free meals, rounds of golf, and other payments from a lobbyist and friend, and in return repeatedly ruled in the lobbyists's favor).

The Seventh Circuit has joined many others in calling conduct like Ryan's bribery. In *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999), for example, a contractor, mimicking the actions of Warner, Klein, and Swanson, "showered" a state official with gifts worth thousands of dollars, including upgraded airline tickets, trips, and money to spend at casinos. *Id.* at 964-65. The official, like Ryan, failed to disclose any of the gifts, as he was required to do by department regulations. *Id.* What the official did do was make recommendations and prepare misleading cost estimates that allowed the contractor to be awarded a lucrative contract on favorable terms, costing the state money and lining the contractor's pockets. *Id.* at 964-65. The Seventh Circuit held that the official's "guilt of receiving bribes is not open to serious doubt," and that he accepted the gifts intending to be influenced in connection with his official acts, in violation of 18 U.S.C. § 666—one of the statutes *Skilling* cites as helpful in defining bribery in the honest services context. *See Martin*, 195 F.3d at 965.

In *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984), a pre-*McNally* bribery case, the Seventh Circuit affirmed the mail fraud conviction of a deputy commissioner on the Cook County board of tax appeals who took cash payments from lawyers who appeared before him, and failed to

disclose those payments on his statements of economic interest. *Gorny*, 732 F.2d at 599-600. Even though none of the cash payments were "linked directly to any action on a particular real estate assessment file," the people who paid bribes "enjoyed an unusually high rate of success in their practice before the Board." *Id.* at 600. In light of this circumstantial evidence of a stream-of-benefits agreement, and the testimony of several bribe payers who said they paid the money intending to receive some favorable treatment in exchange, the Court concluded that sufficient evidence had been presented to establish that the defendant accepted the payments intending to be influenced by them. *Id.* at 601. Just so here.

B. The Government Argued to the Jury that Ryan Took Bribes and Kickbacks.

As outlined above, the government argued that Ryan exchanged official action for the benefits he received from Warner, Klein, and Swanson—in the government's words, that Ryan "sold his office" in return for "corrupt payments." Tr23084-85, 23817-18, 23809, 23826. The government explained Ryan's bribes and kickbacks using the stream-of-benefits theory courts repeatedly have approved. As the government argued, "the flow of benefits, when Ryan received, referred, and advocated for these financial benefits and then took some action to benefit those who had provided the benefits to him or his family, he was, in essence, selling his office brick by brick." Tr22971; *see also* Tr22836.

The government told the jury:

- "George Ryan actively perverted the decision-making process to tilt the gain in favor of his friends who were taking care of him and his family. And that is not politics, ladies and gentlemen. That's a crime." Tr23100.
- Ryan "decided that the benefits of his public office were his to give out like candy to Larry Warner and to other friends of his who at the same time were giving him and his family financial benefits and gifts." Tr23140.

- "Warner hit the jackpot during George Ryan's terms as secretary of state and as governor . . . $3 million in total benefits," and Warner, in turn, "did a very nice job of taking care of George Ryan." Tr22835.

Ryan's motion notes correctly that more than once, the government told the jury it did not have to find a "*quid pro quo*." Tr22956-58, 23083-84, 23763-64, 23817-18. But, as is clear from the context of those statements, the government was simply arguing, correctly, that in order to convict Ryan, the jury did not have to find that Ryan had a conversation in which he expressly agreed to accept a specific benefit in exchange for a specific official act. Instead, the government emphasized that Ryan received benefits from Warner, Klein, and Swanson over many years, and in return, Ryan took official action for these benefactors as opportunities arose. The government made this point several times, perhaps most clearly in its initial closing argument:

> [Ryan] did not make announcements or press releases when Warner, Swanson, or Klein gave him or his family something in order to influence his decision-making. The loans, the vacations, the other benefits did not come in packages with bright red lettering that said, "This is to influence you." Most importantly, keep in mind that this is not a case in which a public official had a specific price for each official act that he did, like a menu in a restaurant where you pick an item and it has a particular price. The type of corruption here—that type of corruption where you give me this, I will give you that, is often referred to as a *quid pro quo*. The corruption here was more like a meal plan in which you don't pay for each item on the menu. Rather, there is a cost that you pay, an ongoing cost, and you get your meals.

Tr22852-53.

This, in a nutshell, is the stream of benefits theory of bribes and kickbacks, one that courts—including courts cited favorably in *Skilling*—repeatedly have approved. *See supra* at 16-17.

C. In Light of the Evidence and the Government's Arguments, a Reasonable Jury, Properly Instructed, Would Have Found that Ryan Took Bribes and Kickbacks.

Three features of Ryan's scheme, as alleged in the indictment and proved by the evidence, make it particularly clear that a properly instructed jury would have convicted Ryan of taking bribes.

First, Ryan, Warner, Swanson, and Klein carefully concealed what they were doing. These "elaborate efforts at concealment provide powerful evidence" of Ryan's consciousness of guilt, *see United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985), and powerful evidence that Ryan hid his transactions precisely because he was awarding friends in exchange for the benefits they gave him. Second, as the government emphasized to the jury during rebuttal, Ryan was not the type of friend who did favors for Warner, Klein, and Swanson other than giving them state business. Ryan did not pay for Warner, Klein, and Swanson to go on vacations, invest in their relatives' companies, or write checks to their families. Tr23763-64. These men did not do favors for Ryan because he reciprocated in kind; they did favors for him because Ryan awarded them state contracts and leases worth millions of dollars. *See Woodward*, 149 F.3d at 58. Finally, Warner, Klein, and Swanson did not seek mere general goodwill, they sought specific official actions—leases, contracts, currency exchange rates—and it was in exchange for these things that they "took care" of Ryan.

In light of the evidence presented by the government at trial, there is no basis for "grave doubt" concerning whether the jury convicted Ryan only of conduct that does not constitute a crime after *Skilling*. *See O'Neal*, 513 U.S. at 435. If properly instructed, any reasonable jury would have convicted Ryan of taking bribes and kickbacks.

V. The Jury Necessarily Concluded that Ryan Committed Money-Property Fraud.

The Court should deny Ryan's motion for a third reason. Even if the jury convicted Ryan of honest services fraud based on undisclosed conflicts of interest that did not involve taking bribes and kickbacks, the jury must have also concluded that Ryan committed money-property fraud, and so any error resulting from the honest services instructions is harmless.[15]

[13] On direct appeal, Ryan raised no claims relating to money-property fraud, and any such claims are procedurally defaulted. Ryan's § 2255 motion likewise fails to raise such a claim.

A. Post-*McNally* Money-Property Cases

After the Supreme Court invalidated the honest services theory in *McNally*, numerous appellate court decisions affirmed mail fraud convictions and found that erroneous jury instructions on the honest services theory were harmless because the government proved a valid money-property theory. *See, e.g.*, *Moore v. United States*, 865 F.2d 149, 153-54 (7th Cir. 1989); *United States v. Asher*, 854 F.2d 1483, 1496 (3d Cir. 1988); *United States v. Perholtz*, 836 F.2d 554, 558-59 (D.C. Cir. 1987). While courts generally overturned convictions that were "based entirely on the intangible rights theory," courts affirmed convictions, such as Ryan's, where the "bottom line of the scheme or artifice to defraud had the inevitable result of effecting monetary or property losses to the . . . state." *Asher*, 854 F.2d at 1490, 1494; *see also Messinger v. United States*, 872 F.2d 217, 222 (7th Cir. 1989); *United States v. Saks*, 964 F.2d 1514, 1521 (5th Cir. 1992). In judging whether an error was harmless, courts looked to the trial as a whole, including the indictment, the evidence, the arguments, and the jury instructions. *See Messinger*, 872 F.2d at 221; *Perholtz*, 836 F.2d at 559. The same harmless error analysis applies here.

B. The Indictment Charged a Single Scheme that Included Money-Property Fraud.

The indictment alleged that Ryan devised and participated in one scheme "to defraud the people of the State of Illinois, and the State of Illinois, of money, property, and the intangible right to honest services. . . ." R110:19. Counts Two through Eight alleged specific mailings of state money, or money derived from state contracts, in furtherance of the single scheme. *Id.* at 59-65. That the scheme involved money and property is central to the indictment's allegations: the indictment describes numerous state contracts and leases that were the objects of the fraud. *See, e.g.*, R110:19-21 (referring to "contracts" and "real property lease[s]").

C. The Evidence Established a Single Scheme that Included Money-Property Fraud.

The elements of mail fraud are a scheme to defraud, intent to defraud, and use of the mail. *United States v. Sorich*, 523 F.3d 702, 708 (7th Cir. 2008). "A scheme to defraud requires the making of a false statement or material misrepresentation, or the concealment of [a] material fact." *United States v. Powell*, 576 F.3d 482, 490 (7th Cir. 2009) (quotations omitted). "A failure to disclose information may constitute fraud if the omission [is] accompanied by acts of concealment." *Id*. at 491. For money-property fraud, the scheme must also have "a substantial potential" to deprive someone of money or property, which includes state contract and leases. *United States v. Barber*, 881 F.2d 345, 349 (7th Cir. 1989); *Sorich*, 523 F.3d at 713; *United States v. Leahy*, 464 F.3d 773, 788 (7th Cir. 2006). At trial, the same evidence that supported the honest services fraud theory based on undisclosed conflicts of interest also established the elements of money-property fraud.

1. South Holland Lease Steered to Klein

The South Holland lease resulted in $600,000 of state money going into Klein's pockets over five years. Tr.6289-91; Gx11-001. At the same time Ryan obtained state money for Klein, Ryan used the false paper trail from the cash-back arrangement to hide the free lodging Klein gave him. In its closing argument, the government correctly called this a "sham transaction." Tr22906. As the government also pointed out during closing, during this same period, Ryan lied on his annual statements of economic interest by failing to disclose these gifts from Klein, as Illinois law required. Gx28-012; Tr22918-20. Later, Ryan lied to the FBI, claiming he paid his own way in Jamaica, and producing the bogus checks as proof. Tr18143-49; Gx10-013.

Ryan did not just obtain state money for Klein through fraud, he caused actual loss to the state. Ryan let Klein decide disputed lease terms, telling Fawell he wanted "Harry to be happy."

Tr2870, 6578-80; Gx01-006. Making Harry happy meant the state lost money, paying $173,000 more for Klein's lease than it had for the previous lease. Tr.6289-9111036; Gx11-001.

2. Contracts and Leases Steered to Warner

a. Bellwood and Joliet Leases

Warner pocketed hundreds of thousands of dollars of state money on the Bellwood and Joliet leases, and both leases were accompanied by acts of concealment and misrepresentations. On the Bellwood lease, Warner assured Ryan and Fawell that the press would never find out about Warner's interest, because Warner's name was "buried in paperwork." Tr2772-73, 2774. Warner concealed his interest in the property until after Ryan signed the lease in the spring of 1993, and then allowed his interest to surface through various transactions. Tr16950-51, 16954; Gx07-011, 07-501, 07-502. Warner did the same for the Joliet lease, again telling Fawell that his interest was buried in paperwork, and again hiding his interest until after Ryan awarded the lease. Tr2812, 3005, Gx06-500. In its closing argument, the government told the jury these leases were filled with "concealment and deceit." Tr22922.

Both leases resulted in a loss to the state. The state paid above market rate for the Bellwood property, for a total of about $246,583 for the first five years. Tr11045,11399 For the Joliet property, the state overpaid by about $296,485. Tr11021. When Warner's role in the Joliet lease ultimately became public, Warner told Udstuen he never should have done the lease because it was "too good a deal." Tr11727.

b. Viisage Contract

In 1996, Ryan awarded Viisage, one of Warner's clients, a contract for $20 million in state money, again using concealment and misrepresentations. As the government's closing argument

pointed out to the jury, Warner actively concealed his role as a lobbyist for Viisage by failing to register as a lobbyist, and by using a front man whose name went on the paperwork. Tr23009, 13206; Gx03-015, 03-016, 03-020, 03-023, 04-045. It was only after Viisage won the contract that Warner removed the front man and had the lobbying arrangement transferred to his company, raking in $834,000 in fees. Tr3103-04, 16923-25; Gx03-500, 03-501. Ryan knew Warner had an interest in the contract from the start. Indeed, before the bidding process even began, Ryan told Warner to cut Swanson in on the Viisage deal, and Warner promised Swanson $36,000 on a contract Viisage hadn't been awarded yet. Tr3102-04; Gx03-009. Five days after Ryan steered the contract to Warner, Warner wrote Ryan a blank check, which Ryan made out for over $3,000 to pay the band at his daughter's wedding. Gx23-003. Ryan lied on his statements of economic interest by not disclosing this benefit, as well as other benefits Warner gave to Ryan and his family. Gx28-012.

c. ADM and IBM Contracts

In 1991, Warner leveraged his access to Ryan and convinced ADM to hire him as a lobbyist to ensure that ADM would keep a lucrative contract for license plate stickers. Tr8032-33, 8064, 8067-68, 8112-13, 11637. ADM paid Warner between $2,000 and $5,000 every month to keep the contract. Gx02-004, 02-005, 02-015, 02-500, 02-501. In 1993, an official at SOS decided it was in the state's best interest to eliminate ADM's security mark, which may have cost ADM the contract, but an angry Warner told the official Warner would "take care of it." Tr8140-44. A few days later, Ryan told the official to quietly retract his proposal, and asserted—falsely—that the security mark was necessary for public safety. Tr8140-44, 9143-46. The official retracted his proposal, even though he believed doing so was against the state's best interests, and in this way, ADM continued to receive state money from 1991 to 1999, and Warner continued to be enriched

as ADM's lobbyist. Tr8143-47, 2801.

In 1996, Ryan allowed Warner and Udstuen to rig the bidding on a computer mainframe contract by allowing them to choose the director of the SOS department who dealt with mainframe issues. Tr12526. Warner and Udstuen specifically picked a director who had expressed support for giving the contract to IBM, a Warner client. Tr12528-29 The official did, in fact, award IBM the $26 million mainframe contract, and Warner received $1 million in fees from IBM, most of which was contingent on IBM landing the contract. Tr3125,12541,12931,12981-87;Gx04-043,04-014,04-021. Warner gave about one-third of these fees to Udstuen, who never registered as IBM's lobbyist and was, in fact, unknown to IBM.

During the same time period the state paid money to ADM and IBM on these contracts, Warner gave a number of financial benefits to Ryan and Ryan's family. In 1994 and again in 1997, Warner loaned a total of $145,000 to Comguard, Ryan's brother's financially unstable company. Tr10677, 17243-49; Gx09-020, 09-008, 09-500, 09-501. Also in 1997, Warner provided a slew of benefits, including waiving a $1,000 insurance adjustment fee Ryan owed, waiving an insurance adjustment fee for Ryan's son-in-law, giving the same son-in-law a $5000 loan, and making a $6,000 investment in Ryan's son's company. Tr15515-19,17092-118,15157-63, 17088-91; Gx32-001,32-004,22-004,22-005,08-087-89. Ryan reported none of these benefits on his disclosure statements. Gx28-012.

The actions of Ryan and his co-schemers, summarized above, were part of a scheme to defraud the state of money and property. The government proved that Ryan and his co-schemers did not merely fail to disclose a conflict, they actively concealed and misrepresented material facts about the benefits he received and the benefits he provided. Each misrepresentation arose in a single

context: Ryan awarding a state contract or lease to one of his benefactors. In that context, Ryan "directly targeted [the state's] coffers and its position as a contracting party." *Leahy*, 464 F3d at 788. Ryan and his co-schemers obtained this state money under false pretenses, by lying or concealing material information. In some cases, such as the Bellwood and Joliet leases and the Viisage contract, Ryan or his co-schemer Warner took active steps to conceal that Warner was the person receiving state money, by "burying Warner's name in paperwork" and using front men to appear on documents—the type of "acts of concealment" that constitute fraud. *See Powell*, 576 F.3d at 491 (involving failure to disclose information plus active concealment in the form of forged signatures).

In other cases, such as the ADM contract, Ryan made misrepresentations by lying to state officials about why he was acting to preserve ADM's contract, claiming that it was for security reasons, when in fact it was to ensure that Warner could keep getting rich on a state contract. For the South Holland lease and the Viisage deal, Ryan lied on his disclosure statements by failing to report Klein's free Jamaican vacations and Warner's blank check for the wedding band. And for all of Warner's contracts and leases, Ryan lied on his disclosure statements by failing to report any of the benefits Warner gave Ryan and his family, benefits the government argued, and the jury was entitled to conclude, were in fact benefits to Ryan himself. Tr22967-69.

The acts of concealment and misrepresentations by Ryan, Warner, and Klein were material because the state would have wanted to know, and was entitled to know, who was receiving state money, why they were receiving it, and whether the recipient had showered Ryan with personal and financial benefits. *See United States v. Bush*, 522 F.2d 641, 647 (7th Cir. 1975). If Ryan had truthfully disclosed this information, it would have been capable of influencing the state when the

state decided whether to award the contracts and leases to Warner and Klein in the first place, and whether to continue the contracts and leases over the course of several years. Indeed, it is precisely because such information is capable of influencing the state that Illinois requires its public officials to file annual statements of economic interests. *See Bush*, 522 F.2d at 645, 647-48 (false statements of economic interests are material misrepresentations). The state might have decided it did not want to award a contract or lease to someone who had benefitted Ryan, or that the state wanted different terms for the contracts and leases than the terms Ryan permitted. By depriving the state of this information, Ryan obtained state money "through false pretenses," that is, active concealment and material misrepresentations, and engaged in a scheme to defraud the state of money. *See Leahy*, 464 F.3d at 788; *United States v. Lack*, 129 F.3d 403, 406 (7th Cir. 1997).

Ryan's fraud cost the state hundreds of thousands of dollars on the South Holland, Bellwood, and Joliet leases. On the ADM stickers contract, Ryan caused the state to continue to pay ADM for a contract based on specifications that the relevant state official no longer believed were in the state's best interest. The Viisage and IBM contracts were essentially no-bid contracts in which Ryan picked, or allowed Warner to pick, one of Warner's clients to receive the contract. Whether or not Ryan caused the state actual loss on these contracts, he exposed the state to a substantial risk of loss, which is all the mail fraud statute requires. *Barber*, 881 F.2d at 349; *see also United States v. Riley*, No. 08-3758, 08-3759, 2010 WL 3584066, at *10 (3d Cir. Sept. 16, 2010); *United States v. Welch*, 327 F.3d. 1081, 1108 (10th Cir. 2003). Here, the risk of loss was inherent in the scheme. Ryan awarded the contracts to Warner's clients because they were Warner's clients—as the ADM example makes clear, Ryan was less interested in whether the deal was in the state's best interests. Even if by chance the contracts were favorable to Illinois, Ryan deprived the state of the chance to

make a better deal, or the best deal possible, because he awarded state business based on what was best for Warner and himself, by making misrepresentations and actively concealing information. *See Bush*, 522 F.2d at 648; *see also Riley*, 2010 WL 3584066, at *10.

D. The Government Argued, and the Court Properly Instructed the Jury, Concerning Money-Property Fraud.

The government argued the money-property fraud scheme to the jury, explaining, "When you are given – when you are stealing from the state, people's resources, that's property. That's money. You can't do that and lie about it, and there is a mailing in furtherance of it. That's money or property." Tr23771. The prosecution used various formulations, but the argument was the same: Ryan and his co-schemers obtained state money by awarding contracts and leases, while concealing or misrepresenting various facts about the transactions. The government marshaled the same evidence to argue that Ryan both failed to disclose conflicts of interest, and defrauded the state of money and property. For example, the government's initial closing argument described "the core of the case" as Ryan violating his duty to provide honest services by "giving state benefits, like contracts and leases to his friends . . . while at the same time they were providing various undisclosed financial benefits to him. . . ." Tr22836. Later, the government explained that Ryan's friends gave him things of value "at the same time that Ryan was giving them government money in the form of leases." Tr22851-52. And whether discussing Ryan's failure to disclose conflicts of interest or Ryan's fraud involving state money, the prosecutors zeroed in on the concealment and misrepresentations of Ryan, Warner, and Klein, arguing that Ryan concealed benefits on his disclosure forms, Tr22958, 22967, and that "concealing is fraud." Tr 23757.

The government also made clear the scheme was not just about an intangible right to honest services, but that the state was defrauded of "tangible things," such as the South Holland, Joliet, and

Bellwood leases, and the ADM sticker contract for which there was no competition. Tr23099. The government emphasized the loss to the state, explaining that the state was"ripped off" for $173,000 for the South Holland lease, Tr22914, and that "Warner, Swanson, Klein take in thousands and thousands of dollars on these leases. The state was a loser . . . where the state moved out of one location, where they were paying less, moved into another Ryan-picked location, where they end up paying more, costing the taxpayers money." Tr22892-93.

Finally, unlike in some cases where courts have found harmless error even when the judge gave no instruction on money-property fraud, *see Moore*, 865 F.2d at 153-54; *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989) (Breyer, J.), this Court properly instructed the jury on the money-property theory. Tr23902-03. The Court also informed the jury that the money-property fraud was part of "a single scheme to defraud." Tr23903.

E. The Jury Must Have Convicted Ryan of Money-Property Fraud.

This case was not "based entirely on the intangible rights theory," but is one where the "bottom line of the scheme or artifice to defraud had the inevitable result of effecting monetary or property losses to the . . . state." *Asher*, 854 F.2d at 1490, 1494. As described above, the evidence and arguments that Ryan failed to disclose conflicts of interest and that Ryan and his co-schemers defrauded the state of money were identical. Any reasonable jury that convicted on the former basis must also have convicted on the latter.

The Seventh Circuit has found harmless error in similar cases where money-property fraud was inherent in the scheme, even where the jury was only instructed on an intangible rights theory. In *Moore*, for example, the Seventh Circuit found the failure to give a money-property instruction was harmless, concluding that, as here, the government "plainly lost money or property as a result

of the proven bid-rigging scheme," and the jury "could not have found a scheme to defraud [the government] of its intangible rights separate from a criminal scheme to obtain money or property by the bid rigging charged and shown." 865 F.2d at 153-54. *See also Asher*, 854 F.2d at 1495-96 (finding harmless error where scheme involved award of no-bid contract in exchange for a bribe, resulting in "a substantially greater cost to the Commonwealth than a contract obtained through traditional competitive bidding."); *Perholz*, 836 F.2d at 558 (finding harmless error where kickback scheme caused the government to overpay for a subcontract). Since, on the facts presented, if the jury found Ryan guilty of honest services fraud they necessarily found him guilty of money-property fraud, Ryan suffered no prejudice.

VI. A Properly Instructed Jury Would Have Convicted Ryan of Money-Property Fraud.

Even if the Court finds that the honest services and money-property frauds were not so closely intertwined, there is a final basis to deny Ryan's motion. Any jury that was instructed solely on the valid theory of money-property fraud would have convicted Ryan of that crime because the evidence that Ryan committed money-property fraud was overwhelming. Therefore, any errors in the honest services instructions could not possibly have prejudiced Ryan

The South Holland lease provides the clearest example. There is no question that Ryan obtained state money through false pretenses, by awarding the lease to Klein, actively concealing the free vacations Klein had given Ryan through the cash-back arrangement, and lying on his disclosure forms by not listing those free vacations, resulting in a state lease for a property with serious drawbacks that cost the state $173,000 more than the previous location. These actions deprived the state of money through fraud.

Because of this evidence, and the evidence related to the other contracts and leases, any

reasonable jury properly instructed solely on money-property fraud would have convicted Ryan. Therefore, the honest services instructions did not affect the verdict, and Ryan's convictions and sentence should stand.

VII. Skilling Provides No Basis for Finding Prejudice Based on the Evidence Admitted at Trial.

Finally, Ryan complains about several pieces of evidence he claims are inadmissible in light of *Skilling*. Mot15-16. Because all of the evidence was admissible even without a mail fraud theory based on undisclosed conflicts of interest, *Skilling* has no effect on the admissibility of this evidence. *See Riley*, 2010 WL 3584066, at *7; *United States v. Prosperi*, 201 F.3d 1335, 1345 (11th Cir. 2000). For example, the following evidence was admissible both before and after *Skilling*.

- That Ryan accepted gifts in excess of the $50 limit imposed by SOS regulations and Ryan's personal policy was admissible to show Ryan's intent to defraud and his credibility, the latter of which was at issue because of the false statements counts.

- The consulting fee Ryan took from the Gramm campaign was specifically charged in the tax counts. *See* R110:80-81.

- The evidence of Ryan's dismantling of the SOS Inspector General's Office was admissible to show Ryan's intent to protect the ability of Citizens for Ryan to make money. Ryan used this money for personal use, but, as charged in the tax counts, did not pay taxes on it. *See* R110:76-84.

- Warner's access to low-digit plates was admissible to show how Ryan gave Warner complete access to SOS operations, which was relevant to the government's mail fraud theories based on both money-property and bribes and kickbacks. As the government argued to the jury, that Ryan's secretary kept a kitty at her desk so Warner could order low-digit plates for his friends showed the types of governmental favors Ryan did for Warner, and made it more believable that SOS employees recognized Warner's clout and acceded to his demands about state contracts and leases. Tr22975; *see also* Tr23047.

- The evidence that Ryan told Swanson the location of the Grayville prison was admissible to show how Ryan showered Swanson with government benefits, including confidential information. Although the Court later vacated Ryan's conviction on Count Ten related to this episode, the evidence was admissible to

prove the flow of benefits between Ryan and Swanson. In any event, Ryan waived his right to challenge this evidence by failing to do so on direct appeal.

- Ryan's conversion of state property, such as using state employees and state resources on his campaigns, was admissible as evidence of how Ryan used false pretenses, including false time sheets, to obtain state money and property.

Even if the Court were to conclude that some of this evidence was inadmissible, any error was harmless because its admission did not affect Ryan's "substantial rights." *See United States v. Jones*, 389 F.3d 753, 758 (7th Cir. 2004). In light of what the Seventh Circuit called the "overwhelming" evidence of Ryan's guilt, *Warner*, 498 F.3d at 675, a reasonable juror's view of the case would not have changed had this evidence been excluded. *See United States v. Owens*, 424 F.3d 649, 656 (7th Cir.2005).

CONCLUSION

For the reasons set forth above, the Court should deny Ryan's motion.

Dated: October 7, 2010

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s/ Marc Krickbaum

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	Case No. 10 CV 5512
v.	)	
	)	Judge Rebecca R. Pallmeyer
GEORGE H. RYAN, SR.	)	

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO SET BAIL

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this response to defendant George H. Ryan's motion for bail pending this Court's resolution of defendant's motion, filed pursuant to 28 U.S.C. § 2255, to vacate, set aside, or correct sentence.

INTRODUCTION

This Court's decision on bail should begin and end with the merits of Ryan's § 2255 motion. The § 2255 motion has no merit, and this Court should deny the bail motion for that reason alone. The Seventh Circuit has repeatedly cautioned that in the context of a pending § 2255 motion, district courts have limited authority to release a defendant on bail, and courts should exercise that authority "very sparingly." *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985). As the government's response to the § 2255 motion[1] demonstrates, the Supreme Court's recent decision in *Skilling v. United States*, 130 S.Ct. 2896 (2010), provides no grounds to vacate Ryan's convictions for racketeering conspiracy and mail fraud. Thus, Ryan has not made the threshold showing required for the Court to even consider granting bail.

[1] The government incorporates by reference the arguments made in its response, R16.

ARGUMENT

No statute authorizes the release of a defendant on bail while his § 2255 motion is pending before the District Court. While this Court has inherent power to grant bail pending the resolution of a § 2255 motion, the Seventh Circuit has held that courts should exercise such power "very sparingly." *Cherek*, 767 F.2d at 337; *accord*, *Kramer v. Jenkins*, 800 F.2d 708, 709 (7th Cir. 1986). *Cf. Bolante v. Keisler*, 506 F.3d 618, 620 (7th Cir. 2007). A defendant, like Ryan, whose conviction has been affirmed on direct appeal "is unlikely to have been convicted unjustly," and the interest in the finality of convictions counsels against release while Ryan is serving his sentence, which would be "tantamount to the judicial grant of a temporary parole." *Kramer*, 800 F.2d at 709. For these reasons, the standard for bail pending review is even higher than the demanding standard for bail pending appeal. *See Cherek*, 767 F.2d at 337.[2] Indeed, the Supreme Court has stated that "a greater showing of special reasons for admission to bail pending review [of collateral proceedings] should be required . . . ." *Aronson v. May*, 85 S. Ct. 3, 5 (1964).

Ryan was not convicted unjustly. The government's response to the § 2255 motion explains in detail why his convictions and sentence were proper, most importantly, because there was no instructional error, and the jury properly concluded that Ryan took bribes and kickbacks, which *Skilling* confirms is a violation of the honest services statute. Even if this Court concludes that there was an instructional error, that error was harmless for three reasons. First, a properly instructed jury

[1] Ryan cites a brief in a case in the Eastern District of North Carolina, where the government's position was that the standard for bail pending appeal, contained in 18 U.S.C. § 3143, should also apply in habeas cases. R9, Def. Memo of Law in Support of Bail Motion at 2-3. The government does not take that position in this case because the Seventh Circuit has specifically ruled that § 3143 "is inapplicable to a convicted defendant who is seeking postconviction relief," and, in such a situation, § 3143 presents "a more favorable standard than the defendant [is] entitled to." *Cherek*, 767 F.2d at 337, 338. This binding precedent precludes application here of the standard set forth in § 1343.

would have convicted Ryan of honest services fraud because the evidence that Ryan took bribes and kickbacks was overwhelming. Second, in light of the evidence presented at trial, any jury that convicted Ryan of honest services fraud must also have convicted Ryan of money-property fraud. Finally, the evidence that Ryan committed money-property fraud was overwhelming, so any errors in the honest services instructions were simply irrelevant to the jury's verdict.

If Ryan were seeking bail pending appeal, he would have to show that, among other things, his motion raises a "substantial question," of law or fact "likely to result" in reversal or a reduced sentence, 18 U.S.C. § 3143(b)(1)(B), meaning "a close question or one that very well could be decided the other way."[3] *United States v. Eaken*, 995 F.2d 740, 741 (7th Cir. 1993). Ryan acknowledges that, according to the *Cherek* decision, he must meet an even higher standard for bail pending a § 2255 motion. Ryan suggests that an appropriate standard is whether it is more likely than not the Court will order his release, R9, Def. Memo of Law in Support of Bail Motion at 4-5, which actually is just a slightly different phrasing of the § 3143 standard. In more practical terms, if the standard for bail pending appeal is whether the issue presents a "close question," the standard for bail pending a § 2255 motion should be whether the issue is a clear win for the defendant. Ryan does not come close to meeting a "clear win" standard, or even the weaker "more likely than not"standard that he suggests. Given the strength of the evidence presented at trial that supported theories of guilt unaffected by *Skilling v. United States*, 561 U.S. __, 130 S.Ct. 2896 (2010), any error in the jury instructions in light of the *Skilling* case are harmless, and none of Ryan's convictions should be disturbed.

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[2] The government agrees that Ryan is not a danger to the community or a flight risk, which are the statute's other requirements in the context of bail pending appeal. *See* 18 U.S.C. § 3143(b)(1)(A).

Even if Ryan could meet either the "clear win" standard or the "more likely than not" standard, he would face an additional hurdle. In cases on collateral review, a defendant moving for bail must show, not just likelihood of success on the merits of his § 2255 motion, but also that his "application is exceptional and deserving of special treatment in the interests of justice." *Aronson*, 85 S. Ct. at 5. Ryan suggests he deserves special treatment because his wife is terminally ill. R9, Def. Memo at 5-6. Mrs. Ryan's condition, while very unfortunate, does not provide a basis for relief where, as here, the defendant cannot show that it is likely his convictions will be vacated or his sentence will be reduced based on his pending motion. Further, the fact that Ryan has served nearly three years of his sentence also does not call for special treatment. Even if the Court were to reject the government's arguments and reverse Ryan's convictions on the racketeering conspiracy count and the seven mail fraud counts, it is not clear that the Court would have to re-sentence Ryan on three counts of lying to the FBI, for each of which Ryan received a sentence of 60 months imprisonment, to run concurrently. And even if the Court were to re-sentence Ryan on these counts, it is far from clear that any reduction in his sentence would be warranted.

There is a final reason Ryan's petition is not exceptional and worthy of special treatment. The crime Ryan committed was extraordinarily serious. For years, Ryan abused his public office for his own personal gain and that of his friends, cheated on his taxes, and lied to the FBI to cover up what he had done. As this Court stated at Ryan's sentencing hearing:

> The one thing that Mr. Ryan has not, sadly, had, until perhaps a few moments ago, is any apparent introspection or sense of remorse. . . . Perhaps he believes the offenses of which he is convicted here are relatively minor or insignificant. And if this is his belief, I would suggest that they were anything but. . . . [T]he real harm done by public corruption is to the confidence that citizens have that their own government plays by the rules. If we lose that confidence, we lose the cooperation and the commitment and the decency of good people that they need to play by the rules too. Cynicism is inconsistent with patriotism. Government leader have an

> obligation to stand as the example of decency and commitment. As the evidence in this case shows, in many respects Mr. Ryan failed to meet that standard.

Sent. Tr. 95-96.

If anything, the "special circumstances" of Ryan's crime favor continued detention.

CONCLUSION

Ryan has not shown he is likely to succeed on the merits and that his motion is extraordinary and worthy of special treatment, and this Court should deny his motion for bail.

Dated: October 7, 2010

Respectfully submitted,

PATRICK J. FITZGERALD
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By: /s/ Marc Krickbaum

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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 5512	**DATE**	10/13/2010
CASE TITLE	George H. Ryan, Sr. vs. USA		

DOCKET ENTRY TEXT

Government's motion for leave to file, *instanter*, a brief in excess of fifteen pages [16] granted.

Notices mailed by Judicial staff.

Courtroom Deputy Initials:	ETV

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	Case No. 10 CV 5512
v.	)	
	)	Judge Rebecca R. Pallmeyer
GEORGE H. RYAN, SR.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this response in opposition to defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255.

INTRODUCTION

Defendant George Ryan challenges his convictions on one count of racketeering and seven counts of mail fraud based on the Supreme Court's recent decision in *Skilling v. United States*, 561 U.S. __, 130 S.Ct. 2896 (2010). Contrary to Ryan's contentions, nothing in *Skilling* undermines Ryan's convictions. The instructions in this case permitted the jury to convict Ryan of honest services fraud only if the jury concluded that Ryan took bribes and kickbacks, the very conduct *Skilling* held is prohibited under the honest services statute. Because there was no instructional error, there was no error at all.

Even if the Court were to conclude that the instructions permitted the jury to convict Ryan for conduct that fell short of taking bribes and kickbacks, any error would be harmless for three reasons. First, even if a jury could have convicted Ryan without finding that he took bribes and kickbacks, no reasonable jury actually would have. Any jury that was properly instructed on honest services fraud would have convicted Ryan of taking bribes and kickbacks because the evidence that

he did so was overwhelming. The evidence showed that over the course of many years, Ryan accepted a stream of benefits from benefactors, and that Ryan awarded state contracts and leases to those benefactors in return. In other words, Ryan took bribes and kickbacks, and any properly instructed jury would have reached that finding.

Second, even if the jury could have convicted Ryan of honest services fraud for conduct that fell short of taking bribes and kickbacks, any reasonable jury that would have convicted Ryan of honest services fraud also would have convicted him of money-property fraud, which the government properly charged. The government alleged a single fraud scheme in which Ryan not only deprived the state of its right to his honest services, but also obtained state money under false pretenses, by steering state money to his benefactors through lucrative state contracts and leases, while actively concealing and lying about the substantial personal and financial benefits his benefactors were giving him in return. In many cases, Ryan's awarding of state money through fraud resulted in a significant loss to the state. This is money-property fraud, and it was so inseparable from Ryan's honest services fraud that no reasonable jury would have convicted on the latter ground without convicting on the former, making any error in the honest services instructions harmless.

Finally, any reasonable jury that was properly instructed only on the money-property fraud theory would have convicted Ryan. The evidence that Ryan committed money-property fraud was overwhelming, and so any error in the honest services instructions could not have prejudiced Ryan.

Because there was no error, and any potential errors were harmless, this Court should deny Ryan's § 2255 motion.

BACKGROUND

I. Second Superseding Indictment

In December 2003, a federal grand jury returned a 22-count second superseding indictment ("indictment") against defendant George Ryan and his co-schemer, Larry Warner. The indictment alleged that over the course of many years as Secretary of State (SOS), and then as Governor of Illinois, Ryan awarded to Warner and others lucrative state property in the form of state contracts and leases in exchange for substantial personal and financial benefits, and that he and his co-schemers concealed these exchanges from the people of Illinois.

Count One of the indictment charged Ryan and Warner with racketeering conspiracy in violation of 18 U.S.C. § 1962(d), alleging that Ryan and Warner conspired to conduct the affairs of the State of Illinois through a pattern of racketeering activity involving multiple acts of mail fraud, money laundering, extortion, obstruction of justice, state-law bribery, and related offenses. R110:1-16.[1] Counts Two through Ten charged that Ryan, in violation of 18 U.S.C. § 1341 and 1346, devised and carried out a scheme to defraud the State of Illinois of money, property, and the right to the honest services of Ryan and other state officials and employees, and used the United States mails and other interstate carriers in furtherance of the scheme. R110:17-67.[2] Counts Eleven through Thirteen charged Ryan with making false statements to the FBI, in violation of 18 U.S.C. § 1001(a)(2). R110:68-71. Counts Eighteen through Twenty-Two charged Ryan with tax crimes. R110:76-88.

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[1] Citations to Ryan's § 2255 motion are to"Mot__." Citations to record documents and trial transcripts are to "R__" and "Tr__," respectively. Citations to the government's trial exhibits are to "Gx__."

[2] Warner was also charged in Counts Two through Five, and Seven through Ten. R110.

II. The Evidence Presented at Trial

The evidence established that, throughout Ryan's tenure in statewide public office, Ryan, his friends, and his family received financial benefits from benefactors, including Larry Warner and other key figures, Harry Klein, Arthur ("Ron") Swanson, and Donald Udstuen, in exchange for state contracts and leases worth millions of dollars, and that Ryan concealed the benefits he received.

A. Official Actions Taken by Ryan in Return for Personal Benefits Provided by Warner and Udstuen

1. The ADM Contract (Count Two)

Shortly after Ryan was elected SOS, Warner told Udstuen, another Ryan friend and political supporter, that Warner was going to capitalize on his relationship with Ryan by entering the lobbying business. Tr11620. Warner said Udstuen "should be part of it" because no one had done more for Ryan than Udstuen, and Udstuen, therefore, "deserved some of this." *Id.*[3] Warner explained that he had talked to Ryan about this plan, and Ryan was "fine" with it. Tr11620-21. Warner added, "I will take care of George." Tr11622.

One of Warner's first clients was ADM, a manufacturer of validation stickers for license plates. Tr11637. Before Ryan became SOS, ADM had won the annual stickers contract, which had specifications calling for a "metallic security mark," which only ADM could provide. Tr8032-33,8064,8067-68,8112-13. From 1991 through 1998, to keep the contract, ADM paid Warner a monthly fee ranging from $2,000 to $5,000. Gx02-004,02-005,02-015,02-500,02-501.

[3] In addition to giving political support to Ryan and assisting on Ryan's political campaigns as a part of a group of supporters providing advice on such things as strategy and fundraising, Tr.11604-10, Udstuen also provided a valuable personal benefit to Ryan in the mid-1980s when, at Ryan's request, he gave a job to Ryan's daughter, who was recuperating from a very serious car accident. The daughter's employment at the Illinois State Medical Society, where Udstuen worked as a lobbyist and administrator for many years, continued through the period in which Ryan was SOS and governor. Tr11593,11600-01,11612-13.

In early 1993, an official in the SOS office decided to change the contract's specifications by eliminating the metallic security mark. Tr8120-26,8135-36. An upset Warner told the SOS official that Warner would "take care of it," and a day or two later, Ryan sternly told the official to quietly retract the revised specifications. Tr8140-45. The official did so, even though he believed the new specifications were in the State's best interests. Tr8146. As a result, ADM continued to be awarded the contract, and from 1991 to 1999, ADM paid Warner $399,000. Tr2801,8146-47. Warner funneled $122,000 of this money to Udstuen, who did nothing to assist ADM. Tr16905,16916;Gx02-500,02-501. Neither Warner nor Udstuen were ever registered as lobbyists for ADM. Tr13755-56;Gx02-093.

2. The IBM Mainframe Computer Contract (Counts Four and Five)

Ryan chose Warner and Udstuen to search for a director of the SOS department that dealt with mainframe computer issues, and then hired Warner and Udstuen's hand-picked candidate for the job. Tr12526. Warner and Udstuen chose the candidate because he said he would support a transition to IBM, one of Warner's clients. Tr12528-29. In 1996, as planned, the SOS office awarded IBM a $26 million mainframe computer contract. Tr3125,12541;Gx04–043. Warner received lobbying fees calculated as 3.5 percent of SOS revenues received by IBM. Tr12931. In total, Warner received almost $1 million from IBM, most of which came as a result of the award of the mainframe contract. Tr12981-87; GX04-014,04-021. Warner funneled $298,371 of this money to Udstuen, although Udstuen's interest was never disclosed to IBM or to the public through lobbyist disclosure documents. Tr16918,16923;Gx04-500,04-501.

3. The Viisage Digital Licensing Contract (Count Seven)

In July 1996, when the SOS office was considering switching to digital driver's licenses,

several companies, including a company called Viisage, made presentations to Ryan. Tr3091-94. Shortly after the presentations, Warner entered into an arrangement with Viisage which provided that he would receive 5 percent of Viisage's revenues on the licensing contract in return for his help in landing it. Gx03-015,03-016. A businessman named Irwin Jann served as a front man in this arrangement. Jann's name was on the original lobbying agreement with Viisage, and Jann was registered as Viisage's lobbyist, even though Jann did no actual work for Viisage. Tr13178,13188-206;Gx03-020, 03-023, 04-045.

In December 1996, months before the bidding process for the contract began, Ryan directed Warner to cut another Ryan friend and supporter, Swanson, in on the Viisage deal, and Warner did so, guaranteeing Swanson $36,000 for his non-existent "lobbying efforts." Tr3102-04;Gx03-009. After the State awarded the $20 million contract to Viisage in June 1997, Tr13195, Warner removed Jann as the front man and had the Viisage lobbying arrangement transferred to Warner's company. Tr13202-05; Gx03-028. Warner never registered as Viisage's lobbyist, and only in 2001 did Viisage file a record showing that the lobbying arrangement had been transferred to Warner's company in 1997. Tr13756-63. Warner received fees totaling $834,000 on the Viisage contract, of which he provided Swanson $36,000, as Ryan had directed, even though Swanson did no work for Viisage, and Swanson never registered as Viisage's lobbyist. Tr3103-04,16923-25;Gx03-023,03-500,03-501. Five days after landing the Viisage contract, Warner wrote Ryan a blank check, which Ryan used to pay over $3,000 to a band for playing at his daughter's wedding. Gx23-003.

4. The Bellwood and Joliet Leases (Counts Three and Eight)

Ryan steered two SOS leases to Warner, costing the state hundreds of thousands of dollars. In 1992, Warner told Ryan that Warner had found a building in Bellwood to house the SOS Police.

Tr2771-73. When Ryan's chief of staff, Scott Fawell, expressed concern that the press might discover Warner's involvement, Warner told Ryan and Fawell not to worry because Warner's ownership interest in the building was "buried in the paperwork." Tr2774. Indeed, before the lease was signed, Warner's interest in the property was hidden behind front men, whose names were put on the real estate trust documents. Tr16939-40; Gx07-500. Ryan approved the Bellwood lease, and after the lease was signed, Warner's ownership interest in the property surfaced through a series of transactions, and Warner went on to receive about $171,000 in profits. Tr16950-51, 16954;Gx07–011,07-501,07-502. The state overpaid on the Bellwood property by about $246,583 for the first five years. Tr11045,11399.

In about 1994, Warner told Ryan that Warner was looking for property in Joliet for the SOS Office to lease, and Ryan directed an SOS official to deal with Warner on the lease. Tr. 7822-24, 2804-05,10463. Warner bought property in Joliet for $200,000, but as with the Bellwood lease, Warner used front men to hide his ownership interest. Tr16954-58; Gx06-500. Warner again told Fawell that Warner's ownership in the property was buried in paperwork. Tr2812,3005. After Ryan personally signed a four-year SOS lease, Warner's 90% ownership interest in the property emerged through various transactions, and Warner ultimately received about $854,258 in rental payments. Tr16959-62; Gx06-016,06-028,06-501,06-502.[4] The state overpaid for the lease by $296,485. Tr11021. When Warner's role in the lease came to light publicly, Warner told Udstuen that he never should have done the Joliet lease because it was "too good a deal." Tr11727.

5. Financial Benefits Provided by Udstuen and Warner

In return for the state contracts and leases Ryan steered to Warner, Warner gave Ryan a

[4] It was unusual for Ryan to personally sign a lease. The evidence showed he signed only two as SOS: the Joliet lease (for Warner) and the South Holland lease (for Klein). Tr6289-91.

stream of benefits to Ryan and to Ryan's family members and associates. Warner provided over $400,000 in payments to Udstuen relating to the ADM and IBM contracts; $145,000 in loans and financial support to Comguard, a financially distressed company partly owned by Ryan's brother, Gx09-001,09-002,09-020,09-500; $36,000 to Swanson relating to the Viisage contract; and provided Ryan and Ryan's family members with approximately $25,000 in loans, gifts, insurance services, investments and payments. *E.g.*,Gx08-087,08-088,08-089,22-004. Udstuen, in addition to getting Ryan's daughter a job at the Illinois State Medical Society, also arranged, at Ryan's request, for Ryan's son-in-law to work for the Medical Society beginning in 1994. Tr11678-83. When, in early 1997, Udstuen told Ryan's son-in-law that the Medical Society was contemplating terminating his services, Ryan called Udstuen and insisted that the Medical Society retain the son-in-law and also give him a raise. Tr11690-91. Ryan told Udstuen, "John needs the help, and you should continue to help. And he could use a little more help." T11691. Ryan added, "Look, this is important." *Id.* Udstuen gave in to Ryan, and the Medical Society not only did not terminate Ryan's son-in-law, but also gave him a raise, as Ryan had asked. Tr11691-96.

B. Official Actions Taken by Ryan in Return for Personal Benefits Provided by Harry Klein (Count Six)

Beginning in the 1990s, Ryan and Fawell made trips to a Jamaican villa owned by Harry Klein, an Illinois currency exchange owner. Tr2832-34,9421-23;Gx01-044. On Fawell's first trip, Ryan said that because Klein's business was regulated by SOS, they should each give Klein a check for the $1,000 lodging fee, and have Klein return to them the same amount in cash. Tr2838-42. In this way, they would create a false paper trail giving the appearance that Ryan and Fawell were paying for their lodging, whereas, in truth, the transaction was actually a "wash"; in other words, Klein was actually providing free lodging. *See id.* This is what happened every year from 1993 to

2001. Tr2844,9432-33;Gx10-001-10-009. Ryan later falsely represented to FBI agents that he paid his own way at Klein's villa, and went so far as to produce negotiated checks reflecting annual lodging payments, while concealing the cash-back arrangement. Tr18143-49;Gx10-013.

Throughout Ryan's first SOS term, currency exchanges repeatedly requested a fee increase, but Ryan opposed it. Tr. 2843-44. In January 1995, however, during one of Ryan's and Fawell's complimentary stays at Klein's villa in Jamaica, Klein asked Ryan to approve a fee increase. Tr2851. Having been treated to lodging at Klein's Jamaica for several years, Ryan subsequently agreed, and the increase was implemented. Tr. 2852-53.

In late 1996 or early 1997, while Ryan, Fawell and Klein were relaxing around a picnic table during another free stay at Klein's Jamaican villa, Klein said that he wanted to lease his building in South Holland to the SOS. Tr2858-59. Upon returning from his free Jamaican vacation, Ryan ordered an SOS director to work out a lease for the Klein property. Tr6552. Without reviewing other sites, the director cancelled a less-expensive lease in order to move an SOS office to Klein's property, even though, according to the head of SOS's property management division, the building was not in an ideal location. Tr3010-11, 6263, 6266-67, 6557-6560;Gx01-062. When the SOS director asked Ryan's view about certain disputed lease terms, Ryan responded, "What does Harry want?" and then approved Klein's terms, telling Fawell he wanted "Harry to be happy." Tr 2870, 6578-80;Gx01-006. In June 1997, Ryan personally signed the South Holland lease, authorizing $600,000 in payments to Klein over five years. Tr6289-91; Gx11-001. Over a two-and-a-half year period, the state paid significantly more for the South Holland lease than it had for the previous lease, for a total difference of over $170,000. Tr11036.

C. Official Actions Taken by Ryan In Return for Personal Benefits Provided by Arthur Swanson

Swanson gave many benefits to Ryan and his family, including a trip to Cancun and a trip to Lake Tahoe in 1995, Tr15262-77,15333, as well as a figurine worth over $1200, which he gave the Ryans for their anniversary in 1996. Tr15275-77;Gx16-045. In early 1995, around the time Swanson gave Ryan a free vacation at a timeshare in Mexico, Ryan steered an SOS lease to Swanson (the Lincoln Towers lease). Tr15261-71, 2910-20;Gx34-004. Ryan told Fawell to work out the Lincoln Towers lease, even after Swanson proposed a rental figure well above market rate. Tr2914-16. By including non-useable space in the cost figures, Fawell manipulated the cost per square foot to make it appear lower than it actually was. Tr2919;Gx01-036. The Lincoln Towers lease cost $97,000 more than the SOS office paid at its former location, and Swanson made over $21,000 on the deal. Tr15345;Gx15-027, 15-029, 16-002,01-036.

In about August 1999, Swanson paid $2,200 for Ryan's daughter to take a family trip to Disney World. Tr1665-66, 16880-81;Gx28-009. Shortly thereafter, Ryan told Fawell to hire Swanson as a lobbyist for the Metropolitan Pier & Exposition Authority (MPEA). Tr2929-30(JA791). When, after several weeks, Fawell had not yet hired Swanson, an agitated Ryan repeated his directive, adding that Swanson should receive $5,000 per month. Tr2934. Fawell then hired Swanson on Ryan's terms. Tr2937-38. As a result, Swanson's firm was paid $180,000 in state money over three years, even though it did virtually no meaningful work. Tr17238;Gx16-503.

D. False Statements of Economic Interest

Every year from 1991 to 2002, Ryan, as SOS and then governor, filed statement of economic interest forms, as state law required. Gx28-012. The forms required Ryan to list the source of all gifts over $500 that he received during the previous calendar year. *Id.* Ryan's forms for 1991

through 2002 listed none of the payments or other benefits he and his family received from Warner, Klein, or Swanson. *Id.* Ryan signed each form, declaring it to be "a true, correct, and complete statement of my economic interests," and filed or caused the forms to be filed with the SOS. *Id.*

III. Conviction, Sentencing, and Appeal

After a seven-month trial, on April 17, 2006, the jury convicted Ryan and Warner on all counts. R770,771. This Court granted Ryan's motions for acquittal on Counts Nine and Ten (mail fraud counts relating to one of Warner's leases and one of Swanson's lobbying deals). R867:20-23. The Court otherwise denied Ryan's motions for acquittal and a new trial. R867.

On September 6, 2006, this Court sentenced Ryan to the low end of the guideline range, 78 months' imprisonment on Count One, the racketeering conspiracy. The Court ordered this sentence to be served concurrently with sentences of 60 months on each mail fraud and false statement count, and 36 months on each of the tax counts. R888. Ryan appealed, and the Seventh Circuit affirmed his conviction and sentence on direct appeal. *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007).

IV. Section 2255 Motion

On August 31, 2010, Ryan filed the instant motion pursuant to 28 U.S.C. § 2255, arguing that the Supreme Court's decision in *Skilling* invalidated his convictions and sentences on Counts One through Eight, the racketeering and mail fraud counts.[5] Ryan does not challenge his convictions and sentences on the remaining counts, but asks the Court to re-sentence him on those counts if the Court vacates his racketeering and mail fraud convictions.[6]

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[5] *Skilling* applies retroactively because it "narrow[s] the scope of a criminal statute by interpreting its terms," and therefore announces a new substantive rule of criminal law. *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

[6] The government disagrees with Ryan's analysis of this Court's reasoning in imposing sentence on the false statement and tax counts. Since the Court will not need to reach the issue if

ARGUMENT

THE SUPREME COURT'S DECISION IN *SKILLING* DOES NOT UNDERMINE THE VALIDITY OF RYAN'S CONVICTIONS ON COUNTS ONE THROUGH EIGHT.

As the Seventh Circuit stated in the direct appeal of this case,"[a]lthough the intangible rights theory of federal mail fraud may have its problems when applied to other fact settings, it is not unconstitutionally vague as applied here," and "the evidence supporting the jury's verdict was overwhelming." *Warner*, 498 F.3d at 698-99, 675. Nothing in the Supreme Court's decision in *Skilling* changes that analysis. The mail fraud offenses of which Ryan was convicted involved bribes and kickbacks, and therefore fell squarely within the definition of "core" honest services fraud under the Supreme Court's decision in *Skilling*. Even before *Skilling*, the Seventh Circuit described Ryan's convictions as arising from his "channel[ing of] state contracts and leases to a friend *in return for* paid vacations." *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (emphasis added).

Moreover, the jury's verdict may be supported by the alternative valid theory of guilt—money-property fraud—which was properly presented to the jury and is unaffected by *Skilling*. For both of these reasons, the *Skilling* decision does not undermine the validity of Ryan's convictions on Counts One through Eight, and Ryan's motion should be denied.

I. Standard of Review

A prisoner is entitled to relief pursuant to 28 U.S.C. § 2255 only if his "sentence was imposed in violation of the Constitution or laws of the United States," the Court lacked jurisdiction, the sentence exceeded the maximum authorized by law, or the sentence is otherwise subject to

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it denies Ryan's motion, the government has deferred any discussion of re-sentencing at this time.

collateral attack. 28 U.S.C. § 2255(a). In considering a motion under § 2255, the Court must "review evidence and draw all reasonable inferences from it in a light most favorable to the government." *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir.1992). This standard requires that the Court uphold the jury's verdict unless "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Blanchard*, 542 F.3d 1133, 1154 (7th Cir. 2008) (quotations omitted).

This Court reviews *de novo* the legal correctness of the instructions provided to the jury. *United States v. Cote*, 504 F.3d 682, 687 (7th Cir. 2007). The Court reviews the instructions as a whole, and finds error "only if the instructions, viewed as a whole, misguide the jury to the litigant's prejudice . . . ." *Id.* (quoting *United States v. Palivos*, 486 F.3d 250, 257 (7th Cir. 2007).

Where an instructional error has occurred, this Court reviews for harmless error. *Neder v. United States*, 527 U.S. 1, 19 (1999). As the Supreme Court made clear in *Skilling*, harmless error review applies where, although the jury has rendered a general verdict after having been instructed on a legally invalid theory of guilt, the verdict may be supported by an alternative, valid legal theory. *Skilling*, 130 S. Ct. at 2934 (citing *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (*per curiam*) (citing *Neder*, 527 U.S. at 19)). On collateral review, an instructional error will result in reversal only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S.750, 776 (1946)); *Carter v. DeTella*, 36 F.3d 1385, 1392 n.14 (7th Cir. 1994).[7]

[7] Ryan argues that *Brecht* may not apply because it was decided in the context of a post-conviction challenge to a state conviction under 28 U.S.C. § 2254. Mot26-27. Most Circuits have held that the *Brecht* standard applies to a post-conviction challenge to a federal conviction under 28 U.S.C. § 2255. *See, e.g.*, *United States v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006); *United States v. Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003); *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000).

The *Brecht* standard requires more than "a reasonable possibility" that the error contributed to the verdict. *Brecht*, 507 U.S. at 637; *Carter*, 36 F.3d at 1392 (quotations omitted). Instead, on habeas review, a court may reverse a conviction only if after looking at the record as a whole, the court concludes—or has a "grave doubt" about whether—the error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637-38; *O'Neal v. McAninich*, 513 U.S. 432, 435 (1995); *Carter*, 36 F.3d at 1392.

II. The Supreme Court's Decision in *Skilling*

In *Skilling v. United States*, the Supreme Court held that the honest services statute, 18 U.S.C. § 1346, is constitutional when limited to mail fraud schemes involving bribes and kickbacks. *Skilling*, 130 S. Ct. at 2905. *Skilling* noted that after the Supreme Court invalidated the honest services theory in *McNally v. United States*, 483 U.S. 550 (1987), Congress passed § 1346 "to reinstate the body of pre-*McNally* honest-services law," which "dominantly and consistently applied the fraud statute to bribery and kickback schemes." *Skilling*, 130 S. Ct. at 2929. In light of this history, the Court in *Skilling* held that schemes involving bribes and kickbacks form the "core" of honest services fraud, and that "[a] criminal defendant who participated in a bribery or kickback scheme . . . cannot tenably complain about prosecution under § 1346 on vagueness grounds." *Id.* at 2929-31. The Court went on to conclude that cases involving convictions for mere undisclosed conflicts of interest are both rarer and less clear than cases involving bribe and kickback schemes,

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The Seventh Circuit has not specifically addressed the issue. In *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000), the Seventh Circuit applied a more stringent standard on collateral review, requiring the government to show the error was harmless beyond a reasonable doubt. *Lanier* applied the heightened standard without analysis, however, and the issue does not appear to have been raised by the parties. Accordingly, *Lanier* is not controlling. *See, e.g.*, *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952). No Circuit that has specifically considered the issue has concluded that the heightened standard applies to § 2255 motions.

and the Court declined to extend the reach of the honest services statute to schemes involving "undisclosed self-dealing" in the absence of a bribe or kickback, that is, to the mere "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 2932 (quotations omitted).

Although the Court in *Skilling* confined honest services fraud to bribes and kickbacks, it did nothing to change the elements of proof required to establish a mail fraud violation based on money-property fraud. *Id.* at 2933-34.

III. Because the Jury Instructions on Honest Services Fraud Required the Jury to Find that Ryan Took Bribes or Kickbacks, There Was No Instructional Error.

A. Bribes and Kickbacks as Described in *Skilling*

Skilling did not redefine bribes and kickbacks, but rather explained that those terms draw content from pre-*McNally* case law involving bribe and kickback schemes, as well as from federal statutes prohibiting bribes and kickbacks. *Skilling*, 130 S. Ct. 2933-34.[8] Cases cited as examples in *Skilling* , as well as recent federal bribery and kickback cases, reveal three essential points. First, to take a bribe, a public official must receive a benefit and perform or promise to perform official acts in return. *See United States v. Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009), *cert. denied*, ___ S. Ct. ___ (Oct. 4, 2010); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir. 2009); *United States v. Ganim*, 510 F.3d 134, 141 (2d Cir. 2007) (Sotomayor, J.); *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007); *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001); *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998). This requirement ensures that the bribe

[8] *Skilling* cited two federal bribery statutes, 18 U.S.C. § 201(b) and 666(a)(2), and one kickback statute, 41 U.S.C. § 52(2). *Skilling* also singled out three post-*McNally* decisions about bribes and kickbacks. *United States v. Ganim*, 519 F.3d 134 (2d Cir. 2007), *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009), *cert. denied*, ___ S. Ct. ___ (Oct. 4, 2010), and *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007). *See Skilling*, 130 S. Ct. at 2934.

payer must get more for his money than mere access or general goodwill; he must get the promise of an official act or acts. *See Kemp*, 500 F.3d at 281.

Second, it is not necessary that the bribe payer and the official express their agreement to exchange benefits for official acts in so many words. "The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." *United States v. Evans*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring); *accord Giles*, 246 F.3d at 972; *Kemp*, 500 F.3d at 284. Instead, an agreement may be "implied from [the official's] words and actions." *Evans*, 504 U.S. at 274; *Giles*, 246 F.3d at 972.

Third, one form of bribery occurs when an official accepts a benefit and agrees in exchange to take official actions to benefit the bribe payer in the future, and in such cases the official does not need to specify those future acts at the time he takes the bribe. *See, e.g., Whitfield*, 590 F.3d at 349-50; *Ganim*, 510 F.3d at 147; *Kemp*, 500 F.3d at 281. In other words, there is bribery as long as there is "a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor." *Jennings*, 160 F.3d at 1014 (quotations omitted); *accord Whitfield*, 590 F.3d at 352-53; *Ganim*, 510 F.3d 147, 149; *Kincaid-Chauncey*, 556 F.3d at 943; *Kemp*, 500 F.3d at 282.[9] Indeed, such schemes have been described as "some of the most pervasive and entrenched corruption in existence." *See, e.g., Ganim*, 510 F.3d at 147. This "stream of benefits" theory is what the government charged and proved in Ryan's case.

Ryan's motion devotes much attention to the argument that bribery requires a "*quid pro quo*." The case law on this issue depends on how courts define that term. In *United States v. McNair*, 605 F.3d 1152, 1187-88 (11th Cir. 2010), for instance, the Eleventh Circuit defined "*quid*

[9] *Skilling* cites *Whitfield*, *Ganim* and *Kemp* approvingly, including the specific portions of those decisions cited here. *Skilling*, 130 S. Ct. at 2934.

pro quo" narrowly to mean "a specific payment given . . . in exchange for a specific official act," *id.* at 1187, and held that because bribery does not require that each specific payment be linked to a specific official act, it does not require a "*quid pro quo*." *See also United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005) (bribery under § 666 does not require a specific *"quid pro quo*"); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997) (same). Similarly in *Ganim*, the Second Circuit held that each specific payment need not be linked to a specific official act, so long as there is an exchange of benefits for official action. *Ganim*, 510 F.3d at 147. However, because *Ganim* defined "*quid pro quo*" more broadly to include "an ongoing course of conduct" where "favors and gifts flow[ ] to a public official . . . *in exchange* for a pattern of official actions . . . ," *id.* at 149, the court said that bribery requires a "*quid pro quo*." The point is that, regardless of the label, bribery simply requires an exchange of benefits for official action.

In the present case, the evidence showed that Ryan agreed to exchange benefits for official action, and such conduct clearly constitutes bribery, as that term is used in *Skilling*.[10]

B. The Jury Instructions on Honest Services Fraud Required That the Jury Find Bribes or Kickbacks.

In the context of this case, the instructions provided to the jury permitted a conviction of honest services fraud *only* if the jury found that Ryan took bribes or kickbacks. The first relevant

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[10] Ryan's motion says little about kickbacks, but the Supreme Court used the term broadly in *Skilling*, citing a federal statute that defines a kickback as "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances]." *Skilling*, 130 S. Ct. at 2933-34 (quoting 41 U.S.C. § 52(2)). This definition—focusing on payments made to get favorable treatment from a person who controls a source of income—is consistent with the way the Seventh Circuit has defined kickbacks. *See United States v. Hickok*, 77 F.3d 992, 1005 n.12 (7th Cir. 1996); *United States v. Hancock*, 604 F.2d 999, 1002 (7th Cir. 1979). If anything, the definition of kickbacks is broader than that of bribes.

instruction stated:

> A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest (also known as a conflict of interest) in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services, if the other elements of the mail fraud offense are met.

Tr23905.

On the facts of this case, this instruction is consistent with *Skilling* because it permitted the jury to convict Ryan for failing to disclose a conflict of interest *only* if the conflict took the form of a "material personal or financial interest . . . in a matter over which [the official] has decision-making power"—which in this case, included only a bribe or kickback. For purposes of the mail fraud counts of which Ryan was convicted, the matters over which Ryan had decision-making power were the state contracts and leases he awarded to Warner, Klein, and Swanson. And the only "material personal or financial interest" the jury heard that Ryan had in those matters was the stream of benefits he received in return for awarding Warner, Klein, and Swanson those contracts and leases. Ryan did not own or have any other interest in buildings leased by the state or the companies that received state contracts, nor did he steer state business directly to himself or his own family. Instead, the only conflict of interest a reasonable jury could have found that Ryan failed to disclose was his agreement to receive personal and financial benefits in exchange for official action—in other words, his receipt of bribes and kickbacks—and not the type of conflicts of interest that *Skilling* excluded from the ambit of the honest services fraud statute.

Just as importantly, the Court's instructions to the jury required that to convict Ryan for undisclosed conflicts of interest, the jury had to find that all of the other elements of the mail fraud statute were met. The Seventh Circuit emphasized this point on direct appeal when it rejected

Ryan's attack on the portion of the instructions that related to conflicts of interest, explaining that:

> The portion of the jury instructions quoted by the defendants about "conflict of interest" is taken out of context, as the jury instructions explicitly stated that a conflict of interest violated the statute only "if the other elements of the mail fraud statute are met." The district court explained that the government must also show that the public official allowed or accepted the conflict of interest with the understanding or intent that she would perform acts within her official capacity in return.

Warner, 498 F.3d at 698.

Accepting a conflict of interest or benefit with the understanding or intent to perform official acts in return constitutes taking a bribe. *See supra* at 15-17. Thus, in context, the conflict of interest instruction permitted the jury to find honest services fraud only if it found that Ryan took a bribe or kickback. There was no error under *Skilling*.

The three instructions that followed[11] properly defined bribes and kickbacks and, as the Seventh Circuit made clear on direct review, correctly informed the jury about the "exchange" element at the heart of a bribe and kickback scheme. Ryan waived or forfeited his right to challenge any of these instructions,[12] however, even if he had not, there would be no error because individually and collectively they correctly emphasized the need to find that the scheme involved the performance of official acts in return for personal benefits. First, in an instruction that Ryan proposed, the Court instructed the jury:

The law does not require that the government identify a specific official act given in

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[11] There was a fourth instruction that addressed bribery in the context of campaign contributions, but it is not relevant to this discussion. Tr23907-08.

[12] Of the three instructions discussed below, Ryan proposed the first and third instructions, them.R703:6; R703:5 (modified in court), and thus waived any challenge to them. *E.g., United States v. Yu Tian Li*, 615 F.3d 752 (7th Cir. 2010). Ryan failed to challenge the second instruction on direct appeal, and so any challenge is procedurally defaulted. *E.g., United States v.* Podhorn, 549 F.3d 552, 558 (7th Cir. 2008).

> exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the public official accepted the personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return.

Tr23905-06 (quoted in part by the Seventh Circuit, *Warner*, 498 F.3d at 698.). This instruction was accurate, and numerous courts, including three cited in *Skilling*, have approved similar language. *See, e.g., Whitfield*, 590 F.3d at 353; *Ganim*, 510 F.3d at 144; *Kemp*, 500 F.3d at 281-82. Ryan's only quibble with the instruction is that it focuses on the understanding of the public official, not on "whether two parties had agreed to an exchange." Mot23. But his § 2255 motion omits the second half of the instruction, which requires the same understanding on the part of the bribe-payer. *See* Tr23906.[13] More importantly, the law is clear that a public official's "intent to perform an act in exchange for a benefit" is sufficient to show the official took a bribe. *Ganim*, 510 F.3d at 147. For example, the solicitation of a bribe from an unwilling payer or from an undercover agent, neither of whom "agreed" to the exchange, would constitute a bribery scheme.

The next instruction stated:

> A benefit or benefits received by a defendant or given by a defendant with the intent that such benefit or benefits would ensure favorable official action when necessary can be sufficient to establish the defendant's intent to defraud the public of its right to honest services. You need not find that such a benefit was conferred or received in exchange for a specific official action.

Tr23906. This instruction also accurately states the law—before and after *Skilling*. Ryan asserts, without authority, that "[a]n intent to ensure favorable action when necessary is not enough." Mot24n.15. For decades, courts, including courts cited as paradigmatic bribery and kickback cases

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[13] The second half of the instruction provided: "Likewise, the law does not require that the government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the personal and financial benefits were given with the understanding that the public official would perform or not perform acts in his official capacity in return."

in *Skilling*, have held otherwise. *See United States v. Isaacs*, 493 F.2d 1124, 1145 (7th Cir. 1974) ("There is bribery if the offer is made with intent that the offeree act favorably to the offeror when necessary."); *accord United States v. Abbey*, 560 F.3d 513, 518 (6th Cir. 2009); *Kinkaid-Chauncey*, 556 F.3d at 943 & n.943; *Kemp*, 500 F.3d at 282; *Jennings*, 160 F.3d at 1014; *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976).

The third instruction—another of Ryan's proposals—stated that to prove a mail fraud violation, it is not enough that a public official received benefits from a person who has business with the state and that, instead, "that receipt violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making." Tr23906-07. Ryan does not explain why this instruction is incorrect, especially when read in light of the instruction cited above requiring that the "public official accepted the personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." Tr23906. Contrary to Ryan's contentions, this instruction passes muster under *Skilling*.

Finally, the Court instructed the jury about certain provisions of Illinois law. Tr23908-11. Ryan claims a violation of state law can never form the basis for an honest services fraud conviction, Mot25, but *Skilling* did not so hold. *Skilling* acknowledged a circuit conflict on the issue, and did not resolve the conflict. 130 S. Ct. at 2928 n.37. In any event, this is a non-issue for several reasons. First, as the Seventh Circuit noted on direct appeal, the instructions made clear that "[n]ot every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation," Tr23908, 23911, and that, to the contrary, an official or employee defrauds the public of his honest services only "[w]here a public official or employee misuses his

official position . . . *for private gain for himself or another*," "*and* the other elements of the mail fraud offense have been met," Tr23911 (emphasis added). And, in discussing the conflict-of-interest provision, the Seventh Circuit explained, the required showing that "the other elements of the mail fraud statute have been met" meant that the official must accept a benefit for private gain "with the understanding or intent that [he will] perform acts within [his] official capacity in return." *Warner*, 498 F.3d at 698. In other words, the instructions required a bribe, particularly in the context of the evidence, which established that the private gain at issue was limited to benefits given to Ryan in exchange for Ryan's steering of valuable contracts and leases. Moreover, as the Seventh Circuit noted:

> [m]any of the state law provisions in the instructions explained what kinds of financial transactions are not prohibited for state officials. This explanation was more likely to undermine than to assist the prosecution in showing the defendants' intent to deprive Illinois citizens of Ryan's honest services.

Warner, 498 F.3d at 698. Thus, the instructions emphatically did not permit the jury to convict based on something other than a bribe or kickback scheme.

Accordingly, in order to find that Ryan committed honest services fraud in this case, the instructions, read as a whole and in the context of the evidence, required the jury to find that Ryan took bribes and kickbacks. There is no instructional error here, and therefore no error at all.

IV. Even if There Were Instructional Error Here, a Properly Instructed Jury Would Have Reached the Same Result, In Light of the Overwhelming Evidence Showing that Ryan Took Bribes and Kickbacks.

Even if this Court were to conclude that the honest services instructions permitted the jury to convict Ryan for actions that did not involve the taking of bribes and kickbacks, the instructional error would be harmless. In light of the evidence, a properly instructed jury would have found that Ryan took bribes and kickbacks because the evidence that he did so was overwhelming. Thus, Ryan

suffered no actual prejudice. *See Brecht*, 507 U.S. at 637-38.

A. The Evidence Established Bribes and Kickbacks.

The indictment charged, and the evidence proved, that Ryan took bribes in the form of a stream of benefits from Warner, Klein and Swanson with respect to each count of honest services mail fraud of which Ryan was convicted. In the face of this evidence, Ryan attempts to define bribes and kickbacks so narrowly that little more than an express agreement to trade a particular sum of cash for a particular official action would ever qualify. The law provides no support for Ryan's cramped definition of bribery.

1. The Currency Exchange and South Holland Bribes

For years, Ryan enjoyed free lodging at Klein's Jamaican villa, gifts Ryan lied about on his disclosure forms and actively concealed through the secret cash-back arrangement. In 1995, while Klein and Ryan were relaxing at Klein's villa in Jamaica, Klein asked Ryan for favorable official action in the form of a fee increase for currency exchanges. Ryan later agreed, even though he had opposed a fee increase for years. As the government reminded the jury in its rebuttal argument, Ryan's change of heart occurred "right after a trip to Jamaica." Tr23714.

During a later vacation at Klein's villa in Jamaica, Klein told Ryan that Klein wanted to lease his building in South Holland to the SOS, and when Ryan returned from the trip, he made that happen. Ryan caused the SOS to cancel a less-expensive lease and move to Klein's ill-suited property without considering other locations, directed his subordinate to agree to Klein's lease terms, and told his chief of staff he wanted to make Klein "happy." Ryan personally signed the lease, giving Klein $600,000 in lease payments over five years. As the government argued to the jury, the $13,000 in cash-back that Klein paid Ryan in Jamaica over the years was a striking example

of the "corrupt payments" that Ryan took in return for state action. Tr23085; *see also* Tr23708.

Ryan's motion argues there was no bribe because four years passed between Ryan's first vacation in Jamaica and the lease signing, Mot18, but Klein's benefits to Ryan were ongoing—Ryan vacationed in Jamaica for free every year, including the year he awarded Klein the lease. And contrary to Ryan's assertion, there is nothing "extraordinary" about years passing between a bribe and the payoff. In *Whitfield*, a case the Supreme Court cited favorably in *Skilling*, an attorney secured a state court judge a favorable loan, which the judge did not list on his disclosure forms. *Whitfield*, 590 F.3d at 336. After the attorney arranged the loan, he filed a personal injury lawsuit, and over a year later, the judge assigned the case to himself. *Id.* Nearly a year and a half after that, the judge ruled for the lawyer's client, awarding him millions of dollars in damages. *Id.* The Fifth Circuit affirmed the honest-services bribery convictions of both defendants without hesitation, despite the passage of time, and even though the lawyer and the judge never expressly agreed to trade the loan for the legal ruling at the time the loan was made. *Id.* at 373. S*ee also Abbey*, 560 F.3d at 515-16 (affirming bribery conviction of developer who gave city administrator a free subdivision lot in exchange for favorable consideration in the future; one year later the administrator pushed for developer to receive funding through municipal bonds, resulting in hundreds of thousands of dollars in payments).

2. The Warner Bribes and Kickbacks

Ryan awarded Warner contracts and leases in return for the many times Warner "took care" of Ryan through financial favors to Ryan, his family, and friends. Warner's relationship with Ryan epitomizes a stream of benefits given in exchange for a serious of favorable official acts. Warner usually was not buying any one specific action; the benefits Warner gave Ryan, his family, and

friends, served to keep Ryan on "retainer," so that when opportunities arose, Ryan used his influence to favor Warner. *See Kincaid-Chauncey*, 556 F.3d at 943& n.15; *Abbey*, 560 F.3d at 518.

In this respect, Ryan's relationship with Warner was similar to that between the defendants in *Kemp*, a case *Skilling* cited with approval. In *Kemp*, the Third Circuit affirmed the defendants' convictions of honest services fraud based on bribery, concluding that bank executives gave a city treasurer benefits such as loans to the treasurer's friends and family members who had "shaky credit." *Kemp*, 500 F.3d at 284-85. This was similar to the way Warner, among other benefits, loaned $145,000 to Ryan's brother's financially unstable company, Comguard, and invested $6,000 to Ryan's son's company. Gx08-087-89,09-001,09-002,09-020,09-500. In *Kemp*, the city treasurer, in exchange for the loans, rigged bids to ensure that the executives' bank got a lucrative government contract, *Kemp*, 500 F.3d at 269, much as Ryan overruled his subordinate to make sure Warner's client ADM kept the lucrative sticker contract, Tr8140-46, steered a state contract to Viisage because Warner was its lobbyist (though Warner concealed that fact), Tr13206, Tr3102-04; Gx03-020, 03-023, 03-009, and caused the SOS to relocate to buildings Warner owned in order to benefit Warner. Tr16954, 7822-24, 2804-05, 10463; Gx07-011, 07-500, 07-501, 07-502.

The court in *Kemp* had no difficulty finding that the city treasurer took bribes, relying on the same stream of benefits theory the government pursued at Ryan's trial. 500 F.3d at 281-82. Among other things, the court noted that on one occasion when a bank executive agreed to waive an appraisal fee for a loan the treasurer wanted approved, the treasurer told the executive, "you are my f–king guy. . . . So you get special treatment." *Id.* at 286. Similarly, when Warner recruited Ryan's friend Udstuen to join Warner's effort to make money from their relationship with Ryan by entering the lobbying business, Warner told Udstuen that no one had done more for Ryan than Udstuen, and

that Warner would "take care of George," Tr11620-22, thereby drawing a direct link between the benefits Warner and Udstuen gave Ryan, and the money Warner and Udstuen would make after Ryan steered them state business.[14] The court in *Kemp* emphasized that the bank executives, like Warner, did in fact get special treatment, with the treasurer rigging bids for a city contract to ensure the bank got it. *Id.* at 286. From this "course of conduct," the court held, the jury could conclude that the treasurer, like Ryan, agreed to take official action in exchange for the benefits he received. *Id.*

In addition to bribes, Warner's Viisage contract also involved at least two instances of kickbacks. Months before the bidding process began, Ryan told Warner to cut Ryan's friend Swanson in on the deal, and Warner eventually paid Swanson $36,000 for no work. The government highlighted this as another example of Ryan's "corrupt payments," telling the jury, "When George Ryan directed Warner to give a piece of the Viisage lobbying fee to [Ryan's] good friend Ron Swanson, that was the equivalent of him claiming a piece of those fees for himself." Tr23085.

In addition, five days after landing the Viisage contract, which earned him over $800,000, Warner wrote Ryan a blank check, which Ryan used to pay the band at his daughter's wedding. The proximity between the award of the contract and Warner's payment to Ryan is evidence the two were linked, *see Giles*, 246 F.3d at 973; *Jennings*, 160 F.3d at 1018, as is Warner's use of a front man to conceal that he was the one getting paid as Viisage's lobbyist. *See Jennings*, 160 F.3d at 1018.

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[14] To take another example, when Ryan was asked about disputed terms in the lease with Klein, he replied, "What does Harry want?" and told Fawell he wanted "Harry to be happy." Tr2870,6578-80.

The ADM and IBM contracts also involved kickbacks—this time to Ryan's friend Udstuen. With Ryan's approval, Warner gave Udsteun a cut of Warner's fees on the contracts, totaling about a third of the money Warner made, even though Udsteun did little or no work. These kickbacks to Ryan's friend are no different than kickbacks to Ryan himself. *Cf. Ganim*, 510 F.3d at 138-39 (affirming honest services conviction of mayor who agreed to kickback of one-third of fees earned on city contracts he awarded).

3. The Swanson Bribes

Swanson's bribes were similar—Ryan awarded Swanson lucrative leases and contracts soon after Swanson paid for vacations for Ryan and his daughter. The $2,200 Swanson paid so Ryan's daughter could go to Disney World netted Swanson a lobbying contract worth $180,000 for no work, showing, as the government explained to the jury, that "Ryan is willing to sell his office in order to give a government benefit to the friend who buys that vacation." Tr23805, 23807-08. After Swanson paid for Ryan's vacation in Cancun, Ryan ordered his subordinates to give Swanson the Lincoln Towers lease for which the state paid well above market rate. As the government told the jury, the state paid Swanson "for one reason: Because Ron Swanson got in George Ryan's office, and George Ryan just got back from Cancun with Ron Swanson." Tr23783.

Ryan does not dispute that over the course of many years, his benefactors gave him a stream of benefits, or that Ryan gave a stream of state business to his benefactors. Nevertheless, Ryan argues he did not take bribes and kickbacks because, he claims, he and his benefactors never agreed that the benefits were *in exchange for* state business. The jury heard ample evidence permitting it to reject this claim. Viewing the evidence in a light most favorable to the government, as is required, the evidence clearly showed that Ryan's relationship with Warner, Klein, and Swanson was a classic

arrangement of "I'll scratch your back if you scratch mine," *see Jennings*, 160 F.3d at 1014, in which people "with continuing and long-term interests" in matters under Ryan's control, gave Ryan numerous benefits "to coax ongoing favorable official action." *United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996). S*ee also United States v. Woodward*, 149 F.3d 46, 55 (1st Cir. 1998) (affirming honest services bribery conviction of state representative who took years worth of undisclosed free meals, rounds of golf, and other payments from a lobbyist and friend, and in return repeatedly ruled in the lobbyists's favor).

The Seventh Circuit has joined many others in calling conduct like Ryan's bribery. In *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999), for example, a contractor, mimicking the actions of Warner, Klein, and Swanson, "showered" a state official with gifts worth thousands of dollars, including upgraded airline tickets, trips, and money to spend at casinos. *Id.* at 964-65. The official, like Ryan, failed to disclose any of the gifts, as he was required to do by department regulations. *Id.* What the official did do was make recommendations and prepare misleading cost estimates that allowed the contractor to be awarded a lucrative contract on favorable terms, costing the state money and lining the contractor's pockets. *Id.* at 964-65. The Seventh Circuit held that the official's "guilt of receiving bribes is not open to serious doubt," and that he accepted the gifts intending to be influenced in connection with his official acts, in violation of 18 U.S.C. § 666—one of the statutes *Skilling* cites as helpful in defining bribery in the honest services context. *See Martin*, 195 F.3d at 965.

In *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984), a pre-*McNally* bribery case, the Seventh Circuit affirmed the mail fraud conviction of a deputy commissioner on the Cook County board of tax appeals who took cash payments from lawyers who appeared before him, and failed to

disclose those payments on his statements of economic interest. *Gorny*, 732 F.2d at 599-600. Even though none of the cash payments were "linked directly to any action on a particular real estate assessment file," the people who paid bribes "enjoyed an unusually high rate of success in their practice before the Board." *Id.* at 600. In light of this circumstantial evidence of a stream-of-benefits agreement, and the testimony of several bribe payers who said they paid the money intending to receive some favorable treatment in exchange, the Court concluded that sufficient evidence had been presented to establish that the defendant accepted the payments intending to be influenced by them. *Id.* at 601. Just so here.

B. The Government Argued to the Jury that Ryan Took Bribes and Kickbacks.

As outlined above, the government argued that Ryan exchanged official action for the benefits he received from Warner, Klein, and Swanson—in the government's words, that Ryan "sold his office" in return for "corrupt payments." Tr23084-85, 23817-18, 23809, 23826. The government explained Ryan's bribes and kickbacks using the stream-of-benefits theory courts repeatedly have approved. As the government argued, "the flow of benefits, when Ryan received, referred, and advocated for these financial benefits and then took some action to benefit those who had provided the benefits to him or his family, he was, in essence, selling his office brick by brick." Tr22971; *see also* Tr22836.

The government told the jury:

- "George Ryan actively perverted the decision-making process to tilt the gain in favor of his friends who were taking care of him and his family. And that is not politics, ladies and gentlemen. That's a crime." Tr23100.
- Ryan "decided that the benefits of his public office were his to give out like candy to Larry Warner and to other friends of his who at the same time were giving him and his family financial benefits and gifts." Tr23140.

- "Warner hit the jackpot during George Ryan's terms as secretary of state and as governor . . . $3 million in total benefits," and Warner, in turn, "did a very nice job of taking care of George Ryan." Tr22835.

Ryan's motion notes correctly that more than once, the government told the jury it did not have to find a "*quid pro quo*." Tr22956-58, 23083-84, 23763-64, 23817-18. But, as is clear from the context of those statements, the government was simply arguing, correctly, that in order to convict Ryan, the jury did not have to find that Ryan had a conversation in which he expressly agreed to accept a specific benefit in exchange for a specific official act. Instead, the government emphasized that Ryan received benefits from Warner, Klein, and Swanson over many years, and in return, Ryan took official action for these benefactors as opportunities arose. The government made this point several times, perhaps most clearly in its initial closing argument:

> [Ryan] did not make announcements or press releases when Warner, Swanson, or Klein gave him or his family something in order to influence his decision-making. The loans, the vacations, the other benefits did not come in packages with bright red lettering that said, "This is to influence you." Most importantly, keep in mind that this is not a case in which a public official had a specific price for each official act that he did, like a menu in a restaurant where you pick an item and it has a particular price. The type of corruption here—that type of corruption where you give me this, I will give you that, is often referred to as a *quid pro quo*. The corruption here was more like a meal plan in which you don't pay for each item on the menu. Rather, there is a cost that you pay, an ongoing cost, and you get your meals.

Tr22852-53.

This, in a nutshell, is the stream of benefits theory of bribes and kickbacks, one that courts—including courts cited favorably in *Skilling*—repeatedly have approved. *See supra* at 16-17.

C. In Light of the Evidence and the Government's Arguments, a Reasonable Jury, Properly Instructed, Would Have Found that Ryan Took Bribes and Kickbacks.

Three features of Ryan's scheme, as alleged in the indictment and proved by the evidence, make it particularly clear that a properly instructed jury would have convicted Ryan of taking bribes.

First, Ryan, Warner, Swanson, and Klein carefully concealed what they were doing. These "elaborate efforts at concealment provide powerful evidence" of Ryan's consciousness of guilt, *see United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985), and powerful evidence that Ryan hid his transactions precisely because he was awarding friends in exchange for the benefits they gave him. Second, as the government emphasized to the jury during rebuttal, Ryan was not the type of friend who did favors for Warner, Klein, and Swanson other than giving them state business. Ryan did not pay for Warner, Klein, and Swanson to go on vacations, invest in their relatives' companies, or write checks to their families. Tr23763-64. These men did not do favors for Ryan because he reciprocated in kind; they did favors for him because Ryan awarded them state contracts and leases worth millions of dollars. *See Woodward*, 149 F.3d at 58. Finally, Warner, Klein, and Swanson did not seek mere general goodwill, they sought specific official actions—leases, contracts, currency exchange rates—and it was in exchange for these things that they "took care" of Ryan.

In light of the evidence presented by the government at trial, there is no basis for "grave doubt" concerning whether the jury convicted Ryan only of conduct that does not constitute a crime after *Skilling*. *See O'Neal*, 513 U.S. at 435. If properly instructed, any reasonable jury would have convicted Ryan of taking bribes and kickbacks.

V. The Jury Necessarily Concluded that Ryan Committed Money-Property Fraud.

The Court should deny Ryan's motion for a third reason. Even if the jury convicted Ryan of honest services fraud based on undisclosed conflicts of interest that did not involve taking bribes and kickbacks, the jury must have also concluded that Ryan committed money-property fraud, and so any error resulting from the honest services instructions is harmless.[15]

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[13] On direct appeal, Ryan raised no claims relating to money-property fraud, and any such claims are procedurally defaulted. Ryan's § 2255 motion likewise fails to raise such a claim.

A. Post-*McNally* Money-Property Cases

After the Supreme Court invalidated the honest services theory in *McNally*, numerous appellate court decisions affirmed mail fraud convictions and found that erroneous jury instructions on the honest services theory were harmless because the government proved a valid money-property theory. *See, e.g.*, *Moore v. United States*, 865 F.2d 149, 153-54 (7th Cir. 1989); *United States v. Asher*, 854 F.2d 1483, 1496 (3d Cir. 1988); *United States v. Perholtz*, 836 F.2d 554, 558-59 (D.C. Cir. 1987). While courts generally overturned convictions that were "based entirely on the intangible rights theory," courts affirmed convictions, such as Ryan's, where the "bottom line of the scheme or artifice to defraud had the inevitable result of effecting monetary or property losses to the . . . state." *Asher*, 854 F.2d at 1490, 1494; *see also Messinger v. United States*, 872 F.2d 217, 222 (7th Cir. 1989)*; United States v. Saks*, 964 F.2d 1514, 1521 (5th Cir. 1992). In judging whether an error was harmless, courts looked to the trial as a whole, including the indictment, the evidence, the arguments, and the jury instructions. *See Messinger*, 872 F.2d at 221; *Perholtz*, 836 F.2d at 559. The same harmless error analysis applies here.

B. The Indictment Charged a Single Scheme that Included Money-Property Fraud.

The indictment alleged that Ryan devised and participated in one scheme "to defraud the people of the State of Illinois, and the State of Illinois, of money, property, and the intangible right to honest services. . . ." R110:19. Counts Two through Eight alleged specific mailings of state money, or money derived from state contracts, in furtherance of the single scheme. *Id.* at 59-65. That the scheme involved money and property is central to the indictment's allegations: the indictment describes numerous state contracts and leases that were the objects of the fraud. *See, e.g.*, R110:19-21 (referring to "contracts" and "real property lease[s]").

C. The Evidence Established a Single Scheme that Included Money-Property Fraud.

The elements of mail fraud are a scheme to defraud, intent to defraud, and use of the mail. *United States v. Sorich*, 523 F.3d 702, 708 (7th Cir. 2008). "A scheme to defraud requires the making of a false statement or material misrepresentation, or the concealment of [a] material fact." *United States v. Powell*, 576 F.3d 482, 490 (7th Cir. 2009) (quotations omitted). "A failure to disclose information may constitute fraud if the omission [is] accompanied by acts of concealment." *Id.* at 491. For money-property fraud, the scheme must also have "a substantial potential" to deprive someone of money or property, which includes state contract and leases. *United States v. Barber*, 881 F.2d 345, 349 (7th Cir. 1989); *Sorich*, 523 F.3d at 713; *United States v. Leahy*, 464 F.3d 773, 788 (7th Cir. 2006). At trial, the same evidence that supported the honest services fraud theory based on undisclosed conflicts of interest also established the elements of money-property fraud.

1. South Holland Lease Steered to Klein

The South Holland lease resulted in $600,000 of state money going into Klein's pockets over five years. Tr.6289-91; Gx11-001. At the same time Ryan obtained state money for Klein, Ryan used the false paper trail from the cash-back arrangement to hide the free lodging Klein gave him. In its closing argument, the government correctly called this a "sham transaction." Tr22906. As the government also pointed out during closing, during this same period, Ryan lied on his annual statements of economic interest by failing to disclose these gifts from Klein, as Illinois law required. Gx28-012; Tr22918-20. Later, Ryan lied to the FBI, claiming he paid his own way in Jamaica, and producing the bogus checks as proof. Tr18143-49; Gx10-013.

Ryan did not just obtain state money for Klein through fraud, he caused actual loss to the state. Ryan let Klein decide disputed lease terms, telling Fawell he wanted "Harry to be happy."

Tr2870, 6578-80; Gx01-006. Making Harry happy meant the state lost money, paying $173,000 more for Klein's lease than it had for the previous lease. Tr.6289-9111036; Gx11-001.

2. Contracts and Leases Steered to Warner

a. Bellwood and Joliet Leases

Warner pocketed hundreds of thousands of dollars of state money on the Bellwood and Joliet leases, and both leases were accompanied by acts of concealment and misrepresentations. On the Bellwood lease, Warner assured Ryan and Fawell that the press would never find out about Warner's interest, because Warner's name was "buried in paperwork." Tr2772-73, 2774. Warner concealed his interest in the property until after Ryan signed the lease in the spring of 1993, and then allowed his interest to surface through various transactions. Tr16950-51, 16954; Gx07-011, 07-501, 07-502. Warner did the same for the Joliet lease, again telling Fawell that his interest was buried in paperwork, and again hiding his interest until after Ryan awarded the lease. Tr2812, 3005, Gx06-500. In its closing argument, the government told the jury these leases were filled with "concealment and deceit." Tr22922.

Both leases resulted in a loss to the state. The state paid above market rate for the Bellwood property, for a total of about $246,583 for the first five years. Tr11045,11399 For the Joliet property, the state overpaid by about $296,485. Tr11021. When Warner's role in the Joliet lease ultimately became public, Warner told Udstuen he never should have done the lease because it was "too good a deal." Tr11727.

b. Viisage Contract

In 1996, Ryan awarded Viisage, one of Warner's clients, a contract for $20 million in state money, again using concealment and misrepresentations. As the government's closing argument

pointed out to the jury, Warner actively concealed his role as a lobbyist for Viisage by failing to register as a lobbyist, and by using a front man whose name went on the paperwork. Tr23009, 13206; Gx03-015, 03-016, 03-020, 03-023, 04-045. It was only after Viisage won the contract that Warner removed the front man and had the lobbying arrangement transferred to his company, raking in $834,000 in fees. Tr3103-04, 16923-25; Gx03-500, 03-501. Ryan knew Warner had an interest in the contract from the start. Indeed, before the bidding process even began, Ryan told Warner to cut Swanson in on the Viisage deal, and Warner promised Swanson $36,000 on a contract Viisage hadn't been awarded yet. Tr3102-04; Gx03-009. Five days after Ryan steered the contract to Warner, Warner wrote Ryan a blank check, which Ryan made out for over $3,000 to pay the band at his daughter's wedding. Gx23-003. Ryan lied on his statements of economic interest by not disclosing this benefit, as well as other benefits Warner gave to Ryan and his family. Gx28-012.

c. ADM and IBM Contracts

In 1991, Warner leveraged his access to Ryan and convinced ADM to hire him as a lobbyist to ensure that ADM would keep a lucrative contract for license plate stickers. Tr8032-33, 8064, 8067-68, 8112-13, 11637. ADM paid Warner between $2,000 and $5,000 every month to keep the contract. Gx02-004, 02-005, 02-015, 02-500, 02-501. In 1993, an official at SOS decided it was in the state's best interest to eliminate ADM's security mark, which may have cost ADM the contract, but an angry Warner told the official Warner would "take care of it." Tr8140-44. A few days later, Ryan told the official to quietly retract his proposal, and asserted—falsely—that the security mark was necessary for public safety. Tr8140-44, 9143-46. The official retracted his proposal, even though he believed doing so was against the state's best interests, and in this way, ADM continued to receive state money from 1991 to 1999, and Warner continued to be enriched

as ADM's lobbyist. Tr8143-47, 2801.

In 1996, Ryan allowed Warner and Udstuen to rig the bidding on a computer mainframe contract by allowing them to choose the director of the SOS department who dealt with mainframe issues. Tr12526. Warner and Udstuen specifically picked a director who had expressed support for giving the contract to IBM, a Warner client. Tr12528-29 The official did, in fact, award IBM the $26 million mainframe contract, and Warner received $1 million in fees from IBM, most of which was contingent on IBM landing the contract. Tr3125,12541,12931,12981-87;Gx04-043,04-014,04-021. Warner gave about one-third of these fees to Udstuen, who never registered as IBM's lobbyist and was, in fact, unknown to IBM.

During the same time period the state paid money to ADM and IBM on these contracts, Warner gave a number of financial benefits to Ryan and Ryan's family. In 1994 and again in 1997, Warner loaned a total of $145,000 to Comguard, Ryan's brother's financially unstable company. Tr10677, 17243-49; Gx09-020, 09-008, 09-500, 09-501. Also in 1997, Warner provided a slew of benefits, including waiving a $1,000 insurance adjustment fee Ryan owed, waiving an insurance adjustment fee for Ryan's son-in-law, giving the same son-in-law a $5000 loan, and making a $6,000 investment in Ryan's son's company. Tr15515-19,17092-118,15157-63, 17088-91; Gx32-001,32-004,22-004,22-005,08-087-89. Ryan reported none of these benefits on his disclosure statements. Gx28-012.

The actions of Ryan and his co-schemers, summarized above, were part of a scheme to defraud the state of money and property. The government proved that Ryan and his co-schemers did not merely fail to disclose a conflict, they actively concealed and misrepresented material facts about the benefits he received and the benefits he provided. Each misrepresentation arose in a single

context: Ryan awarding a state contract or lease to one of his benefactors. In that context, Ryan "directly targeted [the state's] coffers and its position as a contracting party." *Leahy*, 464 F3d at 788. Ryan and his co-schemers obtained this state money under false pretenses, by lying or concealing material information. In some cases, such as the Bellwood and Joliet leases and the Viisage contract, Ryan or his co-schemer Warner took active steps to conceal that Warner was the person receiving state money, by "burying Warner's name in paperwork" and using front men to appear on documents—the type of "acts of concealment" that constitute fraud. *See Powell*, 576 F.3d at 491 (involving failure to disclose information plus active concealment in the form of forged signatures).

In other cases, such as the ADM contract, Ryan made misrepresentations by lying to state officials about why he was acting to preserve ADM's contract, claiming that it was for security reasons, when in fact it was to ensure that Warner could keep getting rich on a state contract. For the South Holland lease and the Viisage deal, Ryan lied on his disclosure statements by failing to report Klein's free Jamaican vacations and Warner's blank check for the wedding band. And for all of Warner's contracts and leases, Ryan lied on his disclosure statements by failing to report any of the benefits Warner gave Ryan and his family, benefits the government argued, and the jury was entitled to conclude, were in fact benefits to Ryan himself. Tr22967-69.

The acts of concealment and misrepresentations by Ryan, Warner, and Klein were material because the state would have wanted to know, and was entitled to know, who was receiving state money, why they were receiving it, and whether the recipient had showered Ryan with personal and financial benefits. *See United States v. Bush*, 522 F.2d 641, 647 (7th Cir. 1975). If Ryan had truthfully disclosed this information, it would have been capable of influencing the state when the

state decided whether to award the contracts and leases to Warner and Klein in the first place, and whether to continue the contracts and leases over the course of several years. Indeed, it is precisely because such information is capable of influencing the state that Illinois requires its public officials to file annual statements of economic interests. *See Bush*, 522 F.2d at 645, 647-48 (false statements of economic interests are material misrepresentations). The state might have decided it did not want to award a contract or lease to someone who had benefitted Ryan, or that the state wanted different terms for the contracts and leases than the terms Ryan permitted. By depriving the state of this information, Ryan obtained state money "through false pretenses," that is, active concealment and material misrepresentations, and engaged in a scheme to defraud the state of money. *See Leahy*, 464 F.3d at 788; *United States v. Lack*, 129 F.3d 403, 406 (7th Cir. 1997).

Ryan's fraud cost the state hundreds of thousands of dollars on the South Holland, Bellwood, and Joliet leases. On the ADM stickers contract, Ryan caused the state to continue to pay ADM for a contract based on specifications that the relevant state official no longer believed were in the state's best interest. The Viisage and IBM contracts were essentially no-bid contracts in which Ryan picked, or allowed Warner to pick, one of Warner's clients to receive the contract. Whether or not Ryan caused the state actual loss on these contracts, he exposed the state to a substantial risk of loss, which is all the mail fraud statute requires. *Barber*, 881 F.2d at 349; *see also United States v. Riley*, No. 08-3758, 08-3759, 2010 WL 3584066, at *10 (3d Cir. Sept. 16, 2010); *United States v. Welch*, 327 F.3d. 1081, 1108 (10th Cir. 2003). Here, the risk of loss was inherent in the scheme. Ryan awarded the contracts to Warner's clients because they were Warner's clients—as the ADM example makes clear, Ryan was less interested in whether the deal was in the state's best interests. Even if by chance the contracts were favorable to Illinois, Ryan deprived the state of the chance to

make a better deal, or the best deal possible, because he awarded state business based on what was best for Warner and himself, by making misrepresentations and actively concealing information. *See Bush*, 522 F.2d at 648; *see also Riley*, 2010 WL 3584066, at *10.

D. The Government Argued, and the Court Properly Instructed the Jury, Concerning Money-Property Fraud.

The government argued the money-property fraud scheme to the jury, explaining, "When you are given – when you are stealing from the state, people's resources, that's property. That's money. You can't do that and lie about it, and there is a mailing in furtherance of it. That's money or property." Tr23771. The prosecution used various formulations, but the argument was the same: Ryan and his co-schemers obtained state money by awarding contracts and leases, while concealing or misrepresenting various facts about the transactions. The government marshaled the same evidence to argue that Ryan both failed to disclose conflicts of interest, and defrauded the state of money and property. For example, the government's initial closing argument described "the core of the case" as Ryan violating his duty to provide honest services by "giving state benefits, like contracts and leases to his friends . . . while at the same time they were providing various undisclosed financial benefits to him. . . ." Tr22836. Later, the government explained that Ryan's friends gave him things of value "at the same time that Ryan was giving them government money in the form of leases." Tr22851-52. And whether discussing Ryan's failure to disclose conflicts of interest or Ryan's fraud involving state money, the prosecutors zeroed in on the concealment and misrepresentations of Ryan, Warner, and Klein, arguing that Ryan concealed benefits on his disclosure forms, Tr22958, 22967, and that "concealing is fraud." Tr 23757.

The government also made clear the scheme was not just about an intangible right to honest services, but that the state was defrauded of "tangible things," such as the South Holland, Joliet, and

Bellwood leases, and the ADM sticker contract for which there was no competition. Tr23099. The government emphasized the loss to the state, explaining that the state was"ripped off" for $173,000 for the South Holland lease, Tr22914, and that "Warner, Swanson, Klein take in thousands and thousands of dollars on these leases. The state was a loser . . . where the state moved out of one location, where they were paying less, moved into another Ryan-picked location, where they end up paying more, costing the taxpayers money." Tr22892-93.

Finally, unlike in some cases where courts have found harmless error even when the judge gave no instruction on money-property fraud, *see Moore*, 865 F.2d at 153-54; *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989) (Breyer, J.), this Court properly instructed the jury on the money-property theory. Tr23902-03. The Court also informed the jury that the money-property fraud was part of "a single scheme to defraud." Tr23903.

E. The Jury Must Have Convicted Ryan of Money-Property Fraud.

This case was not "based entirely on the intangible rights theory," but is one where the "bottom line of the scheme or artifice to defraud had the inevitable result of effecting monetary or property losses to the . . . state." *Asher*, 854 F.2d at 1490, 1494. As described above, the evidence and arguments that Ryan failed to disclose conflicts of interest and that Ryan and his co-schemers defrauded the state of money were identical. Any reasonable jury that convicted on the former basis must also have convicted on the latter.

The Seventh Circuit has found harmless error in similar cases where money-property fraud was inherent in the scheme, even where the jury was only instructed on an intangible rights theory. In *Moore*, for example, the Seventh Circuit found the failure to give a money-property instruction was harmless, concluding that, as here, the government "plainly lost money or property as a result

of the proven bid-rigging scheme," and the jury "could not have found a scheme to defraud [the government] of its intangible rights separate from a criminal scheme to obtain money or property by the bid rigging charged and shown." 865 F.2d at 153-54. *See also Asher*, 854 F.2d at 1495-96 (finding harmless error where scheme involved award of no-bid contract in exchange for a bribe, resulting in "a substantially greater cost to the Commonwealth than a contract obtained through traditional competitive bidding."); *Perholz*, 836 F.2d at 558 (finding harmless error where kickback scheme caused the government to overpay for a subcontract). Since, on the facts presented, if the jury found Ryan guilty of honest services fraud they necessarily found him guilty of money-property fraud, Ryan suffered no prejudice.

VI. A Properly Instructed Jury Would Have Convicted Ryan of Money-Property Fraud.

Even if the Court finds that the honest services and money-property frauds were not so closely intertwined, there is a final basis to deny Ryan's motion. Any jury that was instructed solely on the valid theory of money-property fraud would have convicted Ryan of that crime because the evidence that Ryan committed money-property fraud was overwhelming. Therefore, any errors in the honest services instructions could not possibly have prejudiced Ryan

The South Holland lease provides the clearest example. There is no question that Ryan obtained state money through false pretenses, by awarding the lease to Klein, actively concealing the free vacations Klein had given Ryan through the cash-back arrangement, and lying on his disclosure forms by not listing those free vacations, resulting in a state lease for a property with serious drawbacks that cost the state $173,000 more than the previous location. These actions deprived the state of money through fraud.

Because of this evidence, and the evidence related to the other contracts and leases, any

reasonable jury properly instructed solely on money-property fraud would have convicted Ryan. Therefore, the honest services instructions did not affect the verdict, and Ryan's convictions and sentence should stand.

VII. Skilling Provides No Basis for Finding Prejudice Based on the Evidence Admitted at Trial.

Finally, Ryan complains about several pieces of evidence he claims are inadmissible in light of *Skilling*. Mot15-16. Because all of the evidence was admissible even without a mail fraud theory based on undisclosed conflicts of interest, *Skilling* has no effect on the admissibility of this evidence. *See Riley*, 2010 WL 3584066, at *7; *United States v. Prosperi*, 201 F.3d 1335, 1345 (11th Cir. 2000). For example, the following evidence was admissible both before and after *Skilling*.

- That Ryan accepted gifts in excess of the $50 limit imposed by SOS regulations and Ryan's personal policy was admissible to show Ryan's intent to defraud and his credibility, the latter of which was at issue because of the false statements counts.

- The consulting fee Ryan took from the Gramm campaign was specifically charged in the tax counts. *See* R110:80-81.

- The evidence of Ryan's dismantling of the SOS Inspector General's Office was admissible to show Ryan's intent to protect the ability of Citizens for Ryan to make money. Ryan used this money for personal use, but, as charged in the tax counts, did not pay taxes on it. *See* R110:76-84.

- Warner's access to low-digit plates was admissible to show how Ryan gave Warner complete access to SOS operations, which was relevant to the government's mail fraud theories based on both money-property and bribes and kickbacks. As the government argued to the jury, that Ryan's secretary kept a kitty at her desk so Warner could order low-digit plates for his friends showed the types of governmental favors Ryan did for Warner, and made it more believable that SOS employees recognized Warner's clout and acceded to his demands about state contracts and leases. Tr22975; *see also* Tr23047.

- The evidence that Ryan told Swanson the location of the Grayville prison was admissible to show how Ryan showered Swanson with government benefits, including confidential information. Although the Court later vacated Ryan's conviction on Count Ten related to this episode, the evidence was admissible to

prove the flow of benefits between Ryan and Swanson. In any event, Ryan waived his right to challenge this evidence by failing to do so on direct appeal.

- Ryan's conversion of state property, such as using state employees and state resources on his campaigns, was admissible as evidence of how Ryan used false pretenses, including false time sheets, to obtain state money and property.

Even if the Court were to conclude that some of this evidence was inadmissible, any error was harmless because its admission did not affect Ryan's "substantial rights." *See United States v. Jones*, 389 F.3d 753, 758 (7th Cir. 2004). In light of what the Seventh Circuit called the "overwhelming" evidence of Ryan's guilt, *Warner,* 498 F.3d at 675, a reasonable juror's view of the case would not have changed had this evidence been excluded. *See United States v. Owens*, 424 F.3d 649, 656 (7th Cir.2005).

CONCLUSION

For the reasons set forth above, the Court should deny Ryan's motion.

Dated: October 7, 2010

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s/ Marc Krickbaum

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Respondent, v. GEORGE H. RYAN, SR., No. 16627-424 Movant.	)	Case No. 10-CV-5512 Judge Rebecca R. Pallmeyer

AGREED MOTION FOR EXTENSION OF TIME TO REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Movant George H. Ryan, Sr., by his attorneys, hereby moves this Court pursuant to Fed. R. Civ. P. 6(b) to extend the time to reply to the Government's response to Ryan's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. In support of this motion, Ryan states as follows:

1. On August 31, 2010, Ryan filed his Motion Pursuant to 28 U.S.C. § 2255 and his Motion to Set Bail. The memorandum of law in support of Ryan's § 2255 Motion was 31 pages long. The Government received until October 7, 2010 to respond – a total of 37 days.

2. The Government's response was 44 pages long.

3. Ryan's reply is currently due on October 21 and oral argument is scheduled for November 1.

4. In order to adequately address the arguments raised in the Government's response, Ryan requires additional time. Ryan requests two additional weeks to file his reply briefs regarding the § 2255 Motion and the Motion to Set Bail. Ryan also requests that the oral argument on those motions be scheduled for the week of November 22, 2010.

5. The Government does not object to this relief.

6. If the Court is available, the parties are prepared to argue the § 2255 Motion and the Motion to Set Bail on November 22, 2010 at 10:00 a.m.

WHEREFORE, Movant George H. Ryan, Sr. respectfully requests that this Court enter an order granting an extension of time of two weeks, up to and including November 4, 2010, to reply to the Government's response to Ryan's § 2255 Motion and Motion to Set Bail. Ryan additionally requests that this Court enter an order scheduling oral argument for November 22, 2010 at 10:00 a.m.

DATED: October 18, 2010

/s/ Gregory J. Miarecki
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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Movant George H. Ryan, Sr., hereby certifies that on October 18, 2010, he caused the foregoing Motion for Extension of Time to be electronically filed with the Clerk of the Court for the Northern District of Illinois using the ECF System, which will send notification to counsel of record.

DATED: October 18, 2010

/s/ Gregory J. Miarecki
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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 5512	**DATE**	10/19/2010
CASE TITLE	George H. Ryan, Sr. vs. USA		

DOCKET ENTRY TEXT

Agreed motion for extension of time to reply to Government's response to Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 [20] granted to and including 11/4/2010. Oral argument set for 11/1/2010 is stricken and reset to 11/22/2010 at 10:00 AM.

Notices mailed by Judicial staff.

	Courtroom Deputy Initials:	ETV

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Respondent, v. GEORGE H. RYAN, SR., No. 16627-424, Movant.	)	Case No. 10 CV 5512 Judge Rebecca R. Pallmeyer

MOVANT'S MOTION FOR LEAVE TO FILE, *INSTANTER*,
A BRIEF IN EXCESS OF FIFTEEN PAGES

Movant, George H. Ryan, Sr. ("Ryan"), by his attorneys and pursuant to Local Rule 7.1, respectfully requests this Court's leave to file, *instanter*, a brief in excess of fifteen pages. In support of this motion, Ryan states as follows:

1. Attached as Exhibit A is Ryan's Reply in Support of his Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. This reply is 37 pages long.

2. The Government's response to Ryan's Motion was 44 pages long.

3. In order to adequately address the range of issues presented in the Government's response, a brief of more than fifteen pages is necessary.

4. The Government does not object to this Motion.

WHEREFORE, Ryan respectfully requests that this Court, pursuant to Local Rule 7.1, grant him leave to file, *instanter*, the 37-page Reply in Support of his Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 attached hereto as Exhibit A.

DATED: November 4, 2010

Respectfully submitted,

/s/ Albert W. Alschuler
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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Movant George H. Ryan, Sr., hereby certifies that on November 4, 2010, he caused the foregoing Motion for Leave to File, *Instanter*, a Brief in Excess of Fifteen Pages to be electronically filed with the Clerk of the Court for the Northern District of Illinois using the ECF System, which will send notification to counsel of record.

DATED: November 4, 2010

Respectfully submitted,

/s/ Albert W. Alschuler
Attorney for Movant

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Exhibit

A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Respondent, v. GEORGE H. RYAN, SR., No. 16627-424, Movant.	)	Case No. 10 CV 5512 Judge Rebecca R. Pallmeyer

MOVANT'S REPLY IN SUPPORT OF HIS MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

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INTRODUCTION

The Government acknowledged repeatedly during its closing argument that it had not proven *quid pro quo* bribes or kickbacks. R. 22956-58, 22973, 23764.[1] It now argues that *Skilling v. United States*, 130 S. Ct. 2896 (2010), changed little and (astonishingly) that an "undisclosed flow of benefits" remains a federal crime. Resp. 2, 16, 23, 24, 25, 27-28, 30. Its response to Ryan's Section 2255 motion is designed to convey an impression of favors flowing to and from George Ryan ("Ryan"), his relatives, friends, and associates and to imply an atmosphere of corruption. After *Skilling*, however, it is no longer sufficient to throw all of the evidence into one cauldron and churn. The critical issue is whether Ryan took bribes or kickbacks, and the bribes or kickbacks must be identified.

Part I of this Reply reviews the defects of the jury instructions, examines the appropriate standard for judging harmlessness, and argues that the Government has conflated questions of harmless error and evidentiary sufficiency. Part II maintains that the evidence was insufficient to establish bribes and kickbacks and that, even if the evidence was sufficient, it did not render the instructional errors harmless. Part III argues that the Government's money/property fraud theory was never presented to the jury, lacks evidentiary basis, and in any event does not render the instructional errors harmless. Part IV argues that the prejudicial evidence heard by the jury would not have been admissible in a post-*Skilling* trial.

[1] The trial transcript is cited as R. __. Ryan's memorandum of law in support of his motion is cited as Mem. __. The Government's Response is cited as Resp. __.

I. THE JURY INSTRUCTIONS WERE ERRONEOUS, AND THE ERROR WAS NOT HARMLESS.

A. The Instructions Were Erroneous.

1. Two errors not contested by the Government: the "*Bloom* instruction" and the "campaign contribution" instruction

Ryan challenged the "*Bloom* instruction"—an instruction that recited the now-invalid standard of honest services fraud approved by *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998). Mem. 21-22. The Court told the jury, "Where a public official misuses his official position or nonpublic information he obtained in it for private gain for himself or another, then that official . . . has defrauded the public of his honest services if the other elements of the mail fraud offense have been met." R. 23911. A similar instruction led the Supreme Court to reverse an honest services conviction in a companion case to *Skilling*, *Black v. United States*, 130 S. Ct. 2963, 2968 (2010). Ryan maintained, "*Black* is on point." Mem. 22. The Government's response never discusses this instruction or cites *Black*.[2]

Ryan also maintained that the Court erred in its "campaign contribution" instruction, which told the jury, "When a person gives and a public official receives a campaign contribution, knowing that it is given in exchange for a specific official act, that conduct violates the mail fraud statute if the other elements of the mail fraud offense are met. The intent of each party can be implied from their words and ongoing conduct." R. 23908; *see* Mem. 23. The Supreme Court has held that a jury may not treat a campaign contribution as a bribe (and hence as honest services fraud) simply because the jury has implied an exchange from words and ongoing conduct. The jury must find an "explicit" *quid pro quo*. *McCormick v. United States*, 500 U.S. 257, 273 (1991). The Government does not cite *McCormick* and does not mention the challenged

[2] The response mentions the "*Bloom* instruction" only to suggest that its references to "private gain" and "the other elements of mail fraud" save another challenged instruction. Resp. 21-22; *see* Part I(A)(3) *infra*.

instruction except to say, "There was a fourth instruction that addressed bribery in the context of campaign contributions, but it is not relevant to this discussion." Resp. 19 n.11.

Although the instruction might not have been relevant to the Government's discussion, the error in the "campaign contribution" instruction is relevant to this case. The Government threw into its cauldron the benefits Ryan gave campaign contributors (particularly low-digit license plates), arguing that they established part of the "flow of benefits" that it contends the jury must have regarded as bribery. *See, e.g.*, R. 22849, 22971-75. Moreover, the jury's convictions on Counts 2, 3, 5, 7, and 8 of the indictment (that is, all but one of the mail fraud convictions that remain) can stand only if the jury must have concluded that Lawrence Warner ("Warner") bribed Ryan. Warner in fact provided only one significant financial benefit to Ryan. He hosted two political fundraisers. Mem. 19. Although the Government noted benefits that Warner provided to Ryan's family and associates as well, it relied in substantial part on these fundraisers. R. 22959-60. The Court's invitation to convict on the basis of these fundraisers even in the absence of an explicit *quid pro quo* was both erroneous and prejudicial. *See* Parts I(A)(4) & II(A)(3)(b) *infra*.

2. The "undisclosed conflicts" instruction

The Court charged the jury:

> A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest, also known as a conflict of interest, in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services, if the other elements of the mail fraud offense are met.

R. 23905.

When the Government argued that this instruction was "consistent with *Skilling*," Resp. 18, it must have forgotten its description of *Skilling* three pages earlier: "[T]he [Supreme] Court declined to extend the reach of the honest services statute to schemes involving 'undisclosed self-

dealing' in the absence of a bribe or kickback, that is, to the mere 'taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.'" Resp. 15 (quoting *Skilling*, 130 S. Ct. at 2932).

The challenged instruction in fact swept more broadly than the standard the Government proposed and the Court emphatically rejected in *Skilling*. The standard proposed in *Skilling* would have criminalized only a failure to disclose a financial interest, but the challenged instruction in this case invited the jury to convict for failing to disclose a personal *or* a financial interest.

The Government maintains that "on the facts of this case" this instruction was permissible because the only interest Ryan had in any matter over which he had decision-making power was his interest in bribes and kickbacks. Resp. 18. The jury, however, would not have guessed that this instruction required it to determine whether Ryan had taken bribes or kickbacks. It might instead have concluded that Ryan failed to disclose a personal interest when he awarded a contract to a friend without revealing that this person was a friend or, perhaps, when he awarded a contract to a friend without revealing that this friend had given him favors.

3. The "state law" instructions

The Court told the jury, "I instruct you that the following state laws were among the laws applicable to state officials . . . ." After reciting several provisions of Illinois law, R. 23908-11, it declared:

> Again, not every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation. Where a public official or employee misuses his official position or material nonpublic information he obtained in it for private gain for himself or another, then that official or employee has defrauded the public of his honest services if the other elements of the mail fraud offense have been met.

R. 23911.

Noting Ryan's statement that, after *Skilling*, state law cannot form the basis for an honest services conviction, the Government writes, "*Skilling* did not so hold." Resp. 21. But *Skilling* did so hold. It limited honest services fraud to bribes and kickbacks, emphasized that courts must give these terms the same meaning they have in federal bribery and kickback statutes, and declared, "[O]ur construction of § 1345 'establish[es] a uniform national standard.'" 130 S. Ct. at 2933 (quoting Brief for Albert W. Alschuler as *Amicus Curiae* in *Weyhrauch v. United States*, O. T. 2009, No. 08-1196, at 28-29.) [3]

The Government argues that the state law "instructions emphatically did not permit the jury to convict based on something other than a bribe or kickback scheme." Resp. 22. A glance at the state laws recited by the Court makes the error of this argument apparent. Most of these laws have nothing to do with bribes or kickbacks. The Court noted an Illinois Constitutional provision "that public funds, property, or credit shall be used only for public purposes," a statutory prohibition against acting "in excess of [] lawful authority," a prohibition against soliciting or knowingly accepting "for the performance of any act a fee or reward which [an official] knows is not authorized by law," a statute requiring an official to file an annual statement of his economic interests, another statute prohibiting the acceptance of gifts from lobbyists and other "prohibited sources," and a statute forbidding the use of public funds in political campaigns. R. 23908-11.

[3] The significance of state law in assessing honest services fraud was the principal issue briefed and argued in *Weyhrauch*, and the principal argument of the quoted *amicus* brief was that state law was irrelevant. *Skilling*'s approval of a uniform national standard adopted this brief's position and made it unnecessary for the Supreme Court to say more. It remanded *Weyhrauch* for further consideration in light of *Skilling*. *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010).

Both the "undisclosed conflicts" instruction and the "state law" instructions end with the words "if the other elements of the mail fraud offense are met." The Government contends that these words save the instructions. Resp. 18-19, 22. As it notes, the instructions did not invite jurors to convict simply because they found undisclosed conflicts or state law violations. The instructions, however, did advise the jurors that an undisclosed conflict of interest or state law violation would establish the central element of pre-*Skilling* honest services fraud—breach of fiduciary duty. If the jurors then found the other elements of mail fraud—mailing, R. 23912-13, a material false representation, R. 23904, an intent to defraud, R. 2304-05, and gain "no matter who receives the benefits," R. 23911—the defendant's guilt would be established.

The Government reads the words "if the other elements of the mail fraud offense are met" to refer, not to the Court's instructions concerning the general elements of mail fraud (elements a jury must find in every mail fraud case) but to an instruction the Court gave on the unlawful receipt of financial benefits. This instruction invited conviction when an official had accepted a benefit with the understanding that he would perform official acts in return. Viewed in context, this instruction simply informed the jury of another way in which the Government could establish the core element of pre-*Skilling* honest services fraud—breach of fiduciary duty.

The Government interprets the instructions as though the Court had said:

> Members of the jury, a person commits honest services fraud if he takes a bribe. He also commits honest services fraud if he fails to disclose a conflict of interest *and takes a bribe*. In addition, this person commits honest services fraud if he violates the Illinois law against using state funds in a political campaign *and takes a bribe*. Moreover, an official commits honest services fraud if he accepts a prohibited gift from a lobbyist *and takes a bribe*. And furthermore, he commits honest services fraud if he acts in excess of his lawful authority *and takes a bribe*.

An instruction with this message could have ended after "a person commits honest services fraud if he takes a bribe" without changing its meaning. The Government interprets all

of the Court's references to undisclosed conflicts of interest and to state law as senseless surplusage. That is not how the jury would have understood them.

4. The "financial benefits" instructions

The bribery instruction emphasized by the Government—the one it mistakenly interprets as qualifying all the other instructions—reads as follows:

> 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.

R. 23905-06.

As noted above, this instruction treats the duty not to accept bribes and kickbacks merely as one of the duties of a public official whose violation can lead to an honest services conviction. Under *Skilling*, a scheme to obtain a bribe or kickback is not one of several paths to conviction; it is the only path. *See* Mem. 21, 22-23.[4]

Moreover, this instruction was embedded in other "financial benefits" instructions that, taken as a whole, did not adequately convey the *quid pro quo* requirement. Although this instruction speaks of an "understanding that the public official would perform or not perform acts

[4] Ryan observed that this "instruction turned the issue on the understanding of one person—the public official—rather than on whether two parties had agreed to an exchange." Mem. 23. The Government properly responds that a scheme to defraud does not require the criminal participation of two people. An actor could, for example, scheme to give a bribe or take a bribe from an undercover agent. Resp. 20.

The schemer, however, must still *intend* an exchange. To illustrate: The governor of a state might think to himself, "If Joe, the waiter in the governor's mansion, refills my coffee cup quickly, I'll recommend him for a promotion." The governor might then accept a benefit (a fresh cup of coffee) with the subjective understanding that he would perform an official act in return (recommending a state employee for a promotion). A cup of coffee delivered by a waiter unaware of the governor's intention, however, would not be a bribe, and in the absence of a contemplated exchange, the governor would not have schemed to obtain a bribe either. Accepting a benefit with a subjective understanding that the beneficiary will reward the benefactor is not enough; there must be a contemplated exchange.

in his official capacity in return," another declared that giving a benefit with the intent "to ensure favorable action when necessary" was enough. R. 23906. A third advised that providing a benefit "with intent to influence or reward [a] public official's exercise of office" was sufficient. R. 23906.

The last in this series of instructions omitted any requirement of an exchange (actual or contemplated) and encompassed gratuities (benefits given to *reward* an official's exercise of office) as well as bribes. The Supreme Court has insisted upon the distinction between bribes and gratuities, noting that giving or receiving a bribe is a much more serious crime. *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999). When the *Skilling* opinion spoke of bribes, it did not mean gratuities; the Supreme Court knows the difference.

Moreover, many campaign contributions and many entertainment expenditures of lobbyists are "intended to influence" an official's exercise of office. The Court's "financial benefits" instructions would criminalize these contributions and expenditures. As the Supreme Court recently observed,

> "Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, . . . to make a contribution to one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors."

Citizens United v. FEC, 130 S. Ct. 876, 910 (2010) (quoting this entire passage from *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (separate opinion of Kennedy, J.)). *See United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) ("It would be naive to suppose that contributors do not expect some benefit—support for favorable legislation, for example—for their contributions.").

When the Supreme Court held that a campaign contribution could not be a bribe in the absence of an "explicit" *quid pro quo*, it declared, "To hold otherwise would open to prosecution

not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures." *McCormick*, 500 U.S. at 272. In this case, however, not only did the Court declare it a crime to provide a benefit "with intent to influence or reward [a] public official's exercise of office" (thereby encompassing ordinary campaign contributions and entertainment expenditures); it also advised the jury that, even in the context of campaign contributions, no explicit *quid pro quo* was required. R. 23907-08; *see* Part I(A)(1) *supra*.[5]

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[5] The Government does not suggest that Ryan waived or forfeited his objections to the "*Bloom* instruction," the "campaign contributions" instruction, the "undisclosed conflicts" instruction, or the "state law" instructions discussed above. It notes, however, that Ryan did not object to one of the challenged "financial benefits" instructions and affirmatively requested two others. Resp. 19 n.12.

Although the Government now maintains that the Court's instructions fully advised the jury of the *quid pro quo* requirement, it strongly resisted instructions that would have set forth this requirement explicitly. Prior to trial, Ryan proposed that the Court use the words *quid pro quo* and that it require an "explicit" *quid pro quo* when charges were predicated on the receipt of campaign contributions. *See* Ryan's Resp. to United States' Mot. for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations at 7-15, Case 1:02-cr-00506, Dkt. 323, 9/15/05. The Latin words were anathema to the Government then, however, and the Court ruled that proof of a specific *quid pro quo* was not required. *United States v. Warner*, 2005 WL 2367769, at *4-5 (N.D. Ill. Sept. 23, 2005).

Ryan then sought instructions that would come within hailing distance of the standard he favored while respecting the Court's ruling. His requests for some instructions and his failure to object to others did not waive or forfeit his earlier objection to the omission of a stronger *quid pro quo* instruction. *See* 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2553 at 63 (3d. Ed.) ("[T]he failure to object to an instruction may be disregarded if the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing.") (citing dozens of cases); *United States v. Salamone*, 800 F.2d 1216, 1223 (3d Cir. 1986) (declaring that a "reasonably justified" failure to renew an earlier objection does not extinguish a claim).

Moreover, Ryan could not have presented at trial the objection he now offers to the "financial benefits" instructions. His pretrial objection was that the Seventh Circuit's standard of honest services fraud (breach of fiduciary duty for personal gain) required a *quid pro quo* instruction. He now objects that the Court's instructions did not convey the *Skilling* standard to the jury. *Skilling* limited honest services fraud to schemes to obtain bribes and kickbacks, and the instructions in this case did not adequately advise the jury of the *quid pro quo* element of bribery. Instructions that might not have been required by the Seventh Circuit's pre-*Skilling* decisions are required now.

Ryan's failure to object to one instruction should not be treated as a waiver or forfeiture of an objection that was unavailable to him. Moreover, even a forfeited instruction should be reviewed for plain error. *See* Fed. R. Crim. P. 52(b). A knowing and voluntary waiver can preclude plain error review, *see United States v. Babul*, 476 F.3d 498, 500 (7th Cir. 2007), but Ryan could not have made a knowing and voluntary waiver before *Skilling* of an objection that *Skilling* created.

The jury instructions in this case are deeply flawed. They were shaped by a view of honest services fraud that the Supreme Court has now repudiated in its entirety.

B. This Court Should Apply the "Harmless Beyond a Reasonable Doubt" Standard Articulated in *Lanier v. United States*.

In *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000), a proceeding under 28 U.S.C. Section 2255, the movant argued for the following harmless error standard: "[I]t must be apparent beyond a reasonable doubt that the error did not contribute to the verdict at all." *Id*. at 838-39. The Government proposed a slightly different standard. "In harmless error analysis, the basic question is, 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" Supp. Br. for the United States at 2, *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000) (No. 98-2689) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). The Seventh Circuit addressed the issue and, declaring the movant's standard "onerous," endorsed the Government's position. 220 F.3d at 839.

The Government now asks this Court to disregard *Lanier*. It notes that several Courts of Appeals other than the Seventh Circuit have approved the standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993)—whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id*. at 631 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Adverting obliquely to its failure to ask the Seventh Circuit to endorse the *Brecht* standard in *Lanier*, the Government writes, "*Lanier* applied the heightened standard without analysis . . . and the issue does not appear to have been raised by the parties. Accordingly, *Lanier* is not controlling. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952)." Resp. 13-14 n.7.

This Court should adhere to *Lanier* for two reasons. First, contrary to the Government's suggestion, *L.A. Tucker Truck Lines* does not authorize the Court to ignore a Seventh Circuit

standard simply because the parties failed to ask it to consider another standard. In *L.A. Tucker*, a litigant maintained that the Supreme Court could not have decided an earlier case as it did unless it had implicitly endorsed a certain legal proposition. The Court said that it would not regard as "binding precedent" a proposition "not . . . raised in briefs or argument nor discussed in the opinion of the Court." *L.A. Tucker*, 344 U.S. at 38. The Supreme Court spoke of its refusal to be "bound" by a proposition allegedly "implicit" in one of its own decisions. It did not suggest that a subordinate court could appropriately disregard a legal standard articulated by a superior court on the ground that the superior court had failed to address a plausible alternative. The Supreme Court has in fact been emphatic about the obligations of lower courts. It said in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *See also Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Second, *Brecht* is inapposite. *Brecht* established the standard for judging harmless error in habeas corpus proceedings brought by *state* prisoners, and the Supreme Court grounded its ruling on federalism concerns inapplicable to post-conviction proceedings brought by federal prisoners. *See Brecht*, 507 U.S. at 635; Mem. 26. Even if this Court were free to disregard *Lanier* and to extend *Brecht* to Section 2255 proceedings, it should not do so.[6]

[6] The Supreme Court itself no longer seems enthusiastic about *Brecht*. In *O'Neal v. McAninch*, 513 U.S. 432 (1995), it contracted this precedent and emphasized that a habeas corpus petitioner bears no burden of establishing prejudice.

Because the harmless error standard is contested and the issue might reach the Seventh Circuit, this Court, once it has reached its decision, might usefully indicate whether the determination of which harmless error standard to apply made a difference.

C. The Government Fails to Distinguish Questions of Evidentiary Sufficiency from Questions of Harmless Error.

Ryan maintains that the evidence presented at trial was insufficient to support his mail fraud and racketeering convictions. He argues in the alternative that the jury instructions were flawed and that the instructional errors were not harmless. The Government's response fails to distinguish between these arguments and assumes erroneously that the principles governing their evaluation are the same.

The Government declares, "In considering a motion under § 2255, the Court must 'review evidence and draw all reasonable inferences from it in a light most favorable to the government.'" Resp. 13 (quoting *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir. 1992)). This statement is half right. It is accurate when the issue is the sufficiency of the evidence, but not when it is whether an instructional error was harmless.

When the Government contends that the evidence was so overwhelming that any reasonable juror would have convicted, it must assume that the jury resolved issues of credibility and drew reasonable inferences in favor of the defendant. It cannot be said that every reasonable juror would have accepted all of the Government's evidence and would have drawn every reasonable inference in its favor.

The Seventh Circuit recognized the difference between issues of evidentiary sufficiency and issues of harmless error in *United States v. Walls*, 225 F.3d 858 (7th Cir. 2000), where it said, "If the question before us were one of sufficiency of the evidence, there is no doubt whatsoever that the evidence sufficed . . . . That said, we cannot hold that the evidence of . . . knowledge and intent was so overwhelming that no rational jury would find otherwise." *Id.* at 867. *See also United States v. Cappas*, 29 F.3d 1187, 1194 n.4 (7th Cir. 1994) (an inquiry into harmlessness is "almost the polar opposite of a sufficiency of the evidence review," and any suggestion that the

evidence should be viewed in the light most favorable to the Government would "flatly contradict" the required inquiry into whether a conviction "*might* rest on an invalid ground") (emphasis in the original); *United States v. Holmes*, 93 F.3d 289, 294 (7th Cir. 1996) ("[T]he record makes clear that there is sufficient evidence of guilt to support a verdict of guilty, but we cannot be sure whether the jury relied upon that evidence . . . ."); *United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994) (error cannot be found harmless when prosecution and defense witnesses both "gave a plausible account" neither of which "was *inherently* unlikely to be true . . . and given the further fact that we are precluded from making credibility determinations") (emphasis in the original).[7]

For example, the parties to this case presented conflicting evidence on whether the State of Illinois paid more than market value for any of the leases that Ryan approved. The Government's experts testified that it did, *see, e.g.*, R. 11019, 11034, 11046, 21689, and Ryan's experts testified that it did not. *See, e.g.*, R. 19926, 20039, 20075. An assumption that the jury credited the Government's experts is appropriate when the Court evaluates the sufficiency of the evidence but not when it evaluates harmlessness. The Government cannot properly argue that, because the state paid too much, the jury must have found money/property fraud—not when the jury, which was invited to convict on an entirely different theory, did not find that the state paid too much.

[7] The Government's position is plainly incompatible with *Lanier*'s harmless beyond a reasonable doubt standard. *See Al-Qaadir v. Gallegos*, 56 F.3d 70 (Table), 1995 WL 330628, at *3 n.5 (9th Cir. 1995) ("It is impossible to determine whether an error was harmless beyond a reasonable doubt by construing evidence in the light most favorable to the government. . . . The two standards are mutually exclusive."). Courts also refuse to construe the evidence in the light most favorable to the government when the standard is the one favored by the government—whether the court is in doubt about whether the error had a substantial and injurious effect on the verdict—and indeed when the standard is the more demanding one applied to claims of ineffective assistance of counsel by *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Watson*, 171 F.3d 695, 700 (D.C. Cir. 1999) (a court must ask "not whether evidence was sufficient to convict notwithstanding the error, but rather whether the court can say that the error did not affect the jury's verdict"); *Pirtle v. Morgan*, 313 F.3d 1160, 1174 (9th Cir. 2002) (applying the *Strickland* standard).

The Government's mistaken assumption that the jury must have credited all of its evidence and must have drawn every reasonable inference in its favor pervades its argument on harmless error and renders this argument useless to the Court.[8]

II. THE EVIDENCE OF BRIBERY WAS INSUFFICIENT TO ESTABLISH HONEST SERVICES FRAUD AND IN ANY EVENT DID NOT RENDER THE INSTRUCTIONAL ERROR HARMLESS.

A. The Evidence Was Insufficient.

1. The Government failed to prove a *quid pro quo*.

Ryan and the Government do not differ about how to define bribery. Although the Government declares, "Ryan attempts to define bribes and kickbacks so narrowly that little more than an express agreement to trade a particular sum of cash for a particular action would ever qualify," Resp. 23, Ryan has disclaimed this position. He has not suggested that bribes must be paid in cash, and he has agreed that a "'particular, specified act need not be identified at the time of payment . . . so long as the payor and payee agreed on a specific *type* of action to be taken in the future.'" Mem. 10 (quoting *United States v. Whitfield*, 590 F.3d 325, 350 (5th Cir. 2009) (emphasis in the original). He has recognized that "'[t]he key to whether a gift constitutes a bribe is whether the parties intended for the benefit to be made in exchange for some official action; the government need not prove that each gift was provided with the intent to prompt a specific

[8] The Government's confusion is particularly evident in this passage of its harmless error argument:

> Ryan argues he did not take bribes and kickbacks because, he claims, he and his benefactors never agreed that the benefits were in exchange for state business. The jury heard ample evidence permitting it to reject this claim. Viewing the evidence in a light most favorable to the government, as is required, the evidence clearly showed that Ryan's relationship with Warner, Klein, and Swanson was a classic arrangement of "I'll scratch your back if you scratch mine . . . ."

Resp. 27-28. When the issue is harmlessness rather than the sufficiency of the evidence, it is not enough that the jury heard evidence "permitting" it to reject the defendant's claim. The evidence must be susceptible to only the Government's interpretation.

official action.'" *Id*. (quoting *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007)).[9] Ryan has also agreed that the *quid pro quo* of a bribery transaction must be express only when the bribe consists of a campaign contribution. "[F]act finders examining other sorts of benefits may infer the necessary agreement from an official's words and actions." *Id.* (citing *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) and *United States v. Garcia*, 992 F.2d 409 (2d Cir. 1993)). Ryan readily accepts these descriptions by the Government of the *quid pro quo* element of bribery: "[B]ribery . . . requires an exchange of benefits for official action." Resp. 17. The alleged bribe giver "must get the promise of an official act or acts" in return. *Id*. at 16.

After acknowledging these definitions, the Government disregards them. As the Supreme Court has noted, the existence or non-existence of a *quid pro quo* must be evaluated at the time a public official receives the benefit alleged to be a bribe. It is not enough for the official to accept a benefit without a commitment or understanding and later to approve an official action that benefits the provider. "[T]he offense is complete at the time when the public official receives a payment in return for his agreement to perform specific official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992). *See McCormick v. United States*, 500 U.S. 257, 283 (1991) (Stevens, J., dissenting) ("When the petitioner took the money, he was either guilty or not guilty."); *Sun-Diamond Growers*, 526 U.S. at 404 ("[F]or bribery there must be a quid pro quo—a specific intent to give or receive something of value *in exchange for* an official act.") (emphasis in the original); *Ganim*, 510 F.3d at 147 ("[R]equiring a jury to find a quid pro quo, as the governing

[9] The Seventh Circuit has offered a similar definition: "[T]he public official [must have] understood that as a result of the payment he was expected to exercise particular kinds of influence on behalf of the payor." *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001).

law does, ensures that a particular payment is made in exchange for a *commitment* to perform official acts to benefit the payor in the future.") (emphasis in the original).[10]

Reviewing the period from when Ryan was elected Secretary of State until he left the Governor's office twelve years later, the Government's response throws into the cauldron every favor it has found that anyone who later obtained a benefit gave George Ryan, his brother, or any of his children. It also stirs in every favor that one Ryan associate gave another on the theory that a favor to any friend of George Ryan was a favor to Ryan himself, at least when Ryan knew about and approved of the favor. As the Government churns, however, it *never* addresses the critical question: What commitment or promise, explicit or implicit, did Ryan make to any benefactor at the time the benefit was given?

The Government in fact begins its "flow of benefits" tale prior to the twelve-year period covered by its indictment. It notes that "in the mid-1980s" Donald Udstuen gave a job to one of Ryan's daughters. Resp. 4 n.3, 8. What commitment or promise by Ryan could a reasonable juror have found at the time his daughter obtained this job? Did he promise to run for Secretary of State five or six years later and, if successful, to approve Warner's sharing of lobbying fees with Udstuen? Because no evidence indicated that this or any other *quo* accompanied the *quid*, no reasonable juror could have found that the benefit given to Ryan's daughter was a bribe. Moreover, if the sharing of lobbying fees with Udstuen was a benefit to Ryan, what did Ryan promise in return? What explicit or implicit commitment did Ryan make when Ron Swanson gave Ryan and his wife a figurine on their fortieth anniversary or when Warner lent money to a business partly owned by Ryan's brother? Posing this central, critical question about each of the

[10] Apart from a citation to Justice Kennedy's concurring opinion in *Evans*, Resp. 16, the Government's response cites none of the three leading Supreme Court decisions on the requisites of bribery—*McCormick*, *Evans*, and *Sun-Diamond Growers*. It relies entirely on lower court decisions, including such dubious pre-*Skilling* outliers as *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), and *United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998). *See* Part II(A)(2) *infra*.

benefits given Ryan, his family, and his associates makes clear that no *quo* accompanied any *quid*, or at least that the Government offered no proof of any during a five-and-one-half month trial.

When Ryan decided what property to lease for the Secretary of State's office, what contracts to enter, or whom to recommend for a governmental position, he might have been motivated in part by his gratitude for the figurine, the loan to his brother's business, or the job given his daughter. After *Skilling*, however, that is not a crime. A general sense of reciprocity is not a *quid pro quo*. As the Seventh Circuit noted in *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993), "Vague expectations of some future benefit should not be sufficient to make a payment a bribe." *See also United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976) (declaring that a gift given with a "generalized hope of ultimate benefit on the part of the donor" is not a bribe); *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980) (same).

2. The Government's view of bribery lacks precedential support.

The Government declares that several courts, including the Seventh Circuit, "call[] conduct like Ryan's bribery." Resp. 28. It cites *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999); *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984); *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998); *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996); and *United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998).

Martin, however, disclaims the Government's theory. "The present case . . . is not one in which a government employee, having received lobbyists' hospitality, gifts, or (if an elected official) campaign contributions, afterward favors or fails to oppose his benefactor." 195 F.3d at 966.

In *Gorny*, five lawyers and tax consultants who practiced before the Cook County Board of (Tax) Appeals independently gave large sums of cash to a board commissioner. Although one

$4,000 payment was disguised as a referral fee, the commissioner provided no referral. Another $500 payment was passed to the commissioner in a white envelope under the table at a restaurant. 732 F.2d at 600. Everyone—the payers and the payee—certainly knew what these payments were for, and the payee provided it by ruling in favor of the payers' clients at an extraordinary rate. The inference of *quid pro quo* bribery was inescapable. *Gorny* differed from earlier cases only because the commissioner "did not receive payments based on the outcome of any specific case." *Id*. at 599. The Seventh Circuit's decision illustrates the appropriateness of the Fifth Circuit's declaration that "'a particular, specified act need not be identified at the time of payment . . . so long as the payor and payee agreed on a specific *type* of action to be taken in the future.'" *Whitfield*, 590 F.3d at 350 (emphasis in the original). It also illustrates the Government's penchant for citing every case endorsing this proposition as though it stood for the entirely different proposition that *no* commitment, promise, or understanding is needed at the time a benefit is received.

Like *Gorny*, *Jennings* was a cinema-worthy case of cash bribery. A building contractor delivered cash to an official empowered to approve no-bid contracts and was regularly awarded new contracts in return. No envelope appeared under the table this time; rather, there was a paper bag containing at least $2,500 in cash. *Jennings*, 160 F.3d at 1011. The Fourth Circuit offered this formulation, one often repeated by other courts: "Bribery requires the intent to exchange money (or gifts) for specific action (or inaction), but each payment need not be correlated with a specific official act. . . . [T]he intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that.'" *Id*. at 1014. The Government's citation of *Martin*, *Gorny*, and *Jennings* as support for its view of bribery reveals how little support there is.

The Government's citation of the First Circuit's pre-*Skilling* decisions in *Sawyer* and *Woodward*, however, is more plausible. The defendant in the first case, Sawyer, was a lobbyist, and the defendant in the second, Woodward, a legislator. The Government showed that Sawyer had entertained Woodward lavishly, that Woodward failed to report meals and golf outings that Sawyer provided, and that Woodward strongly supported most of Sawyer's legislative agenda. The First Circuit observed that honest services fraud had typically been found in two circumstances—(1) bribery and (2) failure to disclose a conflict of interest, resulting in personal gain. It then "expanded category (1) from quid pro quo bribery, to include a more generalized pattern of gratuities to coax 'ongoing favorable official action.'" *Woodward*, 149 F.3d at 55 (quoting *Sawyer*, 85 F.3d at 730).

Here is more of *Woodward*'s description of *Sawyer*:

> Noting that prior cases usually involved "quid pro quo bribery or blatant conflict of interest," . . . we distinguished Sawyer's gratuities to Woodward (and other legislators) as involving conduct which "itself may not be very different, except in degree, from routine cultivation of friendship in a lobbying context," which does not violate federal law. We noted that "the practice of using hospitality, including lavish hospitality, to cultivate business or political relationships is longstanding and pervasive." Because the "difference between lawful and unlawful turns primarily on intent," we held that the court must instruct the jury that a lobbyist does not commit honest services fraud . . . if his "intent was limited to the cultivation of business or political friendship." He commits those violations "only if instead or in addition, there is an intent to cause the recipient to alter her official acts."

Woodward, 149 F.3d at 55 (omitting several "*id*." citations to *Sawyer*, 85 F.3d at 730).

Sawyer and *Woodward*, which treated the "honest services" statute as an invitation to dispense with the *quid pro quo* requirement altogether and to collapse the distinction between bribes and gratuities, cannot survive *Skilling*. *Skilling* cited as models three Court of Appeals decisions that applied the *quid pro quo* standard to honest services bribery. *See* 130 S. Ct. at 2934.

Moreover, *Sawyer* and *Woodward* illustrate why the Supreme Court needed to rein in the sprawling law of honest services fraud. The instructions mandated by these decisions, which declare it lawful for lobbyists to entertain legislators in order to cultivate "business or political friendship" but felonious for them to do so "to cause the recipient to alter her official acts," are incomprehensible. People who hire lobbyists do not pay their salaries and reimburse their expenses simply because they hope that decision makers will appreciate the lobbyists as friends. They hope to generate support for their programs—in other words, to cause decision makers to alter their official acts. The Court's acknowledgment that the benefits it makes felonious "may not be very different, except in degree, from routine cultivation of friendship in a lobbying context" is an acknowledgment that its standard is a "smells" test inviting prosecutors (some of whom may be ambitious and/or responsive to politically motivated superiors) and jurors (some of whom may be prepared to assume the worst of all public officials before they come to court[11]) to invent the law as they go along.

In short, adhering to *Sawyer* and *Woodward* would plunge the law of honest services fraud back into the vagueness morass from which the Supreme Court sought to rescue it. So would endorsing the amorphous "stream of benefits" theory of bribery propounded by the Government in this case. Legislatures should prohibit inappropriate conduct by lobbyists, but a "smells test" interpretation of a federal criminal statute carrying a twenty-year penalty is no way to do it.[12]

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[11] *See Americans Still Trust Own Judgment More than Politicians'*, Gallup, Nov. 2, 2010, http://www.gallup.com/poll/143675/Americans-Trust-Own-Judgment-Politicians.aspx.

[12] The Government relied primarily on *Sawyer* and *Woodward* when it argued before trial that it would be "clearly *improper* . . . for the defense to argue or suggest to the jury that . . . specific quid pro quo evidence is a *prerequisite* to a finding of guilt" and that "[o]ther circuits . . . have upheld public corruption prosecutions rooted in . . . the failure of a public official to disclose a financial interest or relationship affected by his official actions." Government's Mot. for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations, Case 1:00-cr-00506, Dkt. 280, 8/31/05, at 3-4, 5-7 (devoting three pages to descriptions of *Sawyer* and *Woodward* and declaring these decisions "particularly pertinent here"). The Government now invites the Court to make the same error twice.

3. The Government failed to show that benefits provided by Klein and Warner were bribes.

In the end, this Court need determine only whether the jury could have found beyond a reasonable doubt that the benefits provided by Warner and Harry Klein ("Klein") to Ryan were bribes. Although the Government alleged a wide-ranging scheme to defraud, it charged mailings only in support of specified aspects of this scheme. The only mail fraud counts that remain standing allege mailings in furtherance of one lease benefitting Klein (Count 6) and several leases and contracts benefitting Warner (Counts 2-5 & 7-8). If Klein and Warner did not procure these leases and contracts through bribes, the alleged mailings were not in furtherance of an unlawful scheme. This Court already has set aside two mail fraud verdicts because the jury found mailings in furtherance of conduct that the Government had not proven to be criminal. *United States v. Warner*, 2006 U.S. Dist. LEXIS 64085, at *38-45 (N.D. Ill. Sept. 7, 2006).

a. Klein

The Government recites only one benefit that Klein gave Ryan. Resp. 8-9, 23-24. From 1993 through 2001, Ryan was an annual guest at Klein's home in Jamaica. In 1997 (four years after the initial alleged *quid*), Ryan took part in a decision by the Secretary of State's office to lease a property that Klein owned in South Holland, and Count 6 of the indictment alleged a mailing related to this lease. Klein testified that none of his hospitality was prompted by a desire to influence Ryan's decisions as Secretary of State and indeed that the thought never crossed his

mind. R. 9552; Mem. 17-18. This evidence provided no basis for inferring that Ryan made a *quid pro quo* promise or commitment to Klein at the time he received Klein's hospitality.[13]

The Government did not charge Klein with honest services fraud or any other crime, but, as a thought experiment, consider whether it could have. Could a businessman be convicted of bribery or honest services fraud simply because a public official who had been his house guest later made an official decision benefitting him?

Perhaps the charge against Ryan prompts a different reaction than the imagined charge against Klein because much other misconduct was alleged over the course of Ryan's five-and-one-half month trial. The Government portrayed Ryan's stays in Jamaica and the South Holland lease as parts of a larger flow of benefits churning in its cauldron. Finding Ryan guilty on Count 6 on the basis of a judgment about all the charges, however, would no longer be proper. If Ryan's stays at Klein's home were bribes, Klein was as guilty of this crime as Ryan. The charge against Ryan might also prompt a different reaction because Ryan allegedly concealed Klein's hospitality. Because accepting any gift worth more than $50 violated Secretary of State regulations, however, the alleged concealment can be readily explained by a hypothesis other than bribery. Note that the alleged concealment contributed to Ryan's false statements convictions and has been punished.

b. Warner

Warner "provided only one significant financial benefit to Ryan. He sponsored two political fundraisers—one raising $75,000 and the other $175,000." Mem. 19. The Government

[13] In 1995, Ryan approved a currency exchange rate increase that benefitted Klein along with every other currency exchange owner in Illinois. Because Ryan earlier had opposed a rate increase, the Government describes his approval as a "change of heart" and suggests that it must have been prompted by a trip to Jamaica. Resp. 23. There is nothing suspicious, however, about opposing a rate increase until increasing costs in an inflationary period have justified the increase. Illinois currency exchanges had gone ten years without an increase prior to Ryan's action. R. 13511-15.

urged the jury to convict partly on the basis of these fundraisers, treating them as part of its churning stew and suggesting that there was something underhanded about them. It was "typical" of Warner to donate other people's money and to remain "behind the curtain" himself. R. 22959-60. The Court erroneously instructed the jury that it could convict for sponsoring the fundraisers even in the absence of an explicit *quid pro quo*. R. 23907-08. *See* Parts I(A)(1) & I(A)(4) *supra*. The Government has offered no response to Ryan's argument that authorizing conviction on the basis of these fundraisers was erroneous.

Ignoring the fundraisers, the Government now recites only one benefit that Warner gave Ryan himself—"waiving a $1,000 insurance adjustment fee." Resp. 36. (In other words, Warner, an insurance agent, adjusted Ryan's insurance claim without a fee after Ryan's apartment flooded. R. 15517-19.) All the other benefits in the cauldron went to people other than Ryan: Warner waived an insurance adjustment fee for a Ryan son-in-law, shared lobbying fees with Donald Udstuen and Ron Swanson, invested in two businesses owed by Ryan family members, lent money to a Ryan son-in-law, and paid for the band at the wedding of one of Ryan's daughters. Resp. 4-5, 6, 8, 25, 26, 36. The Government makes no attempt to answer the critical question: What commitment or promise did Ryan make to Warner at the time that Warner shared any lobbying fee with Udstuen or Swanson, waived any insurance fee, invested in Ryan's son's cigar business, or paid for the band at Ryan's daughter's wedding?

The Government's only hint of a *quo* comes in its discussion of the wedding gift. Noting that the wedding occurred five days after one of Warner's clients was awarded a contract, the Government writes, "The proximity between the award of the contract and Warner's payment to Ryan is evidence the two were linked, as is Warner's use of a front man to conceal that he was the one getting paid as Viisage's lobbyist." *Id*. at 26 (citations omitted). The Government does not

explain how the two events were linked, and does not explain how any concealment of this payment made Warner's wedding gift a bribe. The question, once again, is what promise or commitment Ryan gave Warner *in exchange for* the gift, *see Sun-Diamond Growers*, 526 U.S. at 404, and the answer is obviously none. "The speculation that Warner was motivated by th[e] contract rather than by affection for Jeanette and her parents was unsupported. Moreover, even if this speculation had been accurate, it would have suggested a gratuity rather than a bribe." Mem. 20.

The Government declares that "Ryan's relationship with Warner was similar to that between the defendants in [*United States v.*] *Kemp*[, 500 F.3d 257, 282 (3d Cir. 2007)]." Resp. 25. The public official convicted in *Kemp* was a city treasurer who told a banker at the time he obtained one of several personal benefits from a bank (this one a waiver of a $3,500 appraisal fee), "[Y]ou are my f-king guy. . . . So you get special treatment." *Id*. (quoting *Kemp*, 500 F.3d at 286). There was an explicit promise of special treatment in *Kemp* and a clear implicit understanding of what the special treatment would be. No comparable evidence exists in this case.

The Government's closing argument in fact acknowledged that it had not proven a *quid pro quo* bribe or kickback. The Government now offers this explanation of its concession at trial:

> Ryan's motion notes correctly that more than once, the government told the jury it did not have to find a "*quid pro quo*." . . . But, as is clear from the context of those statements, the government was simply arguing, correctly, that in order to convict Ryan, the jury did not have to find that Ryan had a conversation in which he expressly agreed to accept a specific benefit in exchange for a specific official act.

Resp. 30.

This statement is imaginative reconstruction. The Government told the jury much more than it need not find a *quid pro quo*; it recognized that no *quid pro quo* had occurred. Moreover,

the Government was not simply arguing, correctly, that a *quid pro quo* need not be explicit and may concern a type of action rather than a specific official act. The Government was arguing, incorrectly, that no *quid pro quo* was necessary and that a stream of benefits going in both directions and motivated in part by a general sense of reciprocity would suffice.

The Government's statement in its closing argument about the friendship of Ryan and Warner bears repetition:

> How did George Ryan reciprocate this longtime friendship [with Warner]? Governmental business is how he did it. $3 million worth of government business. *Was it a quid pro quo? No, it wasn't. Have we proved a quid pro quo? No, [we] haven't. Have we charged a quid pro quo? No, we haven't.* We have charged an undisclosed flow of benefits back and forth. And I am going to get to the instructions in a minute, folks, but that's what we have charged. . . . We have charged an undisclosed flow of benefits, which, under the law, is sufficient . . . .

R. 23764 (emphasis added). The Government's closing argument was correct. There was no *quid pro quo*.

The evidence supporting the mail fraud counts was insufficient, and absent any indication that the jury rested its RICO conspiracy conviction on legally sufficient predicates, the Court must set aside this conviction as well. *See, e.g., United States v. Holzer*, 840 F.2d 1343, 1352 (7th Cir. 1988); *United States v. Ruggierio*, 726 F.2d 913, 921 (2d Cir. 1984) (overruled in part on other grounds); *United States v. Marcello*, 876 F.2d 1147, 1153 (5th Cir. 1989).

B. The Evidence of Bribery Did Not Render the Errors of the Jury Instructions Harmless.

As argued above, the Government's claim that Ryan took bribes or kickbacks rests upon extraordinarily strained inferences—inferences that no reasonable jury could have drawn, especially when charged that it must find guilt beyond a reasonable doubt. The Government presented no evidence that Ryan made any return commitment or promise of any sort, implicit or explicit, at the time he received any benefit. Yet even if the jury could somehow have inferred

from the "flow of benefits" churning in the Government's cauldron that one benefit or another must have been a bribe or that all of them were, the evidence did not compel it to draw this inference. The jury might have found that the wedding present Warner gave Ryan's daughter was only a wedding present.

The Government manages to argue to the contrary only by confounding the standards for judging harmless error with the standards for judging the sufficiency of the evidence. It assumes improperly that the jury drew all reasonable inferences in its favor, speaks of what findings the evidence "permitted" the jury to make, and declares the instructional errors harmless because the jury *might* have found in its favor. That will not do. *See* Part I(C) *supra*.

The jury in this case was never asked to determine whether the evidence met the *Skilling* standard—that is, whether Ryan took bribes or kickbacks. It was instead invited to convict on the basis of conduct that, after *Skilling*, is not a crime. Even under the harmless error standard favored by the Government, there is at least doubt about whether the Court's failure to pose the right questions "had substantial and injurious effect or influence in determining the jury's verdict." *Abrahamson*, 507 U.S. at 631.[14]

[14] The Government notes that the Seventh Circuit described the evidence of Ryan's guilt as overwhelming, Resp. 12, but of course the Seventh Circuit referred to the Government's proof of pre-*Skilling* honest services fraud, a crime that did not require any showing of bribes or kickbacks.

Even under pre-*Skilling* standards of honest services fraud, the jury did not have an easy time with this case. After the jury had deliberated eight days, the Court replaced two jurors. Then, the jury deliberated ten days before reaching a verdict. *See United States v. Warner*, 498 F.3d 666, 675-77 (7th Cir. 2007). The jury might not have agreed with the Seventh Circuit that the evidence in this case was overwhelming, and this Court should recall the jury's struggles in evaluating the Government's contention that it certainly would have convicted Ryan of scheming to obtain bribes and kickbacks if only it had been asked to do so.

III. THE GOVERNMENT'S MONEY/PROPERTY ARGUMENT WAS NEVER PRESENTED TO THE JURY, IS UNSUPPORTED BY THE EVIDENCE, AND DOES NOT RENDER THE INSTRUCTIONAL ERRORS HARMLESS.

A. The Government's Money/Property Fraud Argument Was Not Presented to the Jury.

A court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury . . . ." *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *see also United States v. Peterson*, 236 F.3d 848, 856 (7th Cir. 2001) ("Fatal to the government's appeal is that this theory was not presented to the jury, and thus, cannot support its verdict."); *United States v. Medina*, 755 F.2d 1269, 1279 (7th Cir. 1985) ("We are unwilling to uphold [the] conviction on a theory that was not argued to the jury and on which it was not instructed."); *United States v. DiCaro*, 772 F.2d 1314, 1320 (7th Cir. 1985); *United States v. Mittelstaedt*, 31 F.3d 1208, 1220 (2d Cir. 1994) (refusing to affirm a "conviction based upon a theory that was never presented to the jury").[15]

The Supreme Court "has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the

[15] In *United States v. Black*, Nos. 07-4080, 08-1030, 08-1072, 08-1106, 7th Cir. Oct. 29, 2010, the Seventh Circuit applied the same principle to defendants, refusing to *reverse* a conviction when the defendants relied on a theory that had not been offered to the jury.

Black did reverse two of the defendants' three convictions for pre-*Skilling* honest services fraud, rejecting the government's argument that the evidence supporting these convictions established money/property fraud as well. The Court, however, affirmed the third conviction. The defendants maintained that, on this charge too, the jury might have convicted them only of honest services fraud. Specifically, the jury might have found that the defendants had failed to disclose a legitimate transaction to their company's board of directors. This failure, they said, would have qualified as pre-*Skilling* honest services fraud but not as money/property fraud. Although the information in *Black* had mentioned this basis for conviction, the government had offered no evidence supporting it and had not argued it to the jury. The jury clearly had found the transaction *illegitimate*, and this finding made the transaction "a plain-vanilla pecuniary fraud." Slip op. at 13-14. As *Black* affirms, defendants may not spin out hypotheses that, although technically possible and consistent with the evidence, were never considered by the jury. The Government may not do so either.

jury." *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991). For example, in *United States v. Riley*, No. 08-3361, 2010 U.S. App. LEXIS 19310 (3d Cir. Sept. 16, 2010), a post-*Skilling* decision, the Third Circuit rejected the Government's argument that erroneous instructions regarding honest services fraud were harmless because the jury had expressly found the defendants guilty of a fraudulent deprivation of money or property. The court ruled that "it would demean the judicial process to attempt to put the genie back in the bottle by essentially rewriting the charge to the jury . . . and assuming the jury made distinctions the Government did not bring out in its summation." *Id*. at *22-23. *See also United States v. Hereimi*, No. 08-30468, 2010 U.S. App. LEXIS 19846, at *1 (9th Cir. Sept. 23, 2010) (reversing a conviction because "it is apparent to us that this case was tried and argued to the jury solely on the theory of honest services fraud that was rejected in *Skilling*.").

Only two words of the 91-page indictment in this case refer to money/property fraud. The indictment alleges that Ryan participated in a scheme to defraud the people of the State of Illinois of "money, property and the intangible right of honest services." Case 1:02-cr-00506, Dkt. 110, 12/17/03, at 19. The Court's instructions are only slightly more expansive.[16]

The Government maintains that it argued money/property fraud to the jury. Resp. 39-40. As the Seventh Circuit has cautioned, however, a court must be "mindful of the dangers of

[16] The Government's response cites (at page 40) two passages of the instructions that refer to money/property fraud:

> A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the potential loss of money or property to another or to deprive the people of the state of Illinois of their intangible right of the honest services of their public officials or employees. R. 23903.
>
> To sustain each charge of mail fraud, the Government must prove the following propositions: first, that the defendant knowingly devised or participated in the scheme to defraud or to obtain money or property by means of materially false pretenses, representations, or promises as charged . . . . R. 23902.

engaging in a revisionist history of the indictment, evidence and jury instructions." *Lombardo v. United States*, 865 F.2d 155, 158 (7th Cir. 1989). The Government's claim rests on one unelaborated reference to "stealing from the state," R. 23771, one unelaborated reference to "tangible things," R. 23097, one unelaborated declaration that the state was "ripped off," R. 22914, and a few statements developing the Government's honest services argument. For example, in support of its claim that the jury heard a money/property fraud argument, the Government notes, "[T]he government's initial closing argument described the 'core of the case' as Ryan violating his *duty to provide honest services* by 'giving state benefits, like contracts and leases to his friends . . . while at the same time they were providing various undisclosed benefits to him.'" Resp. 39 (quoting R. 22836) (emphasis added).

The jury did not hear that contracts and leases were state "property" that might be stolen by deception—a legal proposition endorsed by the Seventh Circuit only after Ryan's trial was concluded. *See United States v. Leahy*, 464 F.3d 773, 788 (7th Cir. 2006). *Compare Cleveland v. United States*, 531 U.S. 12 (2000) (holding that video poker licenses issued by a state are not state property that can be stolen by deception). Moreover, the jury heard none of the arguments that the Government now advances—that Ryan defrauded the state of the ADM contract by declaring that a security decal on licenses was needed for public safety, that he stole the IBM contract by failing to disclose that Warner lent Ryan's son-in-law $5,000 and gave his family other benefits, that he stole the South Holland lease by failing to disclose that Klein hosted his vacations in Jamaica, that he stole the Bellwood and Joliet leases because Warner hid his interest in these leases, and that he stole the Viisage contract by failing to disclose a wedding gift his daughter received five days after the contract was awarded. These arguments appear for the first time in the Government's response to Ryan's motion.

The Government thus invites the Court to enter the jury box, comb the record, and itself convict Ryan of money/property fraud. As noted above, courts often have declined this sort of invitation without indicating that their rulings were constitutionally compelled. Nevertheless, as *Sullivan v. Louisiana*, 508 U.S. 275 (1993), reveals, declaring Ryan guilty on a theory not presented to the jury would violate his right to a jury trial.

Declaring an error harmless because the Court has judged a defendant guilty is no different from directing a jury to convict him, an action the Sixth Amendment plainly condemns. *See Sparf v. United States*, 156 U.S. 51, 105-06 (1895). As the Supreme Court observed in *Sullivan*, "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." 508 U.S. at 279. The Court observed that, when a court asks whether an error was harmless,

> the question . . . is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . Harmless-error review looks . . . to the basis on which "the jury *actually rested* its verdict." . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.

Id. (emphasis in original) (citations omitted).

The question posed by *Sullivan* is whether *this* jury clearly convicted Ryan of money/property fraud, and it clearly did not. *This* jury never heard the Government's money/property theories.

B. Even if the Government's Theories Had Been Presented to the Jury, the Evidence of Money/Property Fraud Would Not Render the Instructional Errors Harmless Unless Every Reasonable Juror Would Have Found Every Element of Common Law Fraud Beyond a Reasonable Doubt.

Following the Supreme Court's repudiation of the intangible rights doctrine in *McNally v. United States*, 483 U.S. 350 (1987), prosecutors "wag[ed] a rear-guard action to preserve

convictions secured under prior law." *Toulabi v. United States*, 875 F.2d 122, 123 (7th Cir. 1989). No prosecutor in the post-*McNally* era, however, appears to have advanced the argument the Government makes in this case—that a failure to disclose past favors given to an official by the recipient of a state lease or contract defrauds the state of property.

Although some decisions upheld pre-*McNally* convictions when the scheme or artifice to defraud had the inevitable result of effecting monetary or property losses to the state (Resp. 32), these decisions do not survive *Neder v. United States*, 527 U.S. 1 (1999). *Neder* narrowed the concept of money/property fraud by applying the "well established rule of construction that '"(w)here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'"" 527 U.S. at 21-22 (quoting authorities). After *Neder*, it would not be enough to show simply that a pre-*McNally* (or pre-*Skilling*) scheme of honest services fraud caused a loss of money or property. The Government would be required to show in addition that it had established all the elements of common law fraud. A court could not declare an instructional error harmless unless it concluded that no reasonable juror could have failed to find each of these elements beyond a reasonable doubt.[17]

These elements have been described as follows:

> It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that he made it with knowledge of its falsity; that the complaining party was

[17] The Government relies particularly on *Moore v. United States*, 865 F.2d 149 (7th Cir. 1989). In *Moore*, however, the "jury was never instructed that it was proper to rely solely on the invalid intangible rights theory of criminal liability." *Id.* at 154. Unlike Ryan's conduct in this case, the bid-rigging scheme in *Moore* might have been found to constitute money/property fraud after *Neder*, but the Court did not consider whether the elements of common law fraud had been established. Even under pre-*Neder* standards, *Moore* apparently was a close case. In the District Court, Judge Plunkett granted the movant's Section 2255 motion, and in the Seventh Circuit, Judge Cudahy dissented.

> ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage.

Melville M. Bigelow, *The Law of Fraud* 3 (1877); *see* Leon Green, *Deceit*, 16 Va. L. Rev. 749, 750 (1930); Mem. 16 n.11.

Neder noted that because Congress "prohibit[ed] the 'scheme to defraud,' rather than the completed crime," the Government can prove mail fraud without establishing the last two elements on the list quoted above, reliance and damage. 527 U.S. at 24-25. Presumably, however, the Government still must show a *scheme* to produce reliance and damage, for otherwise it would not show a scheme to commit common law fraud.

C. The Evidence of Money/Property Fraud Was Insufficient to Support Ryan's Conviction.

The Government failed to present sufficient evidence of money/property fraud to support Ryan's conviction on any of the mail fraud counts.

1. Count 2 (the ADM contract)

The Government's discussion of the ADM contract recites only one allegedly false representation. The Government claims that Ryan "asserted—falsely—that the security mark [that only the ADM company could affix to licenses] was necessary for public safety." Resp. 35. Ryan's statement, however, was a statement of opinion, not fact, and "in general, a statement of opinion cannot form the basis of a fraud claim." *Piper v. DPFA, Inc.*, No. 09 CV 1220, 2010 U.S. Dist. LEXIS 72820, at *20 (N.D. Ill. July 20, 2010). Moreover, the Government presented no evidence that Ryan did not believe what he said. The evidence of money/property fraud was therefore insufficient to sustain Count 2.

2. Counts 3 and 8 (the Joliet and Bellwood leases)

The Government's discussion of the Joliet and Bellwood leases mentions no misrepresentation or nondisclosure by Ryan at all. It relies entirely on Warner's failure to disclose his interest in these leases. Resp. 34. Ryan, however, bore no responsibility for Warner's nondisclosures.[18] Moreover, Warner, a private party, had no obligation to reveal his financial interests to the people of Illinois, and the Government offered no proof that his nondisclosures were material.

The Government claims that the state paid too much for the Joliet and Bellwood leases.[19] Even if the jury believed the Government's experts on this point rather than Ryan's, however, the Government offered no proof that Ryan realized that the rental for these properties was too high or that he intended to cause any financial loss to the people of Illinois.[20] *See United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) ("[T]he government . . . must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims. Only a showing of intended harm will satisfy the element of fraudulent intent.") (emphasis in original). The evidence on

[18] The Government implies that Ryan was responsible for Warner's nondisclosures because he and Warner were members of a criminal conspiracy and the nondisclosures furthered the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640 (1946). The only conspiracy in which Ryan and Warner allegedly participated, however, was a conspiracy to conduct the affairs of an enterprise through a pattern of pre-*Skilling* honest services fraud. The offenses on which this conspiracy was predicated are no longer crimes.

[19] In fact, it is far from clear what property the Government believes that Ryan stole—the leases themselves or the money the state allegedly would have saved if it had rented other property. Whatever property Ryan is alleged to have stolen went to Warner and Klein, not to Ryan himself. In *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993), a professional sports agent concealed contracts he had signed with student athletes, thereby enabling the athletes to obtain university scholarships for which NCAA rules made them ineligible. The Seventh Circuit emphasized that the universities "were not out of pocket *to Walters*; he planned to profit by taking a percentage of the players' professional incomes, not of their scholarships." *Id*. at 1224 (emphasis in the original). Declaring the universities' loss "indirect" and "incidental," the Court held that the agent had not committed money/property fraud.

[20] When experts who made full appraisals with the benefit of hindsight disagreed about the value of these properties, a reasonable juror could not have found beyond a reasonable doubt that Ryan believed that the rentals were inflated and intended to cause financial harm.

Counts 3 and 8 was insufficient because (1) Ryan bore no responsibility for Warner's failure to disclose his interests; (2) Warner had no duty to disclose these interests; (3) Warner's nondisclosures were immaterial; and (4) no reasonable juror could have found beyond a reasonable doubt that Ryan intended to cause financial harm.

3. Counts 4 and 5 (the IBM contract)

The only misrepresentations or nondisclosures mentioned in the Government's discussion of the IBM contract are Ryan's failure to report the benefits that Warner gave him and his family—benefits such as Warner's waiver of an insurance fee, his loan to Ryan's brother's business, and his investment in Ryan's son's business. Resp. 36.

The Government's allegations of money/property fraud would make no difference if they authorized only the conviction of people who had taken *quid pro quo* bribes or kickbacks; these people would be guilty of honest services fraud under *Skilling* anyway. On the assumption that the benefits provided by Warner were gifts and not bribes, could Ryan's failure to disclose them provide a basis for convicting him of money/property fraud? If so, could an official be convicted of money/property fraud if he approved a contract without revealing that a beneficiary of this contract once took his aunt to dinner? How large a gift would it take—an all-day golf outing, a figurine, or a check to cover the cost of the band at the aunt's wedding? Fraud has been a tort for hundreds of years and mail fraud a crime for 138 of those years. *See* Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. The Government, however, cites no precedent indicating that this sort of nondisclosure has ever been held fraudulent or, indeed, that anyone has ever before claimed that it was.

4. Count 6 (the South Holland lease)

The Government maintains that Ryan defrauded the state in connection with the South Holland lease by concealing the hospitality Harry Klein provided in Jamaica. Resp. 33-34.

Again, however, the award of a contract or lease to the provider of a gift should not be sufficient in itself to establish a fraudulent deprivation of property.

5. Count 7 (the Viisage contract)

The Government's discussion of the Viisage contract points to two omissions alleged to be fraudulent. Resp. 34-35. First, Warner failed to register as Viisage's lobbyist. For the reasons explained above, however, Ryan cannot be held responsible for Warner's omissions. The Government, moreover, offered no proof that knowledge of Warner's lobbying role was material.

The second allegedly fraudulent omission was Ryan's failure to report the wedding gift Warner gave his daughter five days after the Secretary of State's office awarded the Viisage contract. One cannot, however, steal property through a misrepresentation that occurs after the property has allegedly been stolen.

D. The Evidence of Money/Property Fraud Did Not Render the Instructional Errors Harmless.

Even if the evidence of money/property fraud could be found sufficient to justify conviction on one or more of the counts discussed above, it did not render the instructional errors in this case harmless. A court could not conclude that every reasonable juror would have resolved every question of intention, reliance, causation, and materiality noted above in the Government's favor.

The Government's money/property argument, like its honest services argument, depends on throwing all of the evidence into one cauldron and churning. The jury had no opportunity to consider the money/property charges that the Government now advances, and reviewing the issues presented by these imaginative charges underscores why it would be improper for the Court to assume the jury's role. In any event, the evidence of money/property fraud surely was not so overwhelming that every reasonable juror would have voted to convict.

IV. THE JURY HEARD HIGHLY PREJUDICIAL EVIDENCE RENDERED INADMISSIBLE BY *SKILLING.*

Much of the evidence heard by the jury had nothing to do with bribes or kickbacks and would not be heard in a post-*Skilling* mail fraud trial. Mem. 15-16, 28. The Government maintains, however, that "all of the evidence was admissible even without a mail fraud theory based on undisclosed conflicts of interest . . . ." Resp. 42.

The Government declares (inexplicably) that evidence of Ryan's disregard of his announced personal policy against accepting gifts worth more than $50 was admissible on the false statements charge, (inexplicably) that evidence of his discharge and reassignment of employees of the Secretary of State's Inspector General's office was admissible on the tax charges, and (correctly) that evidence of the consulting fee he received from the Phil Gramm presidential campaign was admissible on the tax charges. *Id*. If this prejudicial evidence had been held admissible only by virtue of the tax and false statements charges, however, Ryan could have sought a severance of these charges, and the Court might have granted the severance to prevent prejudice. *See* Fed. R. Crim. P. 14(a) ("If the joinder of offenses . . . appears to prejudice a defendant . . . the court may order separate trials of counts . . . .").

Although Ryan might not have been entitled to a severance as a matter of right, he would have been entitled to an instruction that the evidence of non-bribery misconduct should be considered only with respect to the tax and false statement charges. *See* Fed. R. Evid. 105 ("When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). The Government's argument depends on the assumption that jurors would have disregarded this instruction. Moreover, Ryan would have been entitled to block the Government's reliance on the non-bribery evidence as proof of mail fraud during its

closing argument. *See*, *e.g.*, R. 22844 (violation of gift policy); R. 23744 (Gramm consulting fee); R. 22866, 22891, 23697 (reassignment of Inspector General's office employees).

The Government contends that Ryan's delegation of authority to a friend to award low-digit license plates and his disclosure to another friend of the location where a state prison would be built tended to show bribery and that his use of state resources for political purposes tended to establish money/property fraud. Resp. 42-43. However, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b).

The Government declares that any error in the admission of evidence was harmless because "a reasonable juror's view of the case would not have changed had this evidence been excluded." Resp. 43. It cites *United States v. Owens*, 424 F.3d 649, 656 (7th Cir. 2005). *Owens*, however, reversed a conviction because propensity evidence had been admitted, and it declared: "The test for harmless error is whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded." *Id*. at 656 (quoting *United States v. Eskridge*, 164 F.3d 1042, 1044 (7th Cir. 1998)).

CONCLUSION

Because the evidence was insufficient to support Ryan's mail fraud and RICO convictions under the standards established by *Skilling*, these convictions must be set aside. Moreover, the Court's instructions embodied a concept of honest services fraud that the Supreme Court has now repudiated, and the error was not harmless.

DATED: November 4, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Movant George H. Ryan, Sr., hereby certifies that on November 4, 2010, he caused the foregoing Reply in Support of his Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 to be electronically filed with the Clerk of the Court for the Northern District of Illinois using the ECF System, which will send notification to counsel of record.

DATED: November 4, 2010

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Respondent, v. GEORGE H. RYAN, SR., No. 16627-424, Movant.	)	Case No. 10 CV 5512 Judge Rebecca R. Pallmeyer

REPLY TO GOVERNMENT'S RESPONSE TO MOVANT'S MOTION TO SET BAIL

George H. Ryan, Sr. ("Ryan"), in the custody of the Federal Bureau of Prisons pursuant to a judgment of this Court, by his attorneys, respectfully presents this Reply to the Government's Response to his Motion to Set Bail.

I. A SECTION 2255 MOVANT WHO POSES NO RISK OF FLIGHT AND NO DANGER TO THE COMMUNITY SHOULD BE RELEASED ON BOND WHEN THE COURT CONCLUDES THAT HIS INCARCERATION IS PROBABLY UNLAWFUL

The Government agrees that Ryan poses no flight risk or danger to the community. BailResp. 3 n.2.[1] Moreover, it recognizes that, in litigation outside the Seventh Circuit, the Government has taken the position that the standard for release pending the resolution of a Section 2255 motion should duplicate the standard for release pending appeal. *Id*. at 2 n.1. The Government reports, however, that it "does not take that position in this case because the Seventh Circuit has specifically ruled that [18 U.S.C.] § 3143[, which sets the standard for release pending appeal,] 'is inapplicable to a convicted defendant who is seeking postconviction relief.'" *Id*. (quoting *Cherek v. United States*, 767 F.2d 335, 338 (7th Cir. 1985)).

[1] Ryan's memorandum of law in support of his Section 2255 motion is cited as Mem. __. The Government's response to this motion is cited as Resp. __. Ryan's memorandum of law in support of his bail motion is cited as BailMem. __. The Government's response to this motion is cited as BailResp. __.

Ryan agrees that the standard for release pending the resolution of a Section 2255 motion should be higher than the standard for release pending appeal. He has in fact proposed a higher standard. As argued in BailMem. at 4-5, the test should be whether the Court "is more likely than not to order a petitioner's release at the conclusion of the proceedings." The Government dismisses this standard as "just a slightly different phrasing of the § 3143 standard," BailResp. 3, but it is not.

The Section 3143 standard for release pending an appeal is a "close case" standard. A "substantial question" within the meaning of Section 3143(b) "is a close question or one that very well could be decided the other way." *United States v. Molt*, 758 F.2d 1198, 1200 (7th Cir. 1985) (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam)). The petitioner need not show that the judgment "probably will be reversed, in order to find that an issue is 'substantial.'" *United States v. Thompson*, 787 F.2d 1084, 1085 (7th Cir. 1986). Rather, the test is whether "the appeal could readily go either way." *United States v. Greenburg*, 772 F.2d 340, 341 (7th Cir. 1985); *see also United States v. Eaken*, 995 F.2d 740, 742-43 (7th Cir. 1993) (affirming release pending appeal because the court was "unsure that the evidence" supported conviction). Ryan proposes, not the "close case" standard governing release pending appeal, but a "probable win" standard—whether the court is more likely than not to order his release.

The Government argues that the standard should be "clear win"—"whether the issue [presented by a Section 2255 motion] is a clear win for the defendant." BailResp. 3.[2] The Government, however, does not explain why it wishes to keep in prison people who probably do

[2] So much for the Government's suggestion that it might have agreed with prosecutors outside the Seventh Circuit if only the Seventh Circuit had not tied its hands. The Government's proposed standard goes far beyond anything the Seventh Circuit has indicated is appropriate. Indeed, the Government's standard is the most demanding it could have proposed short of denying the possibility of release on bond altogether.

not belong there. It offers no argument for its standard.

When a movant *probably* is wrongfully incarcerated and when he poses no flight risk or danger to the community, it is unconscionable to prolong his imprisonment. If the Court's best judgment is that it is more likely than not to order Ryan's release at the conclusion of these proceedings, it should order his release on bond.

II. EXCEPTIONAL CIRCUMSTANCES SUPPORT RYAN'S RELEASE

The Government quotes *Kramer v. Jenkins*, 800 F.2d 708, 709 (7th Cir. 1986), for the proposition that "a defendant . . . whose conviction has been affirmed on direct appeal 'is unlikely to have been convicted unjustly.'" BailResp. 2. This generalization surely does not apply to a defendant who was convicted under an interpretation of a criminal statute that the Supreme Court later held grossly overbroad—a defendant whom the jury was invited to convict for conduct that is not a crime.

In civil cases, **"**[a] preliminary injunction requires both a showing of irreparable injury and a likelihood of success on the merits." *Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865, 872 (7th Cir. 2009). No less than a civil plaintiff concerned about a threat to his property interests, a Section 2255 movant who can show both a likelihood of success on the merits and irreparable injury should be entitled to interim relief.

If this Court were to approve Ryan's release on bond and later deny his Section 2255 motion, the Government would have suffered no irreparable harm. Ryan would simply return to prison to serve the remainder of his sentence. If, however, the Court were to deny release and Ryan then prevailed, he and his family would have suffered irreparable injury in the interim. Every day of wrongful imprisonment is an irreparable injury in itself; it cannot be restored. In this case, moreover, the injury would have been compounded by the fact that Ryan's wife of 54

years is terminally ill (a circumstance the Government describes as "very unfortunate," BailResp. at 4). Every day of wrongful imprisonment is drawn from a dwindling store of days that George and Lura Lynn Ryan might spend together.

As noted in Mem. at 28-30, the Court sentenced Ryan to the maximum term allowed by law for his tax convictions and false statements convictions only because these crimes were joined for sentencing with his mail fraud and RICO convictions. Ryan has asked the Court to re-determine his sentences for the less serious offenses. If he had received the sentences prescribed by the Guidelines for these offenses standing alone, he would have completed these sentences long ago. Indeed, with appropriate good time credit, he has in fact completed his sentence for the tax offenses.

The Government responded, "Since the Court will not need to reach the issue if it denies Ryan's motion, the Government has deferred any discussion of re-sentencing at this time." Resp. 11-12 n.6. The extent of Ryan's obligations on the tax and false statement charges is relevant, however, to his present motion for bail. Without offering any analysis of the issue, the Government argues that the Court should deny release because "it is not clear that the Court would have to re-sentence Ryan" on the false statements counts. BailResp. 4. When the Government has offered no response to Ryan's careful and detailed explanation of why lower sentences are appropriate, the Court certainly should assume that he has served sufficient time for his tax and false statements convictions.

CONCLUSION

The Government writes, "This Court's decision on bail should begin and end with the merits of Ryan's § 2255 motion." BailResp. 1. Like the Government, Ryan believes that this Court's ruling on bail should turn on the merits of his motion. If this motion "has no merit," as

the Government contends, *id.*, the Court should deny his request for release. If, however, the Court's best judgment is that his incarceration is probably unlawful, it should promptly order his release on bond.

DATED: November 4, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Movant George H. Ryan, Sr., hereby certifies that on November 4, 2010, he caused the foregoing Reply to the Government's Response to Movant's Motion to Set Bail to be electronically filed with the Clerk of the Court for the Northern District of Illinois using the ECF System, which will send notification to counsel of record.

DATED: November 4, 2010

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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 5512	**DATE**	11/9/2010
CASE TITLE	George H. Ryan, Sr. vs. USA		

DOCKET ENTRY TEXT

Movant's motion for leave to file, *instanter*, a brief in excess of fifteen pages [24] granted.

Docketing to mail notices.

Courtroom Deputy Initials:	ETV

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Respondent, v. GEORGE H. RYAN, SR., No. 16627-424, Movant.	Case No. 10 CV 5512 Judge Rebecca R. Pallmeyer

MOVANT'S REPLY IN SUPPORT OF HIS MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

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INTRODUCTION

The Government acknowledged repeatedly during its closing argument that it had not proven *quid pro quo* bribes or kickbacks. R. 22956-58, 22973, 23764.[1] It now argues that *Skilling v. United States*, 130 S. Ct. 2896 (2010), changed little and (astonishingly) that an "undisclosed flow of benefits" remains a federal crime. Resp. 2, 16, 23, 24, 25, 27-28, 30. Its response to Ryan's Section 2255 motion is designed to convey an impression of favors flowing to and from George Ryan ("Ryan"), his relatives, friends, and associates and to imply an atmosphere of corruption. After *Skilling*, however, it is no longer sufficient to throw all of the evidence into one cauldron and churn. The critical issue is whether Ryan took bribes or kickbacks, and the bribes or kickbacks must be identified.

Part I of this Reply reviews the defects of the jury instructions, examines the appropriate standard for judging harmlessness, and argues that the Government has conflated questions of harmless error and evidentiary sufficiency. Part II maintains that the evidence was insufficient to establish bribes and kickbacks and that, even if the evidence was sufficient, it did not render the instructional errors harmless. Part III argues that the Government's money/property fraud theory was never presented to the jury, lacks evidentiary basis, and in any event does not render the instructional errors harmless. Part IV argues that the prejudicial evidence heard by the jury would not have been admissible in a post-*Skilling* trial.

[1] The trial transcript is cited as R. __. Ryan's memorandum of law in support of his motion is cited as Mem. __. The Government's Response is cited as Resp. __.

I. THE JURY INSTRUCTIONS WERE ERRONEOUS, AND THE ERROR WAS NOT HARMLESS.

A. The Instructions Were Erroneous.

1. Two errors not contested by the Government: the "*Bloom* instruction" and the "campaign contribution" instruction

Ryan challenged the "*Bloom* instruction"—an instruction that recited the now-invalid standard of honest services fraud approved by *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998). Mem. 21-22. The Court told the jury, "Where a public official misuses his official position or nonpublic information he obtained in it for private gain for himself or another, then that official . . . has defrauded the public of his honest services if the other elements of the mail fraud offense have been met." R. 23911. A similar instruction led the Supreme Court to reverse an honest services conviction in a companion case to *Skilling*, *Black v. United States*, 130 S. Ct. 2963, 2968 (2010). Ryan maintained, "*Black* is on point." Mem. 22. The Government's response never discusses this instruction or cites *Black*.[2]

Ryan also maintained that the Court erred in its "campaign contribution" instruction, which told the jury, "When a person gives and a public official receives a campaign contribution, knowing that it is given in exchange for a specific official act, that conduct violates the mail fraud statute if the other elements of the mail fraud offense are met. The intent of each party can be implied from their words and ongoing conduct." R. 23908; *see* Mem. 23. The Supreme Court has held that a jury may not treat a campaign contribution as a bribe (and hence as honest services fraud) simply because the jury has implied an exchange from words and ongoing conduct. The jury must find an "explicit" *quid pro quo*. *McCormick v. United States*, 500 U.S. 257, 273 (1991). The Government does not cite *McCormick* and does not mention the challenged

[2] The response mentions the "*Bloom* instruction" only to suggest that its references to "private gain" and "the other elements of mail fraud" save another challenged instruction. Resp. 21-22; *see* Part I(A)(3) *infra*.

instruction except to say, "There was a fourth instruction that addressed bribery in the context of campaign contributions, but it is not relevant to this discussion." Resp. 19 n.11.

Although the instruction might not have been relevant to the Government's discussion, the error in the "campaign contribution" instruction is relevant to this case. The Government threw into its cauldron the benefits Ryan gave campaign contributors (particularly low-digit license plates), arguing that they established part of the "flow of benefits" that it contends the jury must have regarded as bribery. *See, e.g.,* R. 22849, 22971-75. Moreover, the jury's convictions on Counts 2, 3, 5, 7, and 8 of the indictment (that is, all but one of the mail fraud convictions that remain) can stand only if the jury must have concluded that Lawrence Warner ("Warner") bribed Ryan. Warner in fact provided only one significant financial benefit to Ryan. He hosted two political fundraisers. Mem. 19. Although the Government noted benefits that Warner provided to Ryan's family and associates as well, it relied in substantial part on these fundraisers. R. 22959-60. The Court's invitation to convict on the basis of these fundraisers even in the absence of an explicit *quid pro quo* was both erroneous and prejudicial. *See* Parts I(A)(4) & II(A)(3)(b) *infra*.

2. The "undisclosed conflicts" instruction

The Court charged the jury:

> A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest, also known as a conflict of interest, in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services, if the other elements of the mail fraud offense are met.

R. 23905.

When the Government argued that this instruction was "consistent with *Skilling*," Resp. 18, it must have forgotten its description of *Skilling* three pages earlier: "[T]he [Supreme] Court declined to extend the reach of the honest services statute to schemes involving 'undisclosed self-

dealing' in the absence of a bribe or kickback, that is, to the mere 'taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.'" Resp. 15 (quoting *Skilling*, 130 S. Ct. at 2932).

The challenged instruction in fact swept more broadly than the standard the Government proposed and the Court emphatically rejected in *Skilling*. The standard proposed in *Skilling* would have criminalized only a failure to disclose a financial interest, but the challenged instruction in this case invited the jury to convict for failing to disclose a personal *or* a financial interest.

The Government maintains that "on the facts of this case" this instruction was permissible because the only interest Ryan had in any matter over which he had decision-making power was his interest in bribes and kickbacks. Resp. 18. The jury, however, would not have guessed that this instruction required it to determine whether Ryan had taken bribes or kickbacks. It might instead have concluded that Ryan failed to disclose a personal interest when he awarded a contract to a friend without revealing that this person was a friend or, perhaps, when he awarded a contract to a friend without revealing that this friend had given him favors.

3. The "state law" instructions

The Court told the jury, "I instruct you that the following state laws were among the laws applicable to state officials . . . ." After reciting several provisions of Illinois law, R. 23908-11, it declared:

> Again, not every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation. Where a public official or employee misuses his official position or material nonpublic information he obtained in it for private gain for himself or another, then that official or employee has defrauded the public of his honest services if the other elements of the mail fraud offense have been met.

R. 23911.

Noting Ryan's statement that, after *Skilling*, state law cannot form the basis for an honest services conviction, the Government writes, "*Skilling* did not so hold." Resp. 21. But *Skilling* did so hold. It limited honest services fraud to bribes and kickbacks, emphasized that courts must give these terms the same meaning they have in federal bribery and kickback statutes, and declared, "[O]ur construction of § 1345 'establish[es] a uniform national standard.'" 130 S. Ct. at 2933 (quoting Brief for Albert W. Alschuler as *Amicus Curiae* in *Weyhrauch v. United States*, O. T. 2009, No. 08-1196, at 28-29.) [3]

The Government argues that the state law "instructions emphatically did not permit the jury to convict based on something other than a bribe or kickback scheme." Resp. 22. A glance at the state laws recited by the Court makes the error of this argument apparent. Most of these laws have nothing to do with bribes or kickbacks. The Court noted an Illinois Constitutional provision "that public funds, property, or credit shall be used only for public purposes," a statutory prohibition against acting "in excess of [] lawful authority," a prohibition against soliciting or knowingly accepting "for the performance of any act a fee or reward which [an official] knows is not authorized by law," a statute requiring an official to file an annual statement of his economic interests, another statute prohibiting the acceptance of gifts from lobbyists and other "prohibited sources," and a statute forbidding the use of public funds in political campaigns. R. 23908-11.

[3] The significance of state law in assessing honest services fraud was the principal issue briefed and argued in *Weyhrauch*, and the principal argument of the quoted *amicus* brief was that state law was irrelevant. *Skilling*'s approval of a uniform national standard adopted this brief's position and made it unnecessary for the Supreme Court to say more. It remanded *Weyhrauch* for further consideration in light of *Skilling*. *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010).

Both the "undisclosed conflicts" instruction and the "state law" instructions end with the words "if the other elements of the mail fraud offense are met." The Government contends that these words save the instructions. Resp. 18-19, 22. As it notes, the instructions did not invite jurors to convict simply because they found undisclosed conflicts or state law violations. The instructions, however, did advise the jurors that an undisclosed conflict of interest or state law violation would establish the central element of pre-*Skilling* honest services fraud—breach of fiduciary duty. If the jurors then found the other elements of mail fraud—mailing, R. 23912-13, a material false representation, R. 23904, an intent to defraud, R. 2304-05, and gain "no matter who receives the benefits," R. 23911—the defendant's guilt would be established.

The Government reads the words "if the other elements of the mail fraud offense are met" to refer, not to the Court's instructions concerning the general elements of mail fraud (elements a jury must find in every mail fraud case) but to an instruction the Court gave on the unlawful receipt of financial benefits. This instruction invited conviction when an official had accepted a benefit with the understanding that he would perform official acts in return. Viewed in context, this instruction simply informed the jury of another way in which the Government could establish the core element of pre-*Skilling* honest services fraud—breach of fiduciary duty.

The Government interprets the instructions as though the Court had said:

> Members of the jury, a person commits honest services fraud if he takes a bribe. He also commits honest services fraud if he fails to disclose a conflict of interest *and takes a bribe*. In addition, this person commits honest services fraud if he violates the Illinois law against using state funds in a political campaign *and takes a bribe*. Moreover, an official commits honest services fraud if he accepts a prohibited gift from a lobbyist *and takes a bribe*. And furthermore, he commits honest services fraud if he acts in excess of his lawful authority *and takes a bribe*.

An instruction with this message could have ended after "a person commits honest services fraud if he takes a bribe" without changing its meaning. The Government interprets all

of the Court's references to undisclosed conflicts of interest and to state law as senseless surplusage. That is not how the jury would have understood them.

4. The "financial benefits" instructions

The bribery instruction emphasized by the Government—the one it mistakenly interprets as qualifying all the other instructions—reads as follows:

> 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.

R. 23905-06.

As noted above, this instruction treats the duty not to accept bribes and kickbacks merely as one of the duties of a public official whose violation can lead to an honest services conviction. Under *Skilling*, a scheme to obtain a bribe or kickback is not one of several paths to conviction; it is the only path. *See* Mem. 21, 22-23.[4]

Moreover, this instruction was embedded in other "financial benefits" instructions that, taken as a whole, did not adequately convey the *quid pro quo* requirement. Although this instruction speaks of an "understanding that the public official would perform or not perform acts

[4] Ryan observed that this "instruction turned the issue on the understanding of one person—the public official—rather than on whether two parties had agreed to an exchange." Mem. 23. The Government properly responds that a scheme to defraud does not require the criminal participation of two people. An actor could, for example, scheme to give a bribe or take a bribe from an undercover agent. Resp. 20.

The schemer, however, must still *intend* an exchange. To illustrate: The governor of a state might think to himself, "If Joe, the waiter in the governor's mansion, refills my coffee cup quickly, I'll recommend him for a promotion." The governor might then accept a benefit (a fresh cup of coffee) with the subjective understanding that he would perform an official act in return (recommending a state employee for a promotion). A cup of coffee delivered by a waiter unaware of the governor's intention, however, would not be a bribe, and in the absence of a contemplated exchange, the governor would not have schemed to obtain a bribe either. Accepting a benefit with a subjective understanding that the beneficiary will reward the benefactor is not enough; there must be a contemplated exchange.

in his official capacity in return," another declared that giving a benefit with the intent "to ensure favorable action when necessary" was enough. R. 23906. A third advised that providing a benefit "with intent to influence or reward [a] public official's exercise of office" was sufficient. R. 23906.

The last in this series of instructions omitted any requirement of an exchange (actual or contemplated) and encompassed gratuities (benefits given to *reward* an official's exercise of office) as well as bribes. The Supreme Court has insisted upon the distinction between bribes and gratuities, noting that giving or receiving a bribe is a much more serious crime. *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999). When the *Skilling* opinion spoke of bribes, it did not mean gratuities; the Supreme Court knows the difference.

Moreover, many campaign contributions and many entertainment expenditures of lobbyists are "intended to influence" an official's exercise of office. The Court's "financial benefits" instructions would criminalize these contributions and expenditures. As the Supreme Court recently observed,

> "Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, . . . to make a contribution to one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors."

Citizens United v. FEC, 130 S. Ct. 876, 910 (2010) (quoting this entire passage from *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (separate opinion of Kennedy, J.)). *See United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) ("It would be naive to suppose that contributors do not expect some benefit—support for favorable legislation, for example—for their contributions.").

When the Supreme Court held that a campaign contribution could not be a bribe in the absence of an "explicit" *quid pro quo*, it declared, "To hold otherwise would open to prosecution

not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures." *McCormick*, 500 U.S. at 272. In this case, however, not only did the Court declare it a crime to provide a benefit "with intent to influence or reward [a] public official's exercise of office" (thereby encompassing ordinary campaign contributions and entertainment expenditures); it also advised the jury that, even in the context of campaign contributions, no explicit *quid pro quo* was required. R. 23907-08; *see* Part I(A)(1) *supra*.[5]

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[5] The Government does not suggest that Ryan waived or forfeited his objections to the "*Bloom* instruction," the "campaign contributions" instruction, the "undisclosed conflicts" instruction, or the "state law" instructions discussed above. It notes, however, that Ryan did not object to one of the challenged "financial benefits" instructions and affirmatively requested two others. Resp. 19 n.12.

Although the Government now maintains that the Court's instructions fully advised the jury of the *quid pro quo* requirement, it strongly resisted instructions that would have set forth this requirement explicitly. Prior to trial, Ryan proposed that the Court use the words *quid pro quo* and that it require an "explicit" *quid pro quo* when charges were predicated on the receipt of campaign contributions. *See* Ryan's Resp. to United States' Mot. for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations at 7-15, Case 1:02-cr-00506, Dkt. 323, 9/15/05. The Latin words were anathema to the Government then, however, and the Court ruled that proof of a specific *quid pro quo* was not required. *United States v. Warner*, 2005 WL 2367769, at *4-5 (N.D. Ill. Sept. 23, 2005).

Ryan then sought instructions that would come within hailing distance of the standard he favored while respecting the Court's ruling. His requests for some instructions and his failure to object to others did not waive or forfeit his earlier objection to the omission of a stronger *quid pro quo* instruction. *See* 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2553 at 63 (3d. Ed.) ("[T]he failure to object to an instruction may be disregarded if the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing.") (citing dozens of cases); *United States v. Salamone*, 800 F.2d 1216, 1223 (3d Cir. 1986) (declaring that a "reasonably justified" failure to renew an earlier objection does not extinguish a claim).

Moreover, Ryan could not have presented at trial the objection he now offers to the "financial benefits" instructions. His pretrial objection was that the Seventh Circuit's standard of honest services fraud (breach of fiduciary duty for personal gain) required a *quid pro quo* instruction. He now objects that the Court's instructions did not convey the *Skilling* standard to the jury. *Skilling* limited honest services fraud to schemes to obtain bribes and kickbacks, and the instructions in this case did not adequately advise the jury of the *quid pro quo* element of bribery. Instructions that might not have been required by the Seventh Circuit's pre-*Skilling* decisions are required now.

Ryan's failure to object to one instruction should not be treated as a waiver or forfeiture of an objection that was unavailable to him. Moreover, even a forfeited instruction should be reviewed for plain error. *See* Fed. R. Crim. P. 52(b). A knowing and voluntary waiver can preclude plain error review, *see United States v. Babul*, 476 F.3d 498, 500 (7th Cir. 2007), but Ryan could not have made a knowing and voluntary waiver before *Skilling* of an objection that *Skilling* created.

The jury instructions in this case are deeply flawed. They were shaped by a view of honest services fraud that the Supreme Court has now repudiated in its entirety.

B. This Court Should Apply the "Harmless Beyond a Reasonable Doubt" Standard Articulated in *Lanier v. United States*.

In *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000), a proceeding under 28 U.S.C. Section 2255, the movant argued for the following harmless error standard: "[I]t must be apparent beyond a reasonable doubt that the error did not contribute to the verdict at all." *Id.* at 838-39. The Government proposed a slightly different standard. "In harmless error analysis, the basic question is, 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" Supp. Br. for the United States at 2, *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000) (No. 98-2689) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). The Seventh Circuit addressed the issue and, declaring the movant's standard "onerous," endorsed the Government's position. 220 F.3d at 839.

The Government now asks this Court to disregard *Lanier*. It notes that several Courts of Appeals other than the Seventh Circuit have approved the standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993)—whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 631 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Adverting obliquely to its failure to ask the Seventh Circuit to endorse the *Brecht* standard in *Lanier*, the Government writes, "*Lanier* applied the heightened standard without analysis . . . and the issue does not appear to have been raised by the parties. Accordingly, *Lanier* is not controlling. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952)." Resp. 13-14 n.7.

This Court should adhere to *Lanier* for two reasons. First, contrary to the Government's suggestion, *L.A. Tucker Truck Lines* does not authorize the Court to ignore a Seventh Circuit

standard simply because the parties failed to ask it to consider another standard. In *L.A. Tucker*, a litigant maintained that the Supreme Court could not have decided an earlier case as it did unless it had implicitly endorsed a certain legal proposition. The Court said that it would not regard as "binding precedent" a proposition "not . . . raised in briefs or argument nor discussed in the opinion of the Court." *L.A. Tucker*, 344 U.S. at 38. The Supreme Court spoke of its refusal to be "bound" by a proposition allegedly "implicit" in one of its own decisions. It did not suggest that a subordinate court could appropriately disregard a legal standard articulated by a superior court on the ground that the superior court had failed to address a plausible alternative. The Supreme Court has in fact been emphatic about the obligations of lower courts. It said in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *See also Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Second, *Brecht* is inapposite. *Brecht* established the standard for judging harmless error in habeas corpus proceedings brought by *state* prisoners, and the Supreme Court grounded its ruling on federalism concerns inapplicable to post-conviction proceedings brought by federal prisoners. *See Brecht*, 507 U.S. at 635; Mem. 26. Even if this Court were free to disregard *Lanier* and to extend *Brecht* to Section 2255 proceedings, it should not do so.[6]

[6] The Supreme Court itself no longer seems enthusiastic about *Brecht*. In *O'Neal v. McAninch*, 513 U.S. 432 (1995), it contracted this precedent and emphasized that a habeas corpus petitioner bears no burden of establishing prejudice.

Because the harmless error standard is contested and the issue might reach the Seventh Circuit, this Court, once it has reached its decision, might usefully indicate whether the determination of which harmless error standard to apply made a difference.

C. The Government Fails to Distinguish Questions of Evidentiary Sufficiency from Questions of Harmless Error.

Ryan maintains that the evidence presented at trial was insufficient to support his mail fraud and racketeering convictions. He argues in the alternative that the jury instructions were flawed and that the instructional errors were not harmless. The Government's response fails to distinguish between these arguments and assumes erroneously that the principles governing their evaluation are the same.

The Government declares, "In considering a motion under § 2255, the Court must 'review evidence and draw all reasonable inferences from it in a light most favorable to the government.'" Resp. 13 (quoting *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir. 1992)). This statement is half right. It is accurate when the issue is the sufficiency of the evidence, but not when it is whether an instructional error was harmless.

When the Government contends that the evidence was so overwhelming that any reasonable juror would have convicted, it must assume that the jury resolved issues of credibility and drew reasonable inferences in favor of the defendant. It cannot be said that every reasonable juror would have accepted all of the Government's evidence and would have drawn every reasonable inference in its favor.

The Seventh Circuit recognized the difference between issues of evidentiary sufficiency and issues of harmless error in *United States v. Walls*, 225 F.3d 858 (7th Cir. 2000), where it said, "If the question before us were one of sufficiency of the evidence, there is no doubt whatsoever that the evidence sufficed . . . . That said, we cannot hold that the evidence of . . . knowledge and intent was so overwhelming that no rational jury would find otherwise." *Id.* at 867. *See also United States v. Cappas*, 29 F.3d 1187, 1194 n.4 (7th Cir. 1994) (an inquiry into harmlessness is "almost the polar opposite of a sufficiency of the evidence review," and any suggestion that the

evidence should be viewed in the light most favorable to the Government would "flatly contradict" the required inquiry into whether a conviction "*might* rest on an invalid ground") (emphasis in the original); *United States v. Holmes*, 93 F.3d 289, 294 (7th Cir. 1996) ("[T]he record makes clear that there is sufficient evidence of guilt to support a verdict of guilty, but we cannot be sure whether the jury relied upon that evidence . . . ."); *United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994) (error cannot be found harmless when prosecution and defense witnesses both "gave a plausible account" neither of which "was *inherently* unlikely to be true . . . and given the further fact that we are precluded from making credibility determinations") (emphasis in the original).[7]

For example, the parties to this case presented conflicting evidence on whether the State of Illinois paid more than market value for any of the leases that Ryan approved. The Government's experts testified that it did, *see, e.g.,* R. 11019, 11034, 11046, 21689, and Ryan's experts testified that it did not. *See, e.g.,* R. 19926, 20039, 20075. An assumption that the jury credited the Government's experts is appropriate when the Court evaluates the sufficiency of the evidence but not when it evaluates harmlessness. The Government cannot properly argue that, because the state paid too much, the jury must have found money/property fraud—not when the jury, which was invited to convict on an entirely different theory, did not find that the state paid too much.

[7] The Government's position is plainly incompatible with *Lanier*'s harmless beyond a reasonable doubt standard. *See Al-Qaadir v. Gallegos*, 56 F.3d 70 (Table), 1995 WL 330628, at *3 n.5 (9th Cir. 1995) ("It is impossible to determine whether an error was harmless beyond a reasonable doubt by construing evidence in the light most favorable to the government. . . . The two standards are mutually exclusive."). Courts also refuse to construe the evidence in the light most favorable to the government when the standard is the one favored by the government—whether the court is in doubt about whether the error had a substantial and injurious effect on the verdict—and indeed when the standard is the more demanding one applied to claims of ineffective assistance of counsel by *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Watson*, 171 F.3d 695, 700 (D.C. Cir. 1999) (a court must ask "not whether evidence was sufficient to convict notwithstanding the error, but rather whether the court can say that the error did not affect the jury's verdict"); *Pirtle v. Morgan*, 313 F.3d 1160, 1174 (9th Cir. 2002) (applying the *Strickland* standard).

The Government's mistaken assumption that the jury must have credited all of its evidence and must have drawn every reasonable inference in its favor pervades its argument on harmless error and renders this argument useless to the Court.[8]

II. THE EVIDENCE OF BRIBERY WAS INSUFFICIENT TO ESTABLISH HONEST SERVICES FRAUD AND IN ANY EVENT DID NOT RENDER THE INSTRUCTIONAL ERROR HARMLESS.

A. The Evidence Was Insufficient.

1. The Government failed to prove a *quid pro quo*.

Ryan and the Government do not differ about how to define bribery. Although the Government declares, "Ryan attempts to define bribes and kickbacks so narrowly that little more than an express agreement to trade a particular sum of cash for a particular action would ever qualify," Resp. 23, Ryan has disclaimed this position. He has not suggested that bribes must be paid in cash, and he has agreed that a "'particular, specified act need not be identified at the time of payment . . . so long as the payor and payee agreed on a specific *type* of action to be taken in the future.'" Mem. 10 (quoting *United States v. Whitfield*, 590 F.3d 325, 350 (5th Cir. 2009) (emphasis in the original). He has recognized that "'[t]he key to whether a gift constitutes a bribe is whether the parties intended for the benefit to be made in exchange for some official action; the government need not prove that each gift was provided with the intent to prompt a specific

[8] The Government's confusion is particularly evident in this passage of its harmless error argument:

> Ryan argues he did not take bribes and kickbacks because, he claims, he and his benefactors never agreed that the benefits were in exchange for state business. The jury heard ample evidence permitting it to reject this claim. Viewing the evidence in a light most favorable to the government, as is required, the evidence clearly showed that Ryan's relationship with Warner, Klein, and Swanson was a classic arrangement of "I'll scratch your back if you scratch mine . . . ."

Resp. 27-28. When the issue is harmlessness rather than the sufficiency of the evidence, it is not enough that the jury heard evidence "permitting" it to reject the defendant's claim. The evidence must be susceptible to only the Government's interpretation.

official action.'" *Id.* (quoting *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007)).[9] Ryan has also agreed that the *quid pro quo* of a bribery transaction must be express only when the bribe consists of a campaign contribution. "[F]act finders examining other sorts of benefits may infer the necessary agreement from an official's words and actions." *Id.* (citing *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) and *United States v. Garcia*, 992 F.2d 409 (2d Cir. 1993)). Ryan readily accepts these descriptions by the Government of the *quid pro quo* element of bribery: "[B]ribery . . . requires an exchange of benefits for official action." Resp. 17. The alleged bribe giver "must get the promise of an official act or acts" in return. *Id.* at 16.

After acknowledging these definitions, the Government disregards them. As the Supreme Court has noted, the existence or non-existence of a *quid pro quo* must be evaluated at the time a public official receives the benefit alleged to be a bribe. It is not enough for the official to accept a benefit without a commitment or understanding and later to approve an official action that benefits the provider. "[T]he offense is complete at the time when the public official receives a payment in return for his agreement to perform specific official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992). *See McCormick v. United States*, 500 U.S. 257, 283 (1991) (Stevens, J., dissenting) ("When the petitioner took the money, he was either guilty or not guilty."); *Sun-Diamond Growers*, 526 U.S. at 404 ("[F]or bribery there must be a quid pro quo—a specific intent to give or receive something of value *in exchange for* an official act.") (emphasis in the original); *Ganim*, 510 F.3d at 147 ("[R]equiring a jury to find a quid pro quo, as the governing

[9] The Seventh Circuit has offered a similar definition: "[T]he public official [must have] understood that as a result of the payment he was expected to exercise particular kinds of influence on behalf of the payor." *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001).

law does, ensures that a particular payment is made in exchange for a *commitment* to perform official acts to benefit the payor in the future.") (emphasis in the original).[10]

Reviewing the period from when Ryan was elected Secretary of State until he left the Governor's office twelve years later, the Government's response throws into the cauldron every favor it has found that anyone who later obtained a benefit gave George Ryan, his brother, or any of his children. It also stirs in every favor that one Ryan associate gave another on the theory that a favor to any friend of George Ryan was a favor to Ryan himself, at least when Ryan knew about and approved of the favor. As the Government churns, however, it *never* addresses the critical question: What commitment or promise, explicit or implicit, did Ryan make to any benefactor at the time the benefit was given?

The Government in fact begins its "flow of benefits" tale prior to the twelve-year period covered by its indictment. It notes that "in the mid-1980s" Donald Udstuen gave a job to one of Ryan's daughters. Resp. 4 n.3, 8. What commitment or promise by Ryan could a reasonable juror have found at the time his daughter obtained this job? Did he promise to run for Secretary of State five or six years later and, if successful, to approve Warner's sharing of lobbying fees with Udstuen? Because no evidence indicated that this or any other *quo* accompanied the *quid*, no reasonable juror could have found that the benefit given to Ryan's daughter was a bribe. Moreover, if the sharing of lobbying fees with Udstuen was a benefit to Ryan, what did Ryan promise in return? What explicit or implicit commitment did Ryan make when Ron Swanson gave Ryan and his wife a figurine on their fortieth anniversary or when Warner lent money to a business partly owned by Ryan's brother? Posing this central, critical question about each of the

[10] Apart from a citation to Justice Kennedy's concurring opinion in *Evans*, Resp. 16, the Government's response cites none of the three leading Supreme Court decisions on the requisites of bribery—*McCormick*, *Evans*, and *Sun-Diamond Growers*. It relies entirely on lower court decisions, including such dubious pre-*Skilling* outliers as *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), and *United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998). *See* Part II(A)(2) *infra*.

benefits given Ryan, his family, and his associates makes clear that no *quo* accompanied any *quid*, or at least that the Government offered no proof of any during a five-and-one-half month trial.

When Ryan decided what property to lease for the Secretary of State's office, what contracts to enter, or whom to recommend for a governmental position, he might have been motivated in part by his gratitude for the figurine, the loan to his brother's business, or the job given his daughter. After *Skilling*, however, that is not a crime. A general sense of reciprocity is not a *quid pro quo*. As the Seventh Circuit noted in *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993), "Vague expectations of some future benefit should not be sufficient to make a payment a bribe." *See also United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976) (declaring that a gift given with a "generalized hope of ultimate benefit on the part of the donor" is not a bribe); *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980) (same).

2. The Government's view of bribery lacks precedential support.

The Government declares that several courts, including the Seventh Circuit, "call[] conduct like Ryan's bribery." Resp. 28. It cites *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999); *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984); *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998); *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996); and *United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998).

Martin, however, disclaims the Government's theory. "The present case . . . is not one in which a government employee, having received lobbyists' hospitality, gifts, or (if an elected official) campaign contributions, afterward favors or fails to oppose his benefactor." 195 F.3d at 966.

In *Gorny*, five lawyers and tax consultants who practiced before the Cook County Board of (Tax) Appeals independently gave large sums of cash to a board commissioner. Although one

$4,000 payment was disguised as a referral fee, the commissioner provided no referral. Another $500 payment was passed to the commissioner in a white envelope under the table at a restaurant. 732 F.2d at 600. Everyone—the payers and the payee—certainly knew what these payments were for, and the payee provided it by ruling in favor of the payers' clients at an extraordinary rate. The inference of *quid pro quo* bribery was inescapable. *Gorny* differed from earlier cases only because the commissioner "did not receive payments based on the outcome of any specific case." *Id.* at 599. The Seventh Circuit's decision illustrates the appropriateness of the Fifth Circuit's declaration that "'a particular, specified act need not be identified at the time of payment . . . so long as the payor and payee agreed on a specific *type* of action to be taken in the future.'" *Whitfield*, 590 F.3d at 350 (emphasis in the original). It also illustrates the Government's penchant for citing every case endorsing this proposition as though it stood for the entirely different proposition that *no* commitment, promise, or understanding is needed at the time a benefit is received.

Like *Gorny*, *Jennings* was a cinema-worthy case of cash bribery. A building contractor delivered cash to an official empowered to approve no-bid contracts and was regularly awarded new contracts in return. No envelope appeared under the table this time; rather, there was a paper bag containing at least $2,500 in cash. *Jennings*, 160 F.3d at 1011. The Fourth Circuit offered this formulation, one often repeated by other courts: "Bribery requires the intent to exchange money (or gifts) for specific action (or inaction), but each payment need not be correlated with a specific official act. . . . [T]he intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that.'" *Id.* at 1014. The Government's citation of *Martin*, *Gorny*, and *Jennings* as support for its view of bribery reveals how little support there is.

The Government's citation of the First Circuit's pre-*Skilling* decisions in *Sawyer* and *Woodward*, however, is more plausible. The defendant in the first case, Sawyer, was a lobbyist, and the defendant in the second, Woodward, a legislator. The Government showed that Sawyer had entertained Woodward lavishly, that Woodward failed to report meals and golf outings that Sawyer provided, and that Woodward strongly supported most of Sawyer's legislative agenda. The First Circuit observed that honest services fraud had typically been found in two circumstances—(1) bribery and (2) failure to disclose a conflict of interest, resulting in personal gain. It then "expanded category (1) from quid pro quo bribery, to include a more generalized pattern of gratuities to coax 'ongoing favorable official action.'" *Woodward*, 149 F.3d at 55 (quoting *Sawyer*, 85 F.3d at 730).

Here is more of *Woodward*'s description of *Sawyer*:

> Noting that prior cases usually involved "quid pro quo bribery or blatant conflict of interest," . . . we distinguished Sawyer's gratuities to Woodward (and other legislators) as involving conduct which "itself may not be very different, except in degree, from routine cultivation of friendship in a lobbying context," which does not violate federal law. We noted that "the practice of using hospitality, including lavish hospitality, to cultivate business or political relationships is longstanding and pervasive." Because the "difference between lawful and unlawful turns primarily on intent," we held that the court must instruct the jury that a lobbyist does not commit honest services fraud . . . if his "intent was limited to the cultivation of business or political friendship." He commits those violations "only if instead or in addition, there is an intent to cause the recipient to alter her official acts."

Woodward, 149 F.3d at 55 (omitting several "*id.*" citations to *Sawyer*, 85 F.3d at 730).

Sawyer and *Woodward*, which treated the "honest services" statute as an invitation to dispense with the *quid pro quo* requirement altogether and to collapse the distinction between bribes and gratuities, cannot survive *Skilling*. *Skilling* cited as models three Court of Appeals decisions that applied the *quid pro quo* standard to honest services bribery. *See* 130 S. Ct. at 2934.

Moreover, *Sawyer* and *Woodward* illustrate why the Supreme Court needed to rein in the sprawling law of honest services fraud. The instructions mandated by these decisions, which declare it lawful for lobbyists to entertain legislators in order to cultivate "business or political friendship" but felonious for them to do so "to cause the recipient to alter her official acts," are incomprehensible. People who hire lobbyists do not pay their salaries and reimburse their expenses simply because they hope that decision makers will appreciate the lobbyists as friends. They hope to generate support for their programs—in other words, to cause decision makers to alter their official acts. The Court's acknowledgment that the benefits it makes felonious "may not be very different, except in degree, from routine cultivation of friendship in a lobbying context" is an acknowledgment that its standard is a "smells" test inviting prosecutors (some of whom may be ambitious and/or responsive to politically motivated superiors) and jurors (some of whom may be prepared to assume the worst of all public officials before they come to court[11]) to invent the law as they go along.

In short, adhering to *Sawyer* and *Woodward* would plunge the law of honest services fraud back into the vagueness morass from which the Supreme Court sought to rescue it. So would endorsing the amorphous "stream of benefits" theory of bribery propounded by the Government in this case. Legislatures should prohibit inappropriate conduct by lobbyists, but a "smells test" interpretation of a federal criminal statute carrying a twenty-year penalty is no way to do it.[12]

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[11] *See Americans Still Trust Own Judgment More than Politicians'*, Gallup, Nov. 2, 2010, http://www.gallup.com/poll/143675/Americans-Trust-Own-Judgment-Politicians.aspx.

[12] The Government relied primarily on *Sawyer* and *Woodward* when it argued before trial that it would be "clearly *improper* . . . for the defense to argue or suggest to the jury that . . . specific quid pro quo evidence is a *prerequisite* to a finding of guilt" and that "[o]ther circuits . . . have upheld public corruption prosecutions rooted in . . . the failure of a public official to disclose a financial interest or relationship affected by his official actions." Government's Mot. for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations, Case 1:00-cr-00506, Dkt. 280, 8/31/05, at 3-4, 5-7 (devoting three pages to descriptions of *Sawyer* and *Woodward* and declaring these decisions "particularly pertinent here"). The Government now invites the Court to make the same error twice.

3. The Government failed to show that benefits provided by Klein and Warner were bribes.

In the end, this Court need determine only whether the jury could have found beyond a reasonable doubt that the benefits provided by Warner and Harry Klein ("Klein") to Ryan were bribes. Although the Government alleged a wide-ranging scheme to defraud, it charged mailings only in support of specified aspects of this scheme. The only mail fraud counts that remain standing allege mailings in furtherance of one lease benefitting Klein (Count 6) and several leases and contracts benefitting Warner (Counts 2-5 & 7-8). If Klein and Warner did not procure these leases and contracts through bribes, the alleged mailings were not in furtherance of an unlawful scheme. This Court already has set aside two mail fraud verdicts because the jury found mailings in furtherance of conduct that the Government had not proven to be criminal. *United States v. Warner*, 2006 U.S. Dist. LEXIS 64085, at *38-45 (N.D. Ill. Sept. 7, 2006).

a. Klein

The Government recites only one benefit that Klein gave Ryan. Resp. 8-9, 23-24. From 1993 through 2001, Ryan was an annual guest at Klein's home in Jamaica. In 1997 (four years after the initial alleged *quid*), Ryan took part in a decision by the Secretary of State's office to lease a property that Klein owned in South Holland, and Count 6 of the indictment alleged a mailing related to this lease. Klein testified that none of his hospitality was prompted by a desire to influence Ryan's decisions as Secretary of State and indeed that the thought never crossed his

mind. R. 9552; Mem. 17-18. This evidence provided no basis for inferring that Ryan made a *quid pro quo* promise or commitment to Klein at the time he received Klein's hospitality.[13]

The Government did not charge Klein with honest services fraud or any other crime, but, as a thought experiment, consider whether it could have. Could a businessman be convicted of bribery or honest services fraud simply because a public official who had been his house guest later made an official decision benefitting him?

Perhaps the charge against Ryan prompts a different reaction than the imagined charge against Klein because much other misconduct was alleged over the course of Ryan's five-and-one-half month trial. The Government portrayed Ryan's stays in Jamaica and the South Holland lease as parts of a larger flow of benefits churning in its cauldron. Finding Ryan guilty on Count 6 on the basis of a judgment about all the charges, however, would no longer be proper. If Ryan's stays at Klein's home were bribes, Klein was as guilty of this crime as Ryan. The charge against Ryan might also prompt a different reaction because Ryan allegedly concealed Klein's hospitality. Because accepting any gift worth more than $50 violated Secretary of State regulations, however, the alleged concealment can be readily explained by a hypothesis other than bribery. Note that the alleged concealment contributed to Ryan's false statements convictions and has been punished.

b. Warner

Warner "provided only one significant financial benefit to Ryan. He sponsored two political fundraisers—one raising $75,000 and the other $175,000." Mem. 19. The Government

[13] In 1995, Ryan approved a currency exchange rate increase that benefitted Klein along with every other currency exchange owner in Illinois. Because Ryan earlier had opposed a rate increase, the Government describes his approval as a "change of heart" and suggests that it must have been prompted by a trip to Jamaica. Resp. 23. There is nothing suspicious, however, about opposing a rate increase until increasing costs in an inflationary period have justified the increase. Illinois currency exchanges had gone ten years without an increase prior to Ryan's action. R. 13511-15.

urged the jury to convict partly on the basis of these fundraisers, treating them as part of its churning stew and suggesting that there was something underhanded about them. It was "typical" of Warner to donate other people's money and to remain "behind the curtain" himself. R. 22959-60. The Court erroneously instructed the jury that it could convict for sponsoring the fundraisers even in the absence of an explicit *quid pro quo*. R. 23907-08. *See* Parts I(A)(1) & I(A)(4) *supra*. The Government has offered no response to Ryan's argument that authorizing conviction on the basis of these fundraisers was erroneous.

Ignoring the fundraisers, the Government now recites only one benefit that Warner gave Ryan himself—"waiving a $1,000 insurance adjustment fee." Resp. 36. (In other words, Warner, an insurance agent, adjusted Ryan's insurance claim without a fee after Ryan's apartment flooded. R. 15517-19.) All the other benefits in the cauldron went to people other than Ryan: Warner waived an insurance adjustment fee for a Ryan son-in-law, shared lobbying fees with Donald Udstuen and Ron Swanson, invested in two businesses owed by Ryan family members, lent money to a Ryan son-in-law, and paid for the band at the wedding of one of Ryan's daughters. Resp. 4-5, 6, 8, 25, 26, 36. The Government makes no attempt to answer the critical question: What commitment or promise did Ryan make to Warner at the time that Warner shared any lobbying fee with Udstuen or Swanson, waived any insurance fee, invested in Ryan's son's cigar business, or paid for the band at Ryan's daughter's wedding?

The Government's only hint of a *quo* comes in its discussion of the wedding gift. Noting that the wedding occurred five days after one of Warner's clients was awarded a contract, the Government writes, "The proximity between the award of the contract and Warner's payment to Ryan is evidence the two were linked, as is Warner's use of a front man to conceal that he was the one getting paid as Viisage's lobbyist." *Id.* at 26 (citations omitted). The Government does not

explain how the two events were linked, and does not explain how any concealment of this payment made Warner's wedding gift a bribe. The question, once again, is what promise or commitment Ryan gave Warner *in exchange for* the gift, *see Sun-Diamond Growers*, 526 U.S. at 404, and the answer is obviously none. "The speculation that Warner was motivated by th[e] contract rather than by affection for Jeanette and her parents was unsupported. Moreover, even if this speculation had been accurate, it would have suggested a gratuity rather than a bribe." Mem. 20.

The Government declares that "Ryan's relationship with Warner was similar to that between the defendants in [*United States v.*] *Kemp*[, 500 F.3d 257, 282 (3d Cir. 2007)]." Resp. 25. The public official convicted in *Kemp* was a city treasurer who told a banker at the time he obtained one of several personal benefits from a bank (this one a waiver of a $3,500 appraisal fee), "[Y]ou are my f-king guy. . . . So you get special treatment." *Id.* (quoting *Kemp*, 500 F.3d at 286). There was an explicit promise of special treatment in *Kemp* and a clear implicit understanding of what the special treatment would be. No comparable evidence exists in this case.

The Government's closing argument in fact acknowledged that it had not proven a *quid pro quo* bribe or kickback. The Government now offers this explanation of its concession at trial:

> Ryan's motion notes correctly that more than once, the government told the jury it did not have to find a "*quid pro quo*." . . . But, as is clear from the context of those statements, the government was simply arguing, correctly, that in order to convict Ryan, the jury did not have to find that Ryan had a conversation in which he expressly agreed to accept a specific benefit in exchange for a specific official act.

Resp. 30.

This statement is imaginative reconstruction. The Government told the jury much more than it need not find a *quid pro quo*; it recognized that no *quid pro quo* had occurred. Moreover,

the Government was not simply arguing, correctly, that a *quid pro quo* need not be explicit and may concern a type of action rather than a specific official act. The Government was arguing, incorrectly, that no *quid pro quo* was necessary and that a stream of benefits going in both directions and motivated in part by a general sense of reciprocity would suffice.

The Government's statement in its closing argument about the friendship of Ryan and Warner bears repetition:

> How did George Ryan reciprocate this longtime friendship [with Warner]? Governmental business is how he did it. $3 million worth of government business. *Was it a quid pro quo? No, it wasn't. Have we proved a quid pro quo? No, [we] haven't. Have we charged a quid pro quo? No, we haven't.* We have charged an undisclosed flow of benefits back and forth. And I am going to get to the instructions in a minute, folks, but that's what we have charged. . . . We have charged an undisclosed flow of benefits, which, under the law, is sufficient . . . .

R. 23764 (emphasis added). The Government's closing argument was correct. There was no *quid pro quo*.

The evidence supporting the mail fraud counts was insufficient, and absent any indication that the jury rested its RICO conspiracy conviction on legally sufficient predicates, the Court must set aside this conviction as well. *See*, *e.g.*, *United States v. Holzer*, 840 F.2d 1343, 1352 (7th Cir. 1988); *United States v. Ruggierio*, 726 F.2d 913, 921 (2d Cir. 1984) (overruled in part on other grounds); *United States v. Marcello*, 876 F.2d 1147, 1153 (5th Cir. 1989).

B. The Evidence of Bribery Did Not Render the Errors of the Jury Instructions Harmless.

As argued above, the Government's claim that Ryan took bribes or kickbacks rests upon extraordinarily strained inferences—inferences that no reasonable jury could have drawn, especially when charged that it must find guilt beyond a reasonable doubt. The Government presented no evidence that Ryan made any return commitment or promise of any sort, implicit or explicit, at the time he received any benefit. Yet even if the jury could somehow have inferred

from the "flow of benefits" churning in the Government's cauldron that one benefit or another must have been a bribe or that all of them were, the evidence did not compel it to draw this inference. The jury might have found that the wedding present Warner gave Ryan's daughter was only a wedding present.

The Government manages to argue to the contrary only by confounding the standards for judging harmless error with the standards for judging the sufficiency of the evidence. It assumes improperly that the jury drew all reasonable inferences in its favor, speaks of what findings the evidence "permitted" the jury to make, and declares the instructional errors harmless because the jury *might* have found in its favor. That will not do. *See* Part I(C) *supra*.

The jury in this case was never asked to determine whether the evidence met the *Skilling* standard—that is, whether Ryan took bribes or kickbacks. It was instead invited to convict on the basis of conduct that, after *Skilling*, is not a crime. Even under the harmless error standard favored by the Government, there is at least doubt about whether the Court's failure to pose the right questions "had substantial and injurious effect or influence in determining the jury's verdict." *Abrahamson*, 507 U.S. at 631.[14]

[14] The Government notes that the Seventh Circuit described the evidence of Ryan's guilt as overwhelming, Resp. 12, but of course the Seventh Circuit referred to the Government's proof of pre-*Skilling* honest services fraud, a crime that did not require any showing of bribes or kickbacks.

Even under pre-*Skilling* standards of honest services fraud, the jury did not have an easy time with this case. After the jury had deliberated eight days, the Court replaced two jurors. Then, the jury deliberated ten days before reaching a verdict. *See United States v. Warner*, 498 F.3d 666, 675-77 (7th Cir. 2007). The jury might not have agreed with the Seventh Circuit that the evidence in this case was overwhelming, and this Court should recall the jury's struggles in evaluating the Government's contention that it certainly would have convicted Ryan of scheming to obtain bribes and kickbacks if only it had been asked to do so.

III. THE GOVERNMENT'S MONEY/PROPERTY ARGUMENT WAS NEVER PRESENTED TO THE JURY, IS UNSUPPORTED BY THE EVIDENCE, AND DOES NOT RENDER THE INSTRUCTIONAL ERRORS HARMLESS.

A. The Government's Money/Property Fraud Argument Was Not Presented to the Jury.

A court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury . . . ." *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *see also United States v. Peterson*, 236 F.3d 848, 856 (7th Cir. 2001) ("Fatal to the government's appeal is that this theory was not presented to the jury, and thus, cannot support its verdict."); *United States v. Medina*, 755 F.2d 1269, 1279 (7th Cir. 1985) ("We are unwilling to uphold [the] conviction on a theory that was not argued to the jury and on which it was not instructed."); *United States v. DiCaro*, 772 F.2d 1314, 1320 (7th Cir. 1985); *United States v. Mittelstaedt*, 31 F.3d 1208, 1220 (2d Cir. 1994) (refusing to affirm a "conviction based upon a theory that was never presented to the jury").[15]

The Supreme Court "has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the

[15] In *United States v. Black*, Nos. 07-4080, 08-1030, 08-1072, 08-1106, 7th Cir. Oct. 29, 2010, the Seventh Circuit applied the same principle to defendants, refusing to *reverse* a conviction when the defendants relied on a theory that had not been offered to the jury.

Black did reverse two of the defendants' three convictions for pre-*Skilling* honest services fraud, rejecting the government's argument that the evidence supporting these convictions established money/property fraud as well. The Court, however, affirmed the third conviction. The defendants maintained that, on this charge too, the jury might have convicted them only of honest services fraud. Specifically, the jury might have found that the defendants had failed to disclose a legitimate transaction to their company's board of directors. This failure, they said, would have qualified as pre-*Skilling* honest services fraud but not as money/property fraud. Although the information in *Black* had mentioned this basis for conviction, the government had offered no evidence supporting it and had not argued it to the jury. The jury clearly had found the transaction *illegitimate*, and this finding made the transaction "a plain-vanilla pecuniary fraud." Slip op. at 13-14. As *Black* affirms, defendants may not spin out hypotheses that, although technically possible and consistent with the evidence, were never considered by the jury. The Government may not do so either.

jury." *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991). For example, in *United States v. Riley*, No. 08-3361, 2010 U.S. App. LEXIS 19310 (3d Cir. Sept. 16, 2010), a post-*Skilling* decision, the Third Circuit rejected the Government's argument that erroneous instructions regarding honest services fraud were harmless because the jury had expressly found the defendants guilty of a fraudulent deprivation of money or property. The court ruled that "it would demean the judicial process to attempt to put the genie back in the bottle by essentially rewriting the charge to the jury . . . and assuming the jury made distinctions the Government did not bring out in its summation." *Id.* at *22-23. *See also United States v. Hereimi*, No. 08-30468, 2010 U.S. App. LEXIS 19846, at *1 (9th Cir. Sept. 23, 2010) (reversing a conviction because "it is apparent to us that this case was tried and argued to the jury solely on the theory of honest services fraud that was rejected in *Skilling*.").

Only two words of the 91-page indictment in this case refer to money/property fraud. The indictment alleges that Ryan participated in a scheme to defraud the people of the State of Illinois of "money, property and the intangible right of honest services." Case 1:02-cr-00506, Dkt. 110, 12/17/03, at 19. The Court's instructions are only slightly more expansive.[16]

The Government maintains that it argued money/property fraud to the jury. Resp. 39-40. As the Seventh Circuit has cautioned, however, a court must be "mindful of the dangers of

[16] The Government's response cites (at page 40) two passages of the instructions that refer to money/property fraud:

> A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the potential loss of money or property to another or to deprive the people of the state of Illinois of their intangible right of the honest services of their public officials or employees. R. 23903.
>
> To sustain each charge of mail fraud, the Government must prove the following propositions: first, that the defendant knowingly devised or participated in the scheme to defraud or to obtain money or property by means of materially false pretenses, representations, or promises as charged . . . . R. 23902.

engaging in a revisionist history of the indictment, evidence and jury instructions." *Lombardo v. United States*, 865 F.2d 155, 158 (7th Cir. 1989). The Government's claim rests on one unelaborated reference to "stealing from the state," R. 23771, one unelaborated reference to "tangible things," R. 23097, one unelaborated declaration that the state was "ripped off," R. 22914, and a few statements developing the Government's honest services argument. For example, in support of its claim that the jury heard a money/property fraud argument, the Government notes, "[T]he government's initial closing argument described the 'core of the case' as Ryan violating his *duty to provide honest services* by 'giving state benefits, like contracts and leases to his friends . . . while at the same time they were providing various undisclosed benefits to him.'" Resp. 39 (quoting R. 22836) (emphasis added).

The jury did not hear that contracts and leases were state "property" that might be stolen by deception—a legal proposition endorsed by the Seventh Circuit only after Ryan's trial was concluded. *See United States v. Leahy*, 464 F.3d 773, 788 (7th Cir. 2006). *Compare Cleveland v. United States*, 531 U.S. 12 (2000) (holding that video poker licenses issued by a state are not state property that can be stolen by deception). Moreover, the jury heard none of the arguments that the Government now advances—that Ryan defrauded the state of the ADM contract by declaring that a security decal on licenses was needed for public safety, that he stole the IBM contract by failing to disclose that Warner lent Ryan's son-in-law $5,000 and gave his family other benefits, that he stole the South Holland lease by failing to disclose that Klein hosted his vacations in Jamaica, that he stole the Bellwood and Joliet leases because Warner hid his interest in these leases, and that he stole the Viisage contract by failing to disclose a wedding gift his daughter received five days after the contract was awarded. These arguments appear for the first time in the Government's response to Ryan's motion.

The Government thus invites the Court to enter the jury box, comb the record, and itself convict Ryan of money/property fraud. As noted above, courts often have declined this sort of invitation without indicating that their rulings were constitutionally compelled. Nevertheless, as *Sullivan v. Louisiana*, 508 U.S. 275 (1993), reveals, declaring Ryan guilty on a theory not presented to the jury would violate his right to a jury trial.

Declaring an error harmless because the Court has judged a defendant guilty is no different from directing a jury to convict him, an action the Sixth Amendment plainly condemns. *See Sparf v. United States*, 156 U.S. 51, 105-06 (1895). As the Supreme Court observed in *Sullivan*, "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." 508 U.S. at 279. The Court observed that, when a court asks whether an error was harmless,

> the question . . . is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . Harmless-error review looks . . . to the basis on which "the jury *actually rested* its verdict." . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.

Id. (emphasis in original) (citations omitted).

The question posed by *Sullivan* is whether *this* jury clearly convicted Ryan of money/property fraud, and it clearly did not. *This* jury never heard the Government's money/property theories.

B. Even if the Government's Theories Had Been Presented to the Jury, the Evidence of Money/Property Fraud Would Not Render the Instructional Errors Harmless Unless Every Reasonable Juror Would Have Found Every Element of Common Law Fraud Beyond a Reasonable Doubt.

Following the Supreme Court's repudiation of the intangible rights doctrine in *McNally v. United States*, 483 U.S. 350 (1987), prosecutors "wag[ed] a rear-guard action to preserve

convictions secured under prior law." *Toulabi v. United States*, 875 F.2d 122, 123 (7th Cir. 1989). No prosecutor in the post-*McNally* era, however, appears to have advanced the argument the Government makes in this case—that a failure to disclose past favors given to an official by the recipient of a state lease or contract defrauds the state of property.

Although some decisions upheld pre-*McNally* convictions when the scheme or artifice to defraud had the inevitable result of effecting monetary or property losses to the state (Resp. 32), these decisions do not survive *Neder v. United States*, 527 U.S. 1 (1999). *Neder* narrowed the concept of money/property fraud by applying the "well established rule of construction that '"(w)here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'"" 527 U.S. at 21-22 (quoting authorities). After *Neder*, it would not be enough to show simply that a pre-*McNally* (or pre-*Skilling*) scheme of honest services fraud caused a loss of money or property. The Government would be required to show in addition that it had established all the elements of common law fraud. A court could not declare an instructional error harmless unless it concluded that no reasonable juror could have failed to find each of these elements beyond a reasonable doubt.[17]

These elements have been described as follows:

> It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that he made it with knowledge of its falsity; that the complaining party was

[17] The Government relies particularly on *Moore v. United States*, 865 F.2d 149 (7th Cir. 1989). In *Moore*, however, the "jury was never instructed that it was proper to rely solely on the invalid intangible rights theory of criminal liability." *Id.* at 154. Unlike Ryan's conduct in this case, the bid-rigging scheme in *Moore* might have been found to constitute money/property fraud after *Neder*, but the Court did not consider whether the elements of common law fraud had been established. Even under pre-*Neder* standards, *Moore* apparently was a close case. In the District Court, Judge Plunkett granted the movant's Section 2255 motion, and in the Seventh Circuit, Judge Cudahy dissented.

> ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage.

Melville M. Bigelow, *The Law of Fraud* 3 (1877); *see* Leon Green, *Deceit*, 16 Va. L. Rev. 749, 750 (1930); Mem. 16 n.11.

Neder noted that because Congress "prohibit[ed] the 'scheme to defraud,' rather than the completed crime," the Government can prove mail fraud without establishing the last two elements on the list quoted above, reliance and damage. 527 U.S. at 24-25. Presumably, however, the Government still must show a *scheme* to produce reliance and damage, for otherwise it would not show a scheme to commit common law fraud.

C. The Evidence of Money/Property Fraud Was Insufficient to Support Ryan's Conviction.

The Government failed to present sufficient evidence of money/property fraud to support Ryan's conviction on any of the mail fraud counts.

1. Count 2 (the ADM contract)

The Government's discussion of the ADM contract recites only one allegedly false representation. The Government claims that Ryan "asserted—falsely—that the security mark [that only the ADM company could affix to licenses] was necessary for public safety." Resp. 35. Ryan's statement, however, was a statement of opinion, not fact, and "in general, a statement of opinion cannot form the basis of a fraud claim." *Piper v. DPFA, Inc.*, No. 09 CV 1220, 2010 U.S. Dist. LEXIS 72820, at *20 (N.D. Ill. July 20, 2010). Moreover, the Government presented no evidence that Ryan did not believe what he said. The evidence of money/property fraud was therefore insufficient to sustain Count 2.

2. Counts 3 and 8 (the Joliet and Bellwood leases)

The Government's discussion of the Joliet and Bellwood leases mentions no misrepresentation or nondisclosure by Ryan at all. It relies entirely on Warner's failure to disclose his interest in these leases. Resp. 34. Ryan, however, bore no responsibility for Warner's nondisclosures.[18] Moreover, Warner, a private party, had no obligation to reveal his financial interests to the people of Illinois, and the Government offered no proof that his nondisclosures were material.

The Government claims that the state paid too much for the Joliet and Bellwood leases.[19] Even if the jury believed the Government's experts on this point rather than Ryan's, however, the Government offered no proof that Ryan realized that the rental for these properties was too high or that he intended to cause any financial loss to the people of Illinois.[20] *See United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) ("[T]he government . . . must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims. Only a showing of intended harm will satisfy the element of fraudulent intent.") (emphasis in original). The evidence on

[18] The Government implies that Ryan was responsible for Warner's nondisclosures because he and Warner were members of a criminal conspiracy and the nondisclosures furthered the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640 (1946). The only conspiracy in which Ryan and Warner allegedly participated, however, was a conspiracy to conduct the affairs of an enterprise through a pattern of pre-*Skilling* honest services fraud. The offenses on which this conspiracy was predicated are no longer crimes.

[19] In fact, it is far from clear what property the Government believes that Ryan stole—the leases themselves or the money the state allegedly would have saved if it had rented other property. Whatever property Ryan is alleged to have stolen went to Warner and Klein, not to Ryan himself. In *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993), a professional sports agent concealed contracts he had signed with student athletes, thereby enabling the athletes to obtain university scholarships for which NCAA rules made them ineligible. The Seventh Circuit emphasized that the universities "were not out of pocket *to Walters*; he planned to profit by taking a percentage of the players' professional incomes, not of their scholarships." *Id.* at 1224 (emphasis in the original). Declaring the universities' loss "indirect" and "incidental," the Court held that the agent had not committed money/property fraud.

[20] When experts who made full appraisals with the benefit of hindsight disagreed about the value of these properties, a reasonable juror could not have found beyond a reasonable doubt that Ryan believed that the rentals were inflated and intended to cause financial harm.

Counts 3 and 8 was insufficient because (1) Ryan bore no responsibility for Warner's failure to disclose his interests; (2) Warner had no duty to disclose these interests; (3) Warner's nondisclosures were immaterial; and (4) no reasonable juror could have found beyond a reasonable doubt that Ryan intended to cause financial harm.

3. Counts 4 and 5 (the IBM contract)

The only misrepresentations or nondisclosures mentioned in the Government's discussion of the IBM contract are Ryan's failure to report the benefits that Warner gave him and his family—benefits such as Warner's waiver of an insurance fee, his loan to Ryan's brother's business, and his investment in Ryan's son's business. Resp. 36.

The Government's allegations of money/property fraud would make no difference if they authorized only the conviction of people who had taken *quid pro quo* bribes or kickbacks; these people would be guilty of honest services fraud under *Skilling* anyway. On the assumption that the benefits provided by Warner were gifts and not bribes, could Ryan's failure to disclose them provide a basis for convicting him of money/property fraud? If so, could an official be convicted of money/property fraud if he approved a contract without revealing that a beneficiary of this contract once took his aunt to dinner? How large a gift would it take—an all-day golf outing, a figurine, or a check to cover the cost of the band at the aunt's wedding? Fraud has been a tort for hundreds of years and mail fraud a crime for 138 of those years. *See* Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. The Government, however, cites no precedent indicating that this sort of nondisclosure has ever been held fraudulent or, indeed, that anyone has ever before claimed that it was.

4. Count 6 (the South Holland lease)

The Government maintains that Ryan defrauded the state in connection with the South Holland lease by concealing the hospitality Harry Klein provided in Jamaica. Resp. 33-34.

Again, however, the award of a contract or lease to the provider of a gift should not be sufficient in itself to establish a fraudulent deprivation of property.

5. Count 7 (the Viisage contract)

The Government's discussion of the Viisage contract points to two omissions alleged to be fraudulent. Resp. 34-35. First, Warner failed to register as Viisage's lobbyist. For the reasons explained above, however, Ryan cannot be held responsible for Warner's omissions. The Government, moreover, offered no proof that knowledge of Warner's lobbying role was material.

The second allegedly fraudulent omission was Ryan's failure to report the wedding gift Warner gave his daughter five days after the Secretary of State's office awarded the Viisage contract. One cannot, however, steal property through a misrepresentation that occurs after the property has allegedly been stolen.

D. The Evidence of Money/Property Fraud Did Not Render the Instructional Errors Harmless.

Even if the evidence of money/property fraud could be found sufficient to justify conviction on one or more of the counts discussed above, it did not render the instructional errors in this case harmless. A court could not conclude that every reasonable juror would have resolved every question of intention, reliance, causation, and materiality noted above in the Government's favor.

The Government's money/property argument, like its honest services argument, depends on throwing all of the evidence into one cauldron and churning. The jury had no opportunity to consider the money/property charges that the Government now advances, and reviewing the issues presented by these imaginative charges underscores why it would be improper for the Court to assume the jury's role. In any event, the evidence of money/property fraud surely was not so overwhelming that every reasonable juror would have voted to convict.

IV. THE JURY HEARD HIGHLY PREJUDICIAL EVIDENCE RENDERED INADMISSIBLE BY *SKILLING.*

Much of the evidence heard by the jury had nothing to do with bribes or kickbacks and would not be heard in a post-*Skilling* mail fraud trial. Mem. 15-16, 28. The Government maintains, however, that "all of the evidence was admissible even without a mail fraud theory based on undisclosed conflicts of interest . . . ." Resp. 42.

The Government declares (inexplicably) that evidence of Ryan's disregard of his announced personal policy against accepting gifts worth more than $50 was admissible on the false statements charge, (inexplicably) that evidence of his discharge and reassignment of employees of the Secretary of State's Inspector General's office was admissible on the tax charges, and (correctly) that evidence of the consulting fee he received from the Phil Gramm presidential campaign was admissible on the tax charges. *Id.* If this prejudicial evidence had been held admissible only by virtue of the tax and false statements charges, however, Ryan could have sought a severance of these charges, and the Court might have granted the severance to prevent prejudice. *See* Fed. R. Crim. P. 14(a) ("If the joinder of offenses . . . appears to prejudice a defendant . . . the court may order separate trials of counts . . . .").

Although Ryan might not have been entitled to a severance as a matter of right, he would have been entitled to an instruction that the evidence of non-bribery misconduct should be considered only with respect to the tax and false statement charges. *See* Fed. R. Evid. 105 ("When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). The Government's argument depends on the assumption that jurors would have disregarded this instruction. Moreover, Ryan would have been entitled to block the Government's reliance on the non-bribery evidence as proof of mail fraud during its

closing argument. *See*, *e.g.*, R. 22844 (violation of gift policy); R. 23744 (Gramm consulting fee); R. 22866, 22891, 23697 (reassignment of Inspector General's office employees).

The Government contends that Ryan's delegation of authority to a friend to award low-digit license plates and his disclosure to another friend of the location where a state prison would be built tended to show bribery and that his use of state resources for political purposes tended to establish money/property fraud. Resp. 42-43. However, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b).

The Government declares that any error in the admission of evidence was harmless because "a reasonable juror's view of the case would not have changed had this evidence been excluded." Resp. 43. It cites *United States v. Owens*, 424 F.3d 649, 656 (7th Cir. 2005). *Owens*, however, reversed a conviction because propensity evidence had been admitted, and it declared: "The test for harmless error is whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded." *Id.* at 656 (quoting *United States v. Eskridge*, 164 F.3d 1042, 1044 (7th Cir. 1998)).

CONCLUSION

Because the evidence was insufficient to support Ryan's mail fraud and RICO convictions under the standards established by *Skilling*, these convictions must be set aside. Moreover, the Court's instructions embodied a concept of honest services fraud that the Supreme Court has now repudiated, and the error was not harmless.

DATED: November 4, 2010

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Movant George H. Ryan, Sr., hereby certifies that on November 4, 2010, he caused the foregoing Reply in Support of his Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 to be electronically filed with the Clerk of the Court for the Northern District of Illinois using the ECF System, which will send notification to counsel of record.

DATED: November 4, 2010

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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 5512	**DATE**	11/22/2010
CASE TITLE	George H. Ryan, Sr. Vs. United States of America		

DOCKET ENTRY TEXT

Oral argument on motion held on 11/22/2010. Case taken under advisement. Ruling to be issued shortly.

Docketing to mail notices.

02:00

Courtroom Deputy Initials:	SRB

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Respondent, v. GEORGE H. RYAN, SR., No. 16627-424 Movant.	)	Case No. 10-CV-05512 Judge Rebecca R. Pallmeyer

RYAN'S MOTION FOR LEAVE TO SUPPLEMENT HIS MOTION TO SET BAIL

George H. Ryan, Sr., in the custody of the Federal Bureau of Prisons pursuant to a judgment of this Court, by his counsel, respectfully presents his Motion for Leave to Supplement his Motion to Set Bail. In support whereof, he states as follows:

1. On November 22, 2010, counsel for Mr. Ryan appeared before this Court and presented Mr. Ryan's arguments in support of his Motion to Vacate Sentence Pursuant to 28 U.S.C. Section 2255 and for bond to be set.

2. At that time, counsel for Mr. Ryan presented evidence in the form of a letter from Dr. Hermes as well as argument regarding the health of Mrs. Lura Lynn Ryan, George Ryan's wife of nearly 55 years. The Court was informed at that time that Mrs. Ryan had pulmonary fibrosis as well as anterior communicating artery cerebral aneurysm, hypertension, high cholesterol levels, arterial sclerosis, low thyroid function, chronic lung disease, mitral valve prolapse severe osteoporosis and lumbar stenosis. Treating her was difficult, and her prognosis was poor. At that time, her physician, Dr. Hermes, opined that Mrs. Ryan had only one to three years to live.

3. Unfortunately, there is worse news now. Mrs. Ryan was hospitalized at Riverside Hospital this week due to a worsening of her symptoms. X rays and a CT scan revealed a large aggressive mass of seven centimeters in her lung – a lung that had no mass the previous year when she had an X-ray. In addition, multiple lesions appeared in her liver, and cancer was apparent in her spine as well. Because Mrs. Ryan is on blood thinners, a biopsy cannot be done until Monday, but her oncologist, Dr. Sipahi, is virtually certain that she has a very aggressive cancer and that there is no cure. *See* Sipahi Letter (attached as Exhibit A).

4. Given Mrs. Ryan's frail condition, Dr. Sipahi opines that she has between three and six months to live at best. Moreover, she may well be unable to handle any kind of chemotherapy, in which case palliative care is all that can be done. *Id.*

5. Because of the urgency of this situation, and for the other reasons presented to this court in writing and at oral argument, Mr. Ryan asks for leave to supplement the record with this information. Counsel for the Government has no objection to this request.

For all of these reasons, and those in his original motion and accompanying Memorandum of Law, Mr. Ryan prays that this Court will grant him a reasonable bail and act expeditiously, due to this grave turn of events.

DATED: December 15, 2010

Respectfully submitted,

/s/ Andrea D. Lyon
Attorney for Movant

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Movant George H. Ryan, Sr., hereby certifies that on December 15, 2010, she caused the foregoing Ryan's Motion for Leave to Supplement his Motion to Set Bail to be electronically filed with the Clerk of the Court for the Northern District of Illinois using the ECF System, which will send notification to counsel of record.

DATED: December 15, 2010

Respectfully submitted,

/s/ Andrea D. Lyon
Attorney for Movant

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EXHIBIT A

RIVERSIDE
Medical Center

Patient Name:	RYAN, LURA LYNN		MRN: 0202976
DOB:	07/05/1934	Sex: F	Account #:
Location:	-		Admit Date:
Attending Phys:	STEPHEN D HERMES, MD		Discharge Date:

LETTER

December 15, 2010

To Whom It May Concern:

RE: Lura Lynn Ryan

I saw Mrs. Lura Lynn Ryan in consultation on 12/14/2010 for evaluation of newly diagnosed left lower lobe lung mass. She had been admitted with worsening respiratory symptoms. Chest x-ray revealed increased opacity at the left lung base in the background of previously established extensive pulmonary fibrosis. She had spiral CT of the chest on 12/13/2010 which showed a mass in the left lower lung field that measured up to 7 cm in diameter. It was somewhat peripherally located adjacent to her rib cage. There was rather extensive superimposed chronic interstitial fibrosis. There was evidence of enlarged lymph nodes in the mediastinum compatible with metastatic disease. Incidentally, there were noted lesions in the liver that were felt to be compatible with metastatic disease. She had a CT scan of the chest on 10/02/2009 which did not reveal this rather large mass in the left lower lung field. She therefore had CT scan of the abdomen and pelvis on 12/14/2010 which once again confirmed the presence of a mass in the left lower lung field which was measured to be 5.1 cm. There was once again noted extensive interstitial pulmonary fibrosis. There were multiple hypodense lesions in the right lobe of the liver consistent with metastatic disease with the largest one measuring 3.7 cm. Bone scan performed the same day revealed the presence of a 1.6 cm lesion in the vertebral body of D3 suspicious for lytic metastatic disease. There was also an area of abnormal uptake in the left eighth rib corresponding to the CT scan finding of a rib fracture which may be pathologic in nature. At the time of this dictation, she has been scheduled to have MRI of the brain and MRI survey of the spine to complete the staging workup.

The overall clinical presentation is highly compatible with metastatic primary and highly aggressive lung cancer. The fact that this rather large mass was not apparent on the previous CT scan of October of last year, and given the rather extensive widespread metastatic disease documented yesterday, we are dealing with a highly aggressive malignancy originating from the mass in the left

Note: This report is considered preliminary until signed by the responsible practitioner.

lower lung field. ~~She had~~ She will have biopsy of the liver next week, a procedure which has to be delayed because she is on blood thinners at this time. Regardless of the biopsy findings of the liver with regards to the type of lung cancer, she has terminal lung cancer. The usual overall survival without any active systemic therapy is in the order of three to six months. Given the frail condition of this elderly female with underlying comorbidities, I doubt very much that she will be able to tolerate systemic chemotherapy with any significant benefit. The benefit from systemic chemotherapy in lung cancer is usually confined to those patients who have excellent performance status with minimal if any underlying comorbidities which unfortunately is not the case in this lady.

If you have any further questions, please feel free to contact me at 815-933-9660.

Sincerely yours,

Mehmet Sipahi, M.D.
Medical Director of Rush Riverside Cancer Institute.
375 N. Wall, Suite P320
Kankakee, Illinois 60901

MEHMET SIPAHI, MD

DD: 12/15/2010 10:36 - Job#: 866908
DT: 12/15/2010 10:50 - cj
RD: 12/15/2010 11:13 - cj

cc: Mehmet Sipahi, MD

Note: This report is considered preliminary until signed by the responsible practitioner.

Patient Name:RYAN, LURA LYNN MRN:0202976
DOB: 07/05/1934 Sex: F Account #:004598322
Location: 3RD - 302 Admit Date:12/13/2010
Attending Phys: STEPHEN D HERMES, MD Discharge Date:

CONSULTATION

TODAY'S DATE:
12/14/10

REQUESTING PHYSICIAN:
Dr. Stephen Hermes

REASON FOR CONSULTATION:
Opinion regarding management of newly diagnosed left lower lobe mass with possible intrahepatic metastatic disease from an underlying lung neoplasm.

HISTORY OF PRESENT ILLNESS:
This is a 76-year-old Caucasian female with well established diagnosis of pulmonary fibrosis who had presented with worsening respiratory symptoms. When her symptoms did not resolve with conservative patient measures, she was subsequently admitted for further management.

PAST MEDICAL HISTORY:
She has pulmonary fibrosis for which she takes supplemental oxygen. She has hypertension. She has cerebral aneurysm, osteoporosis, primary hypothyroidism, hyperlipidemia, history of urethral stenosis. She had left lower lobe pneumonia several years ago. She has musculoskeletal deconditioning. She is gravida 6 para 6.

Medications were noted, Atorvastatin, calcium carbonate, cholecalciferol, Plavix 75 mg daily, levothyroxine, losartan, methylprednisolone, Avelox intravenously, Vicodin, levalbuterol nebulizer treatments.

ALLERGIES:
Penicillin, sulfa.

SOCIAL HISTORY:
She apparently began smoking at a very young age and did so up until her early 60s on an average of about one pack per day. She states she has not smoked during the past several years. She denies any alcohol abuse. She is married.

FAMILY HISTORY:
Not pertinent.

REVIEW OF SYSTEMS:
She denies any headache, nausea or emesis. She denies any gross hemoptysis. She does have dyspnea on exertion. She has had pain in the right lower back and has had recently pain on the left lower back. The pain has on the right has radiated down her right buttocks into her right knee.

PHYSICAL EXAMINATION:
76-year-old Caucasian female, somewhat frail-appearing, pale complexion.

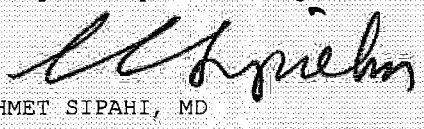
EENT sclerae anicteric. There is no obvious cervical, supraclavicular, r axillary lymphadenopathy. Heart tones are distant. There is ardiomegaly. Lungs reveal decreased breath sounds. Breasts do not eveal any obvious large masses. Abdomen is soft. Spleen tip is not alpable below the left costal margin. There is suggestion of some epatomegaly with deep inspiration but it is not a consistent finding. It ay be artifactual due to her lung disease. There is no ascites. xtremities no edema.

IAGNOSTIC DATA:
BC shows WBC of 7090 with unremarkable differential. Hemoglobin is 11.5, ematocrit 36.6, platelet count is 221,000. Chemistry profile shows levation of SGOT to 62 but was otherwise unremarkable. Electrolytes are ormal. GFR is 51 mL/minute. TSH is mildly increased to 5.340. In the ast pulmonary function testing had revealed severe decrease in diffusion apacity. There was good response to bronchodilator therapy. Chest x-ray f 12/07/10, showed increased opacity at the left lung base in the ackground of pulmonary fibrosis. Spiral CT of the chest of 12/13/10, howed mass in the left lower lung field measuring up to 7 cm in diameter. t was somewhat peripherally located. There was noted rather extensive uperimposed chronic interstitial fibrosis. There was suggestion of ossible metastatic disease in the liver. There were also enlarged lymph odes in the mediastinum. This left lower lobe mass has developed since he previous CT of the chest dating back to 10/02/2009. She had x-ray of he thoracic spine which revealed a mild kyphosis with mild degenerative hanges. There was evidence of pulmonary fibrosis as before. X-ray of he lumbar spine showed degenerative disk and facet disease with ubluxation from L3 to L5.

SSESSMENT:
his was a 76-year-old Caucasian female who until proven otherwise has rimary lung neoplasm in the left lower lung with possible invasion of the ediastinum and with probable invasion of the liver and possible invasion o the osseous structures in the pelvis. She should have additional maging and if the diagnosis of metastatic disease in the liver is onfirmed, I would prefer that she have CT-guided liver biopsy as apposed o lung biopsy even though the lesion is peripheral for fear of neumothorax which could further compromise this patient's pulmonary tatus.

LAN:
. CT scan of the abdomen and pelvis with IV contrast will be obtained. e will extend the pelvic exam to include bone images of the pelvis.
. Bone scan has been ordered.
. Plavix will be discontinued in anticipation of the performance of iopsy.

hank you very much for your trust. We will follow the patient as needed.



MEHMET SIPAHI, MD

D: 12/14/2010 10:55 - Job#: 866607
T: 12/14/2010 13:15 - kms
ote: This report is considered preliminary until signed by the esponsible practitioner.

CONSULTATION Page 1 of 1
COPY

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 5512	**DATE**	12/20/2010
CASE TITLE	USA vs. George H. Ryan, Sr.		

DOCKET ENTRY TEXT

Ryan's motion for leave to supplement his motion to set bail [30] granted.

Notices mailed by Judicial staff.

Courtroom Deputy Initials:	ETV

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 5512	**DATE**	12/21/2010
CASE TITLE	George H. Ryan, Sr vs. United States of America		

DOCKET ENTRY TEXT

Enter Memorandum Opinion and Order. Ryan's motion to vacate, set aside, or correct his sentence [1] is denied. Ryan's motion to set bail [8] is also denied. (For further detail see separate order.)

■ [For further detail see separate order(s).]

Notices mailed by Judicial staff.
*Mail AO 450 form.

	Courtroom Deputy Initials:	ETV

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE H. RYAN, SR.	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 10 C 5512**
	)	
UNITED STATES OF AMERICA,	)	**Judge Rebecca R. Pallmeyer**
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

In April 2006, George H. Ryan, Sr., once Governor of Illinois, was convicted of racketeering, mail fraud, making false statements to the FBI, and tax violations. This court sentenced him to a prison term of 78 months, a sentence he is now serving. Ryan's conviction was affirmed by a divided Seventh Circuit and, after that court denied rehearing *en banc*, the Supreme Court denied *certiorari*. Earlier this year, however, the Supreme Court decided *Skilling v. United States*, 130 S. Ct. 2896 (2010), which imposed limits on the scope of the "honest services" mail fraud theory under which Ryan was convicted. In the wake of *Skilling*, Mr. Ryan has filed a petition pursuant to 28 U.S.C. § 2255. He urges that his mail fraud and RICO convictions must be overturned, and has asked the court to vacate, set aside, or correct his sentence to reflect the interpretation of the mail fraud statute articulated in *Skilling*. Ryan also asks the court to release him on bail pending the ultimate resolution of this motion. For the reasons described herein, the court denies Ryan's motion to vacate, set aside, or correct his sentence, and denies Ryan's motion to set bail.

BACKGROUND

On April 17, 2006, following a six-month trial, a jury convicted George Ryan of conspiring to use the resources of the State of Illinois for his personal and financial benefit in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d); devising a scheme to defraud the people of the State of Illinois and the State of Illinois of money, property, and the right to his honest services, in violation of the federal mail fraud statute, 18 U.S.C. §§ 1341,

1346; making false statements to the FBI, 18 U.S.C. § 1001(a)(2); obstructing the Internal Revenue Service, 26 U.S.C. § 7212(a); and filing materially false tax returns, 26 U.S.C. § 7206(1). *See United States v. Warner*, No. 02-cr-506, 2006 WL 2583722, at *1 (N.D. Ill. Sept. 7, 2006). The court set aside that verdict with respect to two mail fraud counts, *id.* at *12, but otherwise upheld the jury's determinations. Ryan's co-Defendant, Lawrence Warner, was convicted on related counts. On September 11, 2006, the court sentenced Ryan to 78 months on the racketeering count, 60 months on the mail fraud and false statement counts, and 36 months on the tax fraud counts, all to run concurrently. (Order [888] at 2.)[1] The court also sentenced Ryan to one year of supervised release. (*Id.*) The Seventh Circuit upheld Ryan's conviction on appeal. *United States v. Warner*, 507 F.3d 508 (7th Cir. 2007), *cert. denied*, 553 U.S. 1064 (2008). Ryan began serving his sentence in November 2007, and has served approximately 36 months. (Order [984].) Because the facts of this case have been discussed at length in the court's previous opinions and in the Seventh Circuit,[2] the court will not repeat them here.

In June 2010, the Supreme Court decided *Skilling v. United States*, 130 S. Ct. 2896 (2010). Vacating the conviction of Jeffrey Skilling on charges that grew out of the Enron collapse, the Supreme Court held there that "honest services" mail fraud encompasses only "paradigmatic cases of bribes and kickbacks." 130 S. Ct. at 2933. Ryan brought this petition on August 31, 2010, pursuant to 28 U.S.C. § 2255, which allows a federal prisoner to "move the court which imposed

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[1] All docket entries and trial references with the exception of the transcript of the oral argument on this motion and the docket entries on the instant motions refer to Ryan's original case, No. 02-cr-506.

[2] This case has generated numerous written opinions. *See United States v. Warner*, 292 F. Supp. 2d 1051 (N.D. Ill. 2003); *United States v. Warner*, No. 02-cr-506, 2004 WL 144125 (N.D. Ill. Jan. 16, 2004); *United States v. Warner*, No. 02-cr-506, 2004 WL 1794476 (N.D. Ill. Aug. 11, 2004); *United States v. Warner*, 396 F. Supp. 2d 924 (N.D. Ill. 2005); *United States v. Warner*, No. 02-cr-506, 2005 WL 2367769 (N.D. Ill. Sept. 23, 2005); *United States v. Warner*, No. 02-cr-506, 2005 WL 2756222 (N.D. Ill. Oct. 21, 2005); *United States v. Warner*, No. 02-cr-506, 2006 WL 2583722 (N.D. Ill. Sept. 7, 2006), *aff'd*, 498 F.3d 666 (7th Cir. 2007), *reh'g en banc denied*, 506 F.3d 517 (7th Cir. 2007), *motion to stay denied*, 507 F.3d 508 (7th Cir. 2007), *cert. denied*, 553 U.S. 1064 (2008); *United States v. Warner*, No. 02-cr-506, 2006 WL 2931903 (N.D. Ill. Oct. 13, 2006).

the sentence to vacate, set aside or correct the sentence" if his sentence "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). A § 2255 petition must be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). The Government agrees that the decision in *Skilling* re-sets the clock for filing of Ryan's post-conviction petition "because it 'narrow[s] the scope of a criminal statute by interpreting its terms,' and therefore announces a new substantive rule of criminal law." (Response Br. at 11 n.5, quoting *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004)).

DISCUSSION

Ryan advances two grounds in support for his motion to vacate or set aside his mail fraud and RICO convictions. First, he urges that *Skilling* undermines the jury instructions: "Because the court's jury instructions were erroneous under *Skilling* and the error was not harmless, Ryan's conviction and Sentence are unlawful." (Mot. to Vacate ¶ 14.) Second, Ryan urges that under the standard established in *Skilling*, the evidence is "insufficient to support Ryan's mail fraud and RICO convictions . . . ." (*Id.*) Because his conviction should be vacated, Ryan urges, he should be released immediately and admitted to bail. (Mot. to Set Bail ¶ 2.)

Skilling is unquestionably relevant here and warrants examination of Ryan's conviction. That said, it is important to note that Skilling's appeal to the Supreme Court presented substantially different circumstances from those in Ryan's case. Skilling had been charged with "conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price." *Skilling*, 130 S. Ct. at 2934. Skilling was prosecuted for these acts, characterized as depriving his private employer and its shareholders of the intangible right to his honest services, and the Supreme Court "acknowledge[d] that Skilling's vagueness challenge has force." *Id.* at 2929. George Ryan, on the other hand, held statewide elected office, and as more fully described below, the conduct for which he was convicted—steering contracts, leases, and

other governmental benefits in exchange for private gain—was well-recognized before his conviction as conduct that falls into the "solid core" of honest services fraud. Such conduct was identified by the Court in *Skilling* as the proper target of § 1346. *Id.* at 2930-31.

In response to Skilling's argument that the statute is void for vagueness, the Supreme Court acknowledged that due process requires any "'penal statute [to] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* at 2927-28 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Ryan's current challenge does not rest on vagueness grounds, and the court believes that, in the language of *Skilling*, Ryan clearly understood "what conduct was prohibited" and could not have been surprised that he was subject to prosecution. Ryan's efforts to conceal his conduct from public scrutiny themselves demonstrate he knew it was improper. Indeed, long before George Ryan and his associates wrote this chapter in Illinois's distressing history of public corruption, one of Ryan's predecessors as Governor, Otto Kerner, was prosecuted under this same theory by an earlier United States Attorney.[3] On direct appeal in this case, the Seventh Circuit acknowledged that the statute could be challenged if Defendants Ryan and Warner "could not have known that the conduct underlying their convictions could be considered 'depriv[ing] another of the intangible right of honest services.'" *United States v. Warner*, 498 F.3d 666, 697 (7th Cir. 2007) (quoting 18 U.S.C. § 1346). As applied in this case, the Court of Appeals concluded, the statute is not unconstitutionally vague—a conclusion that drew no comment from the dissenting judge.

Four years ago, in writing about Ryan's prosecution, Professor Alschuler (who was not then one of Ryan's lawyers) asserted that "the mail fraud and RICO statutes unfairly stack the deck" in large part because the Government was allowed to present "every allegation of criminal and

[3] Professor Alschuler, now one of Ryan's attorneys, characterized the prosecution of Otto Kerner in 1973 as one of the trailblazing honest services prosecutions. Albert W. Alschuler, *The Mail Fraud & RICO Racket: Thoughts on the Trial of George Ryan*, 9 GREEN BAG 2D 113, 114 (2006).

non-criminal misconduct by Ryan and Warner that prosecutors have collected," and if "some of the dirt they have thrown at the wall has stuck, [the jury] is likely to find the defendants guilty of the principal charges against them." 9 GREEN BAG 2D at 113. At oral argument on the motions before this court, Alschuler argued again that "[a]ll of this evidence went into one churning cauldron." (Oral Arg. at 5.) *Skilling*, however, did not invalidate the honest services mail fraud statute, nor did it invalidate RICO. *Skilling* limited prosecutions under these statutes to bribery and kickback schemes—the very theory of prosecution under which Ryan was convicted. *Skilling* emphasized that when Congress reinstated the honest services mail fraud statute after it was invalidated by *McNally v. United States*, 483 U.S. 350 (1987), the focus was on "core" or "paradigmatic" cases involving kickback or bribery schemes. The *Skilling* Court made several references to *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941), as an example of the paradigmatic case that would survive its ruling. *Skilling*, 130 S. Ct. at 2926, 2931. Notably, our own Court of Appeals[4] relied on *Shushan* when it upheld Otto Kerner's conviction, quoting this language:

> No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud. . . . A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public.

United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir. 1974) (quoting *Shushan v. United States*, 117 F.2d 115 (5th Cir. 1941)). The Seventh Circuit then observed that "this is precisely what occurred here. The citizens of Illinois were defrauded of Kerner's honest and faithful services as governor." 493 F.2d at 1151. Ryan's prosecution, like Kerner's before it, targeted conduct that remains at the core of honest services fraud.

While *Skilling* did not comment directly on Ryan's case, it came close. In a particularly relevant section, the Court noted that "the honest-services doctrine had its genesis in prosecutions

[4] While the case was decided by a Seventh Circuit panel, all of the judges were sitting by designation from other circuits because Kerner served on the Seventh Circuit after leaving the Governor's office.

involving bribery allegations." 130 S. Ct. at 2931 (citations omitted). That section cites *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008), for its language that these prosecutions constitute "most [of the] honest services cases. . . ." *Sorich* itself, in the section cited in *Skilling* states:

> Broadly speaking, honest services fraud cases come in two types. In the first, an employer is defrauded of its employee's honest services by the employee or another. . . . In the second and more common type of case, the citizenry is defrauded of its right to the honest services of a public servant, again, by that servant or by someone else. For instance, in *United States v. Warner,* 498 F.3d 666 (7th Cir. 2007), the Illinois Secretary of State [Ryan] channeled state contracts and leases to a friend in return for paid vacations. In both examples above, and in most honest services cases, the defendant violates a fiduciary duty in return for cash-kickbacks, bribes, or other payments.

523 F.3d at 707. The Seventh Circuit and the Supreme Court have, thus, acknowledged that this case presents the paradigmatic type of case undisturbed by *Skilling*. This does not end our inquiry, of course, because neither court grappled with the details presented here. It does, however, suggest that in many cases,[5] and in Ryan's case, *Skilling* was not the sea change that Ryan urges.

Ryan's case warrants more examination because, rather than relying solely on a bribery theory, the Government chose also to present Ryan's mail fraud and RICO charges under a conflict-of-interest theory—the very same theory invalidated in *Skilling*. The result of this course of action is addressed below; for now, what matters is whether, in returning its verdict, the jury must have found those elements that would support a conviction under the still-valid honest services bribery theory. Further, the court must determine whether the instructions it gave the jury on the conflict-of-interest and related theories could have violated Ryan's substantial rights. As Ryan's attorneys argued repeatedly at trial, the conduct for which he and Warner were convicted does not

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[5] The Seventh Circuit has already upheld two convictions challenged based on *Skilling* with little discussion. *See United States v. Cantrell*, 617 F.3d 919, 921 (7th Cir. 2010) ("This was clearly a kickback scheme, so § 1346–even as pared down by *Skilling*–applies to Cantrell."); *United States v. Lupton*, 620 F.3d 790, 803 n.3 (7th Cir. 2010) ("Lupton's scheme constitutes not a mere failure to disclose a conflict of interest . . . but rather the 'paradigmatic kickback fact pattern' . . . that remains within the ambit of § 1346.") (citation and quotation omitted); *id.* at 805 ("Lupton's conduct . . . placed him squarely within even the recently narrowed parameters of § 1346.").

fall into a plain-vanilla bribery fact pattern in which a suitcase of cash is exchanged for an official action. But *Skilling* does not say that it must. The method by which Ryan's co-schemers compensated him for official action requires a searching examination after *Skilling*, but as explained here, the conclusion that his conduct violates the law survives *Skilling*.

This court's analysis begins by considering the jury instructions to determine whether they are incorrect, based on the holding in *Skilling.* If so, the court next examines whether the error was nevertheless harmless. The court proceeds to address the Government's contention that, even if the honest services charge in this case exceeds what is permissible after *Skilling*, the jury would nevertheless necessarily have convicted Ryan of pecuniary fraud. The court briefly examines Ryan's challenge to the sufficiency of the evidence; an in-depth examination is unnecessary because the harmless error standard requires more than the sufficiency-of-the-evidence test. Finally, the court determines whether evidence introduced at trial would be barred in a post-*Skilling* honest services prosecution, and whether the introduction of that evidence prejudiced Ryan and requires that his conviction be vacated.

I. Harmless Error Review of Honest Services Mail Fraud Charges

As noted, Ryan challenges the instructions given to the jury in this case. He argues that they improperly presented a theory of honest services fraud that is no longer valid after *Skilling*. He contends, further, that error in the instructions was not harmless and that the court must accordingly vacate Ryan's conviction on the mail fraud and RICO counts.

A. Standard of Review

Error in jury instructions does not automatically require that a conviction be vacated. As the *Skilling* Court explained, where a jury returns a general verdict that may rest on a legally invalid theory, the conviction may be upheld under a harmless-error analysis. 130 S. Ct. at 2934. Harmless error review means that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." FED. R. CRIM. P. 52(a). *Skilling* cited *Hedgpeth v. Pulido*,

129 S. Ct. 530, 531 (2008), where the Court instructed that "a reviewing court finding such error should ask whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Hedgpeth*, 555 U.S. 57, 129 S. Ct. 530, 531 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)), cited in *Skilling*, 130 S. Ct. at 2934 n.46. That standard, the Court made clear, applies on direct review of a conviction as well as on collateral review. *Id.* at 2834 n.46.

Ryan draws a further distinction; he argues that the *Brecht* harmless error standard does not apply because this case does not involve collateral review of a state-court proceeding, but rather post-conviction review of a federal proceeding. He contends that "[t]he federalism concerns that prompted *Brecht* are absent in Section 2255 proceedings brought by federal prisoners." (Pet.'s Br. at 26.) Ryan argues for application of the standard articulated by the Seventh Circuit in *Lanier v. United States*, 220 F.3d 833, 839 (7th Cir. 2000): that the conviction should be overturned unless it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 839. The Government argues that *Lanier* "applied the heightened standard without analysis" and notes that no Circuit has applied a less deferential standard for Section 2255 motions after specifically considering the standard of review issue. (Response Br. at 13-14 n. 7.) This court notes that *Lanier* cited *Neder v. United States*, 527 U.S. 1 (1999), where the Court explained that when an element of the offense was omitted from the jury instructions, the reviewing court "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element," and if the answer is "no," the error is harmless. 527 U.S. at 19.

In two recent cases, the Seventh Circuit has used a harmless error test to uphold convictions challenged as inconsistent with *Skilling*. *Black v. United States*, 130 S. Ct. 2963 (2010), a companion case to *Skilling*, was remanded for a determination of whether the convictions of Conrad Black and his co-defendants for honest-services fraud could be upheld under an alternative theory of "money-property fraud." On remand, the Seventh Circuit noted that a bribery or kickback

scheme "was not proved here," but observed that the defendants' convictions could nevertheless be upheld "if it is not open to reasonable doubt that a reasonable jury would have convicted [Black] of pecuniary fraud . . . ." *United States v. Black*, 625 F.3d 386, 388 (7th Cir. 2010), *reh'g en banc denied*, No. 08 CR 727 [117] (7th Cir. Dec. 17, 2010). In *United States v. Cantrell*, 617 F.3d 919 (7th Cir. 2010), the Seventh Circuit upheld an honest services conviction on direct appeal without articulating a standard of review because the charged conduct "was clearly a kickback scheme," so the honest services statute applied, even as narrowed by *Skilling*. *Id.* at 921.

Black is directly on point. This court reviews the conviction under a harmless error standard and asks whether it is beyond a reasonable doubt that a reasonable jury[6] would have convicted Ryan of a legally valid theory on which it was properly instructed.

B. *Skilling* Standard

Before addressing the propriety of the instructions in this case, the court pauses to review the theory of honest services fraud post-*Skilling*. The defendant in *Skilling* was charged with "conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price." 130 S. Ct. at 2934. As a result, the Government alleged, Skilling profited from the sale of Enron stock to the tune of $89 million. No allegation of any bribery or side payments was made, however, and the Court concluded that Skilling's conduct could not constitute honest services fraud. Because the indictment alleged not only honest services fraud, but also pecuniary fraud and securities fraud, the Court remanded the case for a determination of

[6] In addition to inquiring as to what a "reasonable jury" would have found, the court also takes into account the actual findings of the jury in this case to the extent they demonstrate what the jury must have believed. *See Black*, 625 F.3d at 393 (noting that had the jury believed failure to disclose fees constituted honest-services fraud it would have convicted on all counts; since it did not, it must have believed that the conduct at issue constituted pecuniary fraud or it would not have convicted); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("Harmless-error review looks, we have said, to the basis on which 'the jury *actually rested* its verdict.' . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.") (citation omitted; emphasis in original).

whether the verdict would survive harmless error analysis. *Id.* at n.46.

Skilling asked the Supreme Court to strike down § 1346 on vagueness grounds, but the Court chose instead to limit its scope. "Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague." *Id.* at 2933. The Court did not offer a specific definition of the types of bribery and kickback schemes prohibited by the honest services statute, but instead noted that the "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing–and defining–similar crimes." *Id.* The court pointed to several federal statutes defining bribery and kickback schemes (18 U.S.C. §§ 201(b), 666(a)(2); and 41 U.S.C. § 52(2)) and identified several cases that define bribery in the context of honest services fraud. This court relies on these sources for a definition of honest services bribery that survives post-*Skilling*.

First, one of the cited statutes, 18 U.S.C. § 201(b), explains in part that the elements of bribery are satisfied when an individual

> directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent . . . to influence any official act; or . . . to induce such public official . . . to do or omit to do any act in violation of the lawful duty of such official . . . .

The elements are also satisfied when a public official

> directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act . . . [or] being induced to do or omit to do any act in violation of the official duty of such official or person . . . .

18 U.S.C. § 201(b)(1)(A)-(C), (2)(A)-(C). Likewise, 18 U.S.C. § 666, explains that bribery occurs whenever an individual

> corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent . . . of a State . . . in connection with any business, transaction, or series of transactions of such organization, government, or agency . . . .

18 U.S.C. § 666(a)(2).

As the case law cited by the Supreme Court reflects, a showing of bribery need not include direct *quid pro quo* exchange; two of the three cases cited by the Court as examples of honest services bribery rest on a "stream of benefits" bribery theory. In a Third Circuit decision upholding a conviction for public corruption, the court approved jury instructions that explained, "where there is a stream of benefits given by a person to favor a public official, . . . it need not be shown that any specific benefit was given in exchange for a specific official act. If you find beyond a reasonable doubt that a person gave an official a stream of benefits in implicit exchange for one or more official acts, you may conclude that a bribery has occurred." *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2007), cited in *Skilling*, 130 S. Ct. at 2934. The *Kemp* court re-stated this theory to explain that, "[w]hile the form and number of gifts may vary, the gifts still constitute a bribe as long as the essential intent–a specific intent to give or receive something of value in exchange for an official act–exists." *Kemp*, 500 F.3d at 282 (emphasis omitted).

Similarly, in *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009), cited in *Skilling*, 130 S. Ct. at 2934, the Fifth Circuit upheld an honest services bribery conviction under a "stream of benefits" theory. The jury charge required that jurors find "a corrupt agreement for [defendant] to provide the particular judge with things of value specifically with the intent to influence the action or judgment of the judge on any question, matter, cause or proceeding which may be then or thereafter pending subject to the judge's action or judgment." 590 F.3d at 353. The court noted that the government did not need to prove the parties had a specific case in mind when the exchange took place, and specifically dismissed the contention that the instruction should have required the jurors to find a "*quid pro quo*": "Despite the district court's failure to include the actual phrase *quid pro quo* in the jury charge, in the instant context the instructions sufficiently conveyed the 'essential idea of give-and-take.'" *Id.* (citing *United States v. Kincaid-Chauncey*, 556 F. 3d 923, 943 (9th Cir. 2009)).

The "stream of benefits" theory has been a viable basis for convictions on bribery and

extortion charges for some time, and has sometimes been referred to as supporting such charges under a "course of conduct" or "retainer" theory. *See, e.g.*, *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) ("The quid pro quo requirement is satisfied so long as the evidence shows a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor.") (internal quotation and citation omitted); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir. 2009) (honest services bribery can be established if "the government official has been put on 'retainer'—that is, that the government official has received payments or other items of value with the understanding that when the payor comes calling, the government official will do whatever is asked.").

C. The Jury Instructions

Ryan contends that the jury instructions in this case were flawed in five different respects: (1) He asserts the instructions are flawed by their reliance on the *Bloom* standard, *see United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998), which was rejected in *Black*; (2) he claims the jury was instructed that the prohibition on accepting bribes or kickbacks was just one violation that could support an honest services conviction, while *Skilling* established that it is the only violation that can support such a conviction; (3) he urges that the instructions do not adequately express the requirement of a showing of *quid pro quo* exchange; (4) Ryan asserts that the instructions permitted a conviction on the basis of a conflict of interest, a showing insufficient after *Skilling*; and (5) he argues that the instructions permitted a conviction on the basis of state-law violations, also not sufficient after *Skilling*. (Pet.'s Br. at 21.) The Government urges that there was no error because the instructions, read as a whole, did require the jury to find that Ryan took bribes or kickbacks in order to convict him.

An instructional error can occur in a variety of ways—including, for example, an instruction on an invalid alternative theory of guilt, or an instruction that omits or erroneously describes an element of the offense. *United States v. Marcus*, 130 S. Ct. 2159, 2165 (2010). Even if an

instructional error has occurred as to some element of the charge, reversal is required "only if the instructions, 'viewed as a whole, misguide the jury to the litigant's prejudice.'" *United States v. Palivos*, 486 F.3d 250, 257 (7th Cir. 2007) (describing harmless error analysis, and citing *United States v. Souffront*, 338 F.3d 809, 834 (7th Cir. 2003)).

1. The *Bloom* Standard

Ryan's first challenge to the instructions is their incorporation of what he refers to as the *Bloom* standard.[7] The instruction at issue stated:

> Where a public official misuses his official position or material nonpublic information he obtained in it for private gain for himself or another, then that official or employee has defrauded the public of his honest services if the other elements of the mail fraud offense have been met.

(Tr. 23911.)

The trial judge gave a similar instruction in *Black*: she instructed the jury that "a person commits honest-services fraud if he 'misuse[s] his position for private gain for himself and/or a co-schemer' and 'knowingly and intentionally breache[s] his duty of loyalty.'" *Black*, 130 S. Ct. at 2967. The Supreme Court concluded that these instructions were flawed because the "scheme to defraud alleged [in *Black*] did not involve any bribes or kickbacks," *id.* at 2968 n.7, and accordingly remanded for a determination of whether the instructional error was harmless. The *Black* Court did not consider or address what instruction would have been appropriate if the scheme to defraud *had* rested on a bribery or kickback theory.

On direct appeal in this case, the Seventh Circuit noted that the conflict-of-interest instruction challenged by Ryan included language requiring the jury to find not only a conflict of interest but also to find that "the other elements of the mail fraud statute are met." *United States v.*

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[7] This instruction derives from *United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998), in which the Seventh Circuit held that the mere breach of a fiduciary duty did not constitute honest-services fraud, and that "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain." *Id.*

Warner, 498 F.3d 666, 698 (7th Cir. 2007). The Seventh Circuit was satisfied that the addition of this requirement meant that the government was required to prove "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." *Id.* That same language is included as part of the *Bloom* instruction that Ryan challenges in the pending motion. The instruction did not limit the prohibited conduct to bribery or kickback schemes, however, and could also be interpreted as an instruction that a scheme of self-dealing itself violates the law—no longer a valid theory of honest services fraud post-*Skilling.* The court concludes the instruction was in error. No self-dealing offense was actually charged, however, and whether this error is harmless or not will be considered below.

2. Duty Not to Accept Bribes or Kickbacks Was Non-Exclusive

Ryan next argues that the instructions were flawed because they explained that the duty not to accept bribes or kickbacks was only one of the duties whose violation could lead to an honest services conviction, while *Skilling* makes clear that a bribery or kickback scheme is the only scheme sufficient to support an honest services fraud conviction. (Pet.'s Br. at 21.) The instruction at issue explained that a public official has a duty not to accept "personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." (Instructions at 85; Tr. 23906.) Ryan also urges that the "structure" of the instructions was flawed because they "made the acceptance of a bribe or kickback only one path to conviction rather than the only one." (Pet.'s Br. at 22.)

Ryan is correct that, post-*Skilling*, an honest services fraud conviction does require a bribery or kickback scheme. As the court reads the challenged instruction, however, nothing in it suggests such a scheme is not a required path to conviction. In fact, this instruction taken alone suggests that a bribe *is* required for conviction. The instruction requires that "the government prove[] 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" (Instructions at 85; Tr. 23906)—an instruction indistinguishable from a bribery instruction. The court finds no error in the language of this instruction; whether a flaw in the overall "structure" of the instructions requires reversal will be addressed as part of the harmless error analysis.

3. The Failure to Require a *Quid Pro Quo*[8]

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[8] The Government argues that Ryan has waived or forfeited his challenges to three of the instructions in this section. (Response Br. at 19 n.12.) First, the Government argues that Ryan himself proposed the instructions he now challenges as improperly omitting a *quid pro quo* requirement and thus has waived any challenges to them. *See* discussion *infra*. "The right to object to jury instructions on appeal is waived if the record illustrates that the defendant approved of the instructions at issue." *United States v. Griffin*, 84 F.3d 912, 924 (7th Cir. 1996). *See also United States v. Yu Tian Li*, 615 F.3d 752, 757 (7th Cir. 2010) ("Having proposed a jury instruction virtually identical to the instruction actually used by the district court, [the defendant] cannot now contest that instruction.").

As the record shows, Ryan's attorneys did propose these two instructions (Def.'s Second Supp. to Proposed Jury Instructions [703] at F, G), and did not object when they were modified (Tr. 22459, 22465) to correspond to instructions related to the Illinois bribery statute, to which Ryan also did not object. (Tr. 22434-40; 22442-43.) Ryan nevertheless argues that his objection was preserved because he originally sought a campaign contribution instruction that did require an explicit *quid pro quo*. (Reply Br. at 9 n.5.) The Government has not raised a waiver argument with respect to the campaign contribution instruction, however. And Ryan's argument that he "sought instructions that would come within hailing distance of the standard he favored while respecting the Court's ruling" is not consistent with the record: During the instructions conference, Ryan's lawyers did pose multiple objections to the campaign contributions instructions despite the court's earlier rulings (Tr. 22275-22288; 22446-22449; 22461), but made none with respect to the instructions at issue here.

Ryan further argues that he "could not have presented at trial the objection he now offers to the 'financial benefits' instructions" because *Skilling* had not been decided. (Reply Br. at 9 n.5.) This argument has traction. *See Waldemar v. United States,* 106 F.3d 729, 731 (7th Cir. 1996) (a defendant who fails to raise a claim at trial may not proffer it as grounds for collateral attack without good cause; but good cause exists where "intractable federal precedent" in effect at the time of trial would have rendered his objection futile); *Bateman v. United States*, 875 F.2d 1304, 1308 (7th Cir. 1989) (§ 2255 petition not barred by procedural default because *McNally* "did indeed represent the type of startling break with past practices so as to excuse procedural default on collateral attack of a conviction."). In any event, even if Ryan had waived his objections to these instructions, the court would still review them for plain error. FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). Moreover, the Supreme Court suggested in *Skilling* that instructional errors in this context are subject to harmless error review without any discussion of waiver. Because the harmless error review is more favorable to Ryan than plain error review would be, the court need not also engage in plain error review.

The Government also argues that Ryan has procedurally defaulted on any challenge to the instruction explaining that the receipt of benefits to "ensure favorable official action when necessary" can be sufficient to establish honest services fraud (Instructions at 86; Tr. 23906), (continued...)

Ryan's next objection challenges the instruction examined above (Instructions at 85; Tr. 23906), as well as the instruction on campaign contributions. Ryan argues that the "personal and financial benefits" instruction is flawed in two respects: first, that it does not require jurors find an "exchange" sufficient to meet the *quid pro quo* requirement; and second, that the latter half of the instruction might encompass gratuities as well as bribes. Ryan next argues that the campaign contribution instruction is in error because it does not require an explicit *quid pro quo*. In its entirety, the instruction on "personal and financial benefits" reads:

> 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.
>
> Likewise, the law does not require that the government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the personal and financial benefits were given with the understanding that the public official would perform or not perform acts in his official capacity in return.

(Instructions at 85; Tr. 23905-06.) Ryan argues that this instruction improperly eliminated any *quid pro quo* requirement because it "turned on the understanding of one person—the public official—rather than on whether the two parties had agreed to an exchange." (Pet.'s Br. at 23.) The court finds this argument unpersuasive. The instruction required the public official to accept a benefit with the understanding he will perform an action in return. Such an understanding necessarily requires a second party to the exchange. The language requiring that the act be performed "in return" underscores the instruction's requirement that there be an agreed exchange.

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[8](...continued)
because, though he objected to it, he failed to challenge it on direct appeal. The Government cites *United States v. Podhorn*, 549 F.3d 552, 558 (7th Cir. 2008), for this proposition, but that case does not discuss the effect of failing to preserve a challenge on appeal. *Podhorn* discussed the effect of failure to object during a jury instructions conference. The court declines to search for further precedent on this point because this instruction would be reviewed for plain error even absent harmless-error review, and, as discussed *infra*, the conviction withstands a challenge under either standard.

Further, the predicate language does include the term "in exchange," and notes that while the exchange need not involve "a specific official act" it must include "acts . . . in return." This language adequately articulates the *quid pro quo* requirement.

Next, Ryan contends that the instruction explaining what provision of benefits does not violate the mail fraud statute incorrectly suggests that a gratuity might serve to violate the statute as well as a bribe. The instruction reads:

> [T]he providing of personal or financial benefits by a private citizen to and for the benefit of a public official, or to and for the benefit of a public official's family, friends, employees, or associates, does not, standing alone, violate the mail fraud statute, even if the private citizen does business with the state, so long as the personal or financial benefits were not intended to influence or reward the public official's exercise of office.

(Instructions at 87; Tr. 23907.) The Supreme Court has explained that the difference between a bribe and a gratuity is "its intent element." *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999) (interpreting 18 U.S.C. § 201). While a bribe requires an intent to influence, or to be influenced, a gratuity "requires only that the gratuity be given or accepted 'for or because of' an official act.'" *Id.* at 405. The instruction's language limiting illegal benefits to those "intended to influence or reward the public official's exercise of office" is the language of bribery. Inclusion of the term "reward" in addition to "influence" is necessary to capture instances where the benefit arrives after the act. Ryan appears to urge that a "reward" must be understood to be a gratuity, but the word reward itself is used in one of the federal bribery statutes, 18 U.S.C. § 666, which explains that bribery occurs whenever an individual "corruptly gives, offers, or agrees to give anything of value to any person, with intent *to influence or reward* an agent . . . in connection with any business, transaction, or series of transactions of such organization, government, or agency. . . ." 18 U.S.C. § 666 (a)(2) (emphasis added). This language is virtually identical to that contained in the instruction, and the court finds no error in the instruction.

Next, Ryan challenges the instruction that permitted the jury to find the intent necessary for

a conviction of honest services fraud from evidence of 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 . . . ." (Instructions at 86; Tr. 23906; Pet.'s Br. at 24 n.15.) Ryan insists such a showing is insufficient to establish intent. Instead, he argues, "the benefit must be conferred or received in exchange for something. An intent to ensure favorable action when necessary is not enough." (Pet.'s Br. at 24 n.15.) The case law, however, defeats Ryan's interpretation. In *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984), for example, the jury instructions included an instruction similar to this one, based on the Illinois bribery statute. The instruction stated:

> [B]ribery occurs when property or personal advantage is accepted by a public employee with knowledge that it is offered with intent to influence the performance of any act related to his public position. No particular act need be contemplated by the person offering the property or personal advantage, or by the public official to whom the offer is made. The crime is completed when the property or personal advantage is accepted by the public employee knowing it was offered with the intent that he act favorably to the person offering the property or personal advantage when necessary.

732 F.2d at 600. *Gorny* affirmed the conviction of a deputy commissioner on a county board of tax appeals who received payments in cash and other advantages from attorneys who practiced before the board. Although Gorny did not receive payments "based on the outcome of any specific case," the Seventh Circuit confirmed his conviction of mail fraud and racketeering, noting that there was evidence from which the jury could find that "these payments and other favors were conferred upon Gorny with intent to influence him" and that Gorny received these favors with a similar intent. *Id.* at 600, 601. *See also United States v. Kincaid-Chauncey*, 556 F.3d at 944 n.15 ("when the payor comes calling, the government official will do whatever is asked."). This instruction is clearly consistent with the "stream of benefits" or retainer theory, and, together with the other benefits instructions, adequately expresses the *quid pro quo* requirement.

Finally, Ryan argues that the campaign contribution instruction does not adequately explain

the type of *quid pro quo* required for campaign contributions to constitute bribes. For purposes of campaign contributions, Ryan urges, the jury must find more than an implied exchange; there must be an "explicit quid pro quo." (Pet.'s Br. at 23.) The instruction at issue states:

> When a person gives and a public official receives a campaign contribution knowing that it is given in exchange for a specific official act, that conduct violates the mail fraud statute, if the other elements of the mail fraud offense are met. The intent of each party can be implied from their words and ongoing conduct.

(Instructions at 88; Tr. 23908.)

Ryan is correct that a campaign contribution can be deemed a bribe only if the money is given in return for a commitment to take (or not take) a specific action. In *McCormick v. United States*, 500 U.S. 257, 273 (1991), the Supreme Court held that a campaign contribution could constitute extortion in a Hobbs Act case, "but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* A year later, the Court confirmed the *quid pro quo* requirement, but explained that "[t]he official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it." *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring).

The final sentence of the campaign contribution instruction in this case tracks Justice Kennedy's language in *Evans*, and therefore accurately articulates the standard for finding a *quid pro quo* based on campaign contributions. Moreover, as the Government noted in oral argument, *Evans* and *McCormick* were both settled law at the time this case went to the jury, and nothing in *Skilling* has unsettled them.

4. Conflict-of-Interest Instruction

Ryan next challenges the conflict-of-interest instruction given to the jury:

> A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a

> material personal or financial interest, also known as a conflict of interest, in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services if the other elements of the mail fraud offense are met.

(Instructions at 84; Tr. 23905.) On direct appeal in this case, the Seventh Circuit examined this instruction to determine whether it comported with the "private gain" requirement imposed by this circuit's jurisprudence (but not by some other circuits). *See Skilling*, 130 S. Ct. at 2928 n.36. The Seventh Circuit was satisfied that the instruction at issue properly required the jury to find that the defendant public official had allowed or accepted a conflict of interest for his own private gain, with the intent to perform acts in his official capacity in return. *Warner*, 498 F.3d at 698.

The objection Ryan now presents is a different one: he notes that this instruction would permit the jury to convict him for self-dealing and other conflicted transactions that fall short of a bribery or kickback scheme. *Skilling*'s core holding precludes such a result. "In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases." 130 S. Ct. at 2932. The court concludes that the conflict-of-interest instruction was in error.

5. State Law Violations

Ryan contends that the instructions allowed the jury to find he committed honest services fraud based on a violation of state law that did not involve a bribery or kickback scheme. The court's instructions did identify a number of state laws that govern the conduct of public officials, including the following:

- "Public funds, property or credit shall be used only for public purposes."
- Misconduct occurs when an official "performs an act in excess of his lawful authority" to "obtain a personal advantage for himself" or "knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law".
- A public official is required to file an annual financial disclosure statement

with the State of Illinois.

- "[A] public officer was prohibited from soliciting or accepting any gifts from any prohibited source or in violation of any federal or state statute, rule or regulation."

(Instructions at 89-90; Tr. 23908-23910.) The court then explained that

> [N]ot every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation. Where a public official or employee misuses his official position (or material, 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 offense have been met.

(Instructions at 93; Tr. 23911.) The Seventh Circuit also examined this instruction on direct appeal, again focusing on the requirement of a showing of personal gain. The court noted that the "cited provisions of Illinois law identified for the jury various ways in which a public official could 'misuse his fiduciary relationship,' but the instructions as a whole unambiguously required the prosecution to prove that misuse of the office was intended for personal gain." *Warner*, 498 F.3d at 698. *See also United States v. Segal*, 495 F.3d 826, 834 (7th Cir. 2007) (rejecting challenge to state-law instruction in honest services prosecution because "state laws are useful for defining the scope of fiduciary duties, and . . . what distinguishes a mere violation of fiduciary duty from a federal fraud case is the misuse of one's position for private gain.").

Determining the duties of office can indeed be relevant to a bribery prosecution; for example, 18 U.S.C. § 201(b) requires that one of the elements of bribery is that an official "do or omit to do any act in violation of the lawful duty of such official." State laws are directly relevant in determining the scope of an official's lawful duty. This court was and is satisfied that the state law instruction did not permit the jury to convict Mr. Ryan of a federal defense solely for the violations of state law. Still, one can misuse his office for private gain without engaging in a bribery or kickback scheme. The court thus concludes that this instruction, too, is error in the light of *Skilling*.

D. Harmless Error Analysis

Having determined that the *Bloom* instruction, the conflict-of-interest instruction, and the state law instructions should not have been given, the court turns to the question of whether these instructional errors were harmless. As explained previously, the relevant inquiry is whether a reasonable jury, properly instructed, must necessarily have convicted based on a proper theory. Put another way, the court asks whether the jury necessarily found the elements of the valid theory satisfied when it chose to convict on a now-invalid theory.

The court notes that this analysis would be significantly more straightforward had the Government argued solely a bribery theory at trial. The vast majority of post-§ 1346 and pre-*Skilling* honest services cases stem from one of two theories—bribery or self-dealing (usually in the form of an undisclosed conflict-of-interest for personal gain). The latter theory is the one on which Mr. Skilling himself was convicted. At first cut, this case appears to present a straightforward bribery theory—Ryan accepted benefits with the intent to be influenced in his official actions. Yet the Government insisted on arguing not only a bribery theory but also an undisclosed conflict-of-interest theory. During the jury instruction conference, Ryan's attorneys challenged the propriety of a conflict-of-interest instruction. Attorney Bradley Lerman argued:

> [T]he failure to disclose financial interest [doctrine] in the Seventh Circuit, that relates to the direct interest that the public official has and fails to disclose. If George Ryan was an owner, for example, of the Joliet property and he failed to disclose his ownership. . . . The fact pattern in this case is closer, much more analogous to the bribery fact pattern. . . . I have always assumed [ ] the theme of the government's case [was] the hidden flow of benefits between people who benefitted from George Ryan's activities.
>
> George Ryan doesn't have a personal financial interest in this case in the decisions that he was making as a public official. The allegation is that he was receiving things of value paid to influence him from people who were benefitting from his decisions.

(Tr. 22070, 22073.) The Government insisted that the conflict-of-interest instruction was appropriate in this case; such an instruction was relevant, for example, to Ryan's concealment on his economic interest forms of the benefits he received from Harry Klein "at the same time that he

is making official decisions that confer public benefits on Mr. Klein." (Tr. 22068.)

The Government's conflict-of-interest theory did go to the jury—had it not, *Skilling* would have provided little upon which Ryan could base the instant petition. But, as Ryan's attorney himself emphasized, the acts underlying either theory were the same—in one instance, a jury was invited to convict based on Ryan's failure to disclose the stream of benefits, and in another it was invited to convict based on the stream of benefits themselves. The court declines, at this stage, to discuss whether the conflict-of-interest instruction was clear enough or necessary at all. The question for now is whether, in order to find Ryan guilty on one theory, the jury must have found him guilty on the other, as well. The legal characterization of the charge is irrelevant so long as the jury found beyond a reasonable doubt that Ryan had engaged in the conduct charged.

Ryan's main defense to the mail fraud charges was that, while he may have done political favors for his friends, including co-Defendant Warner, such activity does not amount to a crime. Thus, Ryan's attorney argued in closing,

> It'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 benefited political supporters. That happens . . . . No witness testified that George Ryan accepted personal or financial benefits to perform official acts. That is so critical . . . . Everyone wants this to be some evil thing. Okay. Maybe the world should work different. Okay. Maybe public officials should never be able to do anything to favor their supporters. Maybe we ought to change the whole way the whole political system in America works. Maybe we should do that. But that's not the way it is. And it's not a crime to help your friends.

(Tr. 23159-60, 23177, 23343.)

Ryan requested, and the jury received, numerous instructions tailored to this theory of defense. The jury was instructed that "[a] public official's receipt of personal or financial benefits . . . does not, standing alone, violate the mail fraud statute, even if the individual providing the personal or financial benefit has business with the state." (Instructions at 87; Tr. 23906-07.) The jury was also told that, "[g]ood faith on the part of the defendant is inconsistent with intent to defraud, an element of the mail fraud charges." (Instructions at 81; Tr. 23905.) Another instruction

explained that a "public official may receive campaign contributions from those who might seek to influence the candidate's performance as long as no promise for or performance of a specific official act is given in exchange," and that campaign contributions from those who "[have] or expect[] to have business pending before the public official" do not necessarily violate the mail fraud statute. (Instructions at 88; Tr. 23907.) Further, the court identified a number of items that a public official could properly receive without violating the law, including "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." (Instructions at 90; Tr. 23909-10.)

As discussed below, the court is satisfied that these instructions required the jury to find that that Ryan did not act in good faith, that he acted for private gain[9], and that the "stream of benefits" flowing between Warner and Ryan were not simply the proceeds of a friendship, as Ryan argued, but were intended to influence him in his official duties. *United States v. Ochoa-Zarate*, 540 F.3d 613, 620 (7th Cir. 2008) ("We presume that the jury followed the court's instructions."). Because such findings are sufficient to establish a bribery scheme, the court is further satisfied that the instructional errors identified above were harmless. These conclusions are explained in greater detail below.

1. Single Scheme to Defraud

In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court held held the "honest services" theory of mail fraud unconstitutional. In the wake of *McNally*, the Seventh Circuit re-

[9] The Seventh Circuit explained that "the instructions as a whole unambiguously required the prosecution to prove that misuse of the office was intended for personal gain . . . ." *Warner*, 498 F.3d at 698. The court notes that "personal gain" might be considered more limited than "private gain," although this difference is probably inconsequential. *United States v. Sorich*, 523 F.3d 702, 709 (7th Cir. 2008) ("The semantic difference between 'private' and 'personal' gain may be insignificant, but to the extent that 'personal' connotes gain only by the defendant, it is misleading. By 'private gain' we simply mean illegitimate gain, which usually will go to the defendant, but need not."). Ryan does not dispute that, even post-*Skilling*, whatever constitutes the gain, be it personal or private, may be actually given to another so long as there is a resulting "gain" to Ryan.

examined a number of convictions to determine whether they remained valid. These cases provide a useful framework for examining Ryan's conviction in light of the *Skilling* decision. In one particularly instructive case, *Messinger v. United States*, 872 F.2d 217 (7th Cir. 1989), the court recognized that the honest services theory under which Messinger had been convicted was no longer valid, but examined whether Messinger might also have been convicted on a pecuniary fraud theory. The court explained that it would "examine the indictment, the evidence, and the jury instructions to see if the jury necessarily had to convict Messinger for defrauding Cook County of its property right . . . notwithstanding any intangible rights theory employed." *Id.* at 221. *See also United States v. Bonansinga*, 855 F.2d 476, 479 (7th Cir. 1988) ("[R]egardless of the language employed in his indictment, the fact remains that the evidence adduced by the government at trial unequivocally demonstrated Bonansinga's participation in conduct clearly proscribed by the mail fraud statute as construed in *McNally*."); *United States v. Wellman*, 830 F.2d 1453, 1463 (7th Cir. 1987) ("[E]ven assuming these allegations were (in form at least) separate, the government could not logically prove one scheme without proving the other since the elements of the two were identical.").

The *Messinger* court undertook this analysis because in that case the jury found the existence of a single scheme to defraud, and convicted *Messinger* based on acts in furtherance of that scheme. This case presents a similar situation. In order to convict Ryan, the jury must have found the existence of a scheme to defraud, and must have found, on each of the mail fraud counts of conviction, a mailing in furtherance of that scheme. The first question is whether the jury's finding that this scheme existed necessitated a finding that it was a bribery or kickback scheme. If so, the court can end its inquiry because the jury, as in *Messinger*, would necessarily have found a violation that falls within the narrowed definition of mail fraud approved by the Supreme Court.

a. Did the jury necessarily find a bribery or kickback scheme?

The fact that the indictment and instructions did not exclusively track *Skilling*'s limited

definition of honest services fraud is not fatal to this analysis. In the post-*McNally* era, courts in this circuit routinely found that indictments that included broad intangible rights language did not necessarily exclude an alternative, valid theory. *Messinger*, 872 F.2d at 221 ("In examining the indictment, we must look at the substance of the actions alleged, not at the language used."); *United States v. Folak*, 865 F.2d 110, 113 (7th Cir. 1988) ("The presence of some language referring to an intangible rights theory is not always fatal to the indictment."); *United States v. Gottlieb*, 738 F. Supp. 1174, 1181 (N.D. Ill. 1990) ("A court must look past the indictment's legal characterization of a scheme and determine whether the 'specific conduct alleged in the indictment is clearly proscribed by the mail fraud statute.' . . . In fact, the substantive allegations in an indictment may be cognizable under *McNally* even if the indictment is couched in 'intangible rights' language.") (quoting *United States v. Wellman*, 830 F.2d 1453, 1463 (7th Cir. 1987)).

The summary indictment provided to the jury in this case[10] alleged that Ryan

> devised and intended to devise, and participated in, a scheme and artifice to defraud the people of the State of Illinois, and the State of Illinois, of money, property and the intangible right to honest services of defendant Ryan and other official and employees of the State of Illinois, by means of materially false and fraudulent pretenses, representations, promises and material omissions, and in furtherance thereof used the United States mails and other interstate carriers.

The indictment went on to further describe the scheme in three additional paragraphs labeled "Overview of Scheme," which, in addition to the language below, included specific examples of actions illustrating the components of the scheme:

> 3. It was part of the scheme that defendant Ryan performed and authorized official actions to benefit the financial interests of Ryan, defendant Warner, Arthur Ronald Swanson, Harry Klein and Donald Udstuen and designated third parties including Ryan family members and Citizens for Ryan.
>
> . . .

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[10] For the purposes of this opinion, the court examines the "summary of second superseding indictment" that was provided to the jurors. "In reviewing the indictment, the evidence, and the jury instructions, our '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*, 872 F.2d at 221 (quoting *Magnuson v. United States*, 861 F.2d 166, 168 (7th Cir. 1988)).

> 4. It was further part of the scheme that defendant Ryan and certain third parties affiliated with Ryan received personal and financial benefits from defendant Warner, Arthur Ronald Swanson and Donald Udstuen, while defendant Ryan knew that such benefits were provided with intent to influence and reward Ryan in the performance of official acts.
>
> . . .
>
> 5. It was further part of the scheme that . . . defendants Ryan, Warner, Arthur Ronald Swanson, and Donald Udstuen concealed their financial relationships . . .

As this court reads the indictment's language, Paragraph 5 presents a conflict-of-interest theory that, standing alone, would not satisfy *Skilling.* Paragraph 3 alleges a theory consistent with bribery, although one that does not necessarily constitute bribery in every instance. Paragraph 4, however, does contains a description that necessarily includes the "stream of benefits" theory of bribery discussed above. Thus, the indictment did present at least one theory of honest services fraud that remains valid post-*Skilling*.[11]

The elements of mail or wire fraud are "(1) a scheme to defraud (entailing a material misrepresentation), (2) an intent to defraud, and (3) the use of the mails." *United States v. Sorich*, 523 F.3d 702, 708 (7th Cir. 2008). In addition, for an honest services mail fraud charge in the Seventh Circuit, the Government was also required to show the misuse of position for private gain. *Id.* These requirements correspond to the outline of the scheme charged in the Ryan indictment: the first paragraph speaks of the acts involved in the scheme and the object of the frauds; the

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[11] The parties devoted substantial attention to these three paragraphs during the jury instructions conference. Ryan argued that the "intent to influence" language must be inserted in paragraph 3. (Tr. 22761-75.) The Government argued that would be unnecessary because it would be clear from all of the instructions that the jury must find each paragraph in the "Overview of Scheme" section satisfied in order to convict. (*Id.*) The parties agreed to keep the original language of the indictment, but delete a paragraph from one of the Government's proposed instructions to the effect that the jury that must unanimously find a false representation, but that "the government is not required to prove all of them." (*Id.*) During this conference, Ryan seemed most concerned that the jurors would find the awarding of a contract sufficient to establish guilt, without any *quid pro quo*. Defendants did not raise any objection to the concealment language believing that the jurors would not be misled "because paragraph [4] has the *quid pro quo* language in it and paragraph [5] has the concealment language." (Tr. 22766.)

second paragraph refers to the private gain reaped from the scheme; and the third paragraph describes the material misrepresentations upon which the scheme relied. Each additional mail fraud count in the indictment then detailed the mailing requirement

Does the fact that the jury found that a fraud scheme existed mean, therefore, that the scheme involved bribery or kickbacks? With respect to the mail fraud charges, the jury was instructed that they were required to find that "the defendant knowingly devised or participated in the scheme to defraud or to obtain money or property by means of materially false pretenses, representations, or promises, *as charged*." (Instructions at 75; Tr. 23902) (emphasis added). The instructions further explained that "[a] scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the potential loss of money or property to another or to deprive the people of the State of Illinois of their intangible right to the honest services of their public officials or employees." (Instructions at 76; Tr. 23903.) As the court reads this language, it did not on its face require the jurors to find that the charged scheme was one involving bribery.

In addition, the jury was instructed that the mail fraud counts "charge that the defendants participated in a single scheme to defraud" and that to find the defendant guilty of a particular count, the jury must "find beyond a reasonable doubt that the proved scheme to defraud was included within the charged scheme to defraud . . . provided that all other elements of the mail fraud charge have been proved." (Instructions at 77; Tr. 23903.) Thus, although the jury was required to find that a charged scheme to defraud existed, no language within either the indictment or the jury instructions explicitly required the jurors to find that every part of the scheme described in the indictment necessarily existed. Case law supports the conclusion that, unless instructed otherwise, a jury need not have found that every part of an alleged scheme existed in order to find that the scheme as a whole existed. *See United States v. Reicin*, 497 F.2d 563, 568 (7th Cir. 1974) ("The issue is whether lack of [proof of one part of a mail fraud scheme], despite the presence of the other

elements of the scheme as alleged in the indictment, vitiates the conviction on [one count]. We hold that it does not. '[I]n most mail fraud prosecutions, there are numerous instances of allegedly illicit conduct, all of which need not be proved to sustain a conviction.'") (quoting *Anderson v. United States*, 369 F.2d 11, 15 (8th Cir. 1966); *United States v. Toney*, 598 F.2d 1349, 1355-56 (5th Cir.1979) ("In mail fraud cases the government need not prove every allegation of fraudulent activities appearing in the indictment. It need only prove a sufficient number of fraudulent activities to support a jury inference that there was a fraudulent scheme.").

It might be possible to read the jury instructions in this case as *requiring* that the jury find the scheme to involve accepting gifts "with intent to influence" official acts. The court declines to construe the instructions this way, however, because there was no explicit instruction to this effect and because the Government, in its closing rebuttal argument,[12] suggested such a finding was not necessary. *See, e.g.*, Tr. 23771 ("[T]his is the heart of the matter. For the first ten counts of the indictment, it is the heart of the matter. It's about trust. Mr. Ryan's honest services. That's what it's about. . . . So, folks, on this honest services, on this scheme, this first element, it can be met with a conflict of interest.").

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[12] The court notes that the Government's closing was equivocal on this issue. Thus, in rebuttal, the Government argued that an honest services mail fraud scheme could be established simply with a showing of conflict of interest. In its main closing argument, however, the Government hammered on the bribery theory. *See, e.g.*, Tr. 22831 ("This was a case in which George Ryan steered government contracts, leases, and money to Larry Warner and a select few group of individuals who were also providing George Ryan, his family and friends with various undisclosed benefits."); Tr. 22836 ("George Ryan, as a public official, had a duty to provide honest services to the people of the state of Illinois who had elected him. And the evidence in this case has shown that he repeatedly violated that duty. He violated that duty by giving state benefits, like contracts and leases, to his friends—Warner, Swanson, Klein—while at the same time they were providing various undisclosed financial benefits to him and his family and to his friends."); Tr. 22956-58 ("What the Government's case is about is that George Ryan received these financial benefits for himself and steered other benefits to third parties, benefits that were not disclosed to the public, from the very individuals and during the very time frame that George Ryan was steering these various people profitable and lucrative leases and contracts. So it's this undisclosed flow of benefits that was charged in the indictment, it's this undisclosed flow of benefits that is in violation of the law, and it's this undisclosed flow of benefits that were proven in this case beyond a reasonable doubt.").

b. Does the conviction rest on a still-viable theory?

Because the jury need not have found every aspect of the charged scheme, the next question is whether the findings they did make support a still-viable theory of honest services fraud. In reviewing mail fraud convictions after *McNally*, courts in this circuit looked to whether one charged theory was "easily separable" from the other. *See, e.g.*, *United States v. Eckhardt*, 843 F.2d 989, 997 (7th Cir. 1988) ("Where a fraud scheme involves multiple objectives, some of which are insufficient to state an offense under *McNally*, the remaining charge or charges will be deemed sufficient to state the offense if they are 'easily separable' from the charges deemed insufficient. In such a case, those allegations which are insufficient to state an offense are mere surplusage, and do not taint the remainder of the indictment.") (citations omitted); *United States v. Folak*, 865 F.2d 110, 113 (7th Cir. 1988) ("[W]here an indictment alleges multiple schemes, some of which serve to defraud victims of property and others that deprive them of some intangible right, we have treated as surplusage any intangible rights theory of fraud that was 'easily separable' from allegations of a scheme to defraud of money or property. We have also held that where a single set of facts establishes both a scheme to defraud a victim of money or property, as well as a deprivation of some intangible right, *McNally* does not require setting aside the conviction.") (citations omitted). The Seventh Circuit undertook a similar inquiry in *Black*, when it determined that a money-property theory could be disentangled from an honest services theory, and determined that a reasonable jury would necessarily have upheld one count of conviction on a money-property theory. *Black*, 625 F.3d at 393.

The difficulty in this case arises because *Skilling* did not invalidate an entire theory of mail fraud, as *McNally* did, but rather eliminated all sub-theories of honest services fraud that do not require bribes or kickbacks. Thus, the court must separate the bribery theory on which Ryan was charged, and the jury instructed, from the invalid theories described above—including the *Bloom* theory, the conflict-of-interest theory, and the state law theories. In order to do this, the court will

examine the evidence presented at trial on each mail fraud count for which Ryan was convicted, and determine whether that set of facts could have supported a scheme in the indictment *other than* the bribery scheme. In each case, if it could have, the court must determine whether a reasonable jury could have convicted based on the alternate theory but not on the bribery theory. The evidence essentially established two "streams of benefits," one from Warner to Ryan (and his family members), and one from Harry Klein to Ryan. Because in the case of Warner, each "stream of benefits" "quid" is allegedly tied to multiple "quos," the court will first examine the benefits alleged to have been received by Ryan from Warner as a whole, and then examine the acts alleged to have been performed in return.

2. Warner-related Mail Fraud Counts

a. Stream of Benefits from Warner to Ryan

In ruling on Ryan's post-trial motion, this court observed that "[t]he government introduced a great deal of evidence of Ryan's acceptance of gifts and benefits." *Warner*, 2006 WL 2583722, at *6. Specifically, the benefits flowing from Warner to Ryan included favorable construction and insurance benefits to Ryan's family members; investments in Ryan's son's business; and favorable financial treatment of Comguard, a business involving Ryan's brother. *Id.* As Ryan himself notes, Warner wrote a $3,185 check to pay for the band that played at Ryan's daughter's wedding and held two major fund-raisers for Ryan, raising a total of $250,000.[13] (Pet.'s Br. at 19.) The government also provided circumstantial evidence that Ryan received cash from Warner and others. *Warner*, 2006 WL 2583722, at *6. The jury need not have believed every one of these incidents occurred or that every incident had a corrupt purpose. As explained below, however, the jury must have believed that in several instances Warner did provide benefits to Ryan in exchange for acts. Moreover, Ryan's convictions on the false statement and tax charges mean that the jury

[13] As noted, the jury was instructed that campaign contributions are unlawful only if given in exchange for a specific official act.

must have believed he substantially understated his income and that he had a "personal financial relationship" with Warner.

b. Count Two

Count Two of the indictment charged that the mailing of a check from the State of Illinois to American Detail & Manufacturing Co. ("ADM") was in furtherance of the scheme to defraud. The evidence at trial showed that Ryan intervened on Warner's behalf in order to get James Covert, head of the Secretary of State's vehicle-services division, to withdraw contract specifications that might have caused ADM to lose a valuable vehicle registration stickers contract. At the time, ADM was Warner's client, and prior to Ryan's direct intervention, Warner represented to Covert that he had "authority to speak for Secretary Ryan" and wanted ADM to retain the contract.

In ruling on the sufficiency of the evidence in support of this count, the court noted that jurors had been instructed that if Ryan had acted in good faith—he claimed that his instructions to Covert were motivated by legitimate law-enforcement concerns—they should not convict him on this count. The jurors convicted Ryan despite this instruction, and the court observed that "Ryan's direct intervention on Warner's behalf, and his attempt to conceal his intervention by directing Covert to withdraw the specifications quietly, amply support the jury's verdict with respect to Count Two." *Warner*, 2006 WL 2583722, at *6.

Paragraph 3 of the summary indictment describes the Warner transaction, charging that it was part of the scheme that Ryan "performed and authorized official actions to benefit the financial interests of . . . Warner. . . . The official actions Ryan performed and authorized included: Awarding, and authorizing the award of, contracts and leases, and intervening in governmental processes related thereto and causing contractual payments to be made to benefit the financial interests of defendant Warner." Paragraph 4 describes the receipt of benefits by Ryan, explaining that "[i]t was further part of the scheme that defendant Ryan and certain third parties affiliated with Ryan received personal and financial benefits from defendant Warner . . . while defendant Ryan

knew that such benefits were provided with intent to influence and reward Ryan in the performance of official acts."

In order to convict Ryan on Count Two, the jurors had to believe one of three theories: either (1) Ryan concealed a conflict-of-interest related to the ADM contract; (2) Ryan misused his office for private gain in discussing the contract with Covert; or (3) Ryan accepted benefits (bribes) from Warner in exchange for his intervention.

The first theory does not stand on its own. The only conflict of interest presented to the jury relating to ADM was Ryan's relationship with Warner and Warner's involvement in this contract. Therefore, if the jury found that Ryan concealed a conflict of interest (theory (1)), it necessarily had to find that he had misused his office for private gain (theory (2)), or that he had accepted benefits from Warner in exchange for favors relating to ADM (theory (3)). The misuse of office theory (2) might stand alone if the jury believed that Ryan decided for some illegitimate reason—unrelated to the benefits Warner provided to Ryan—to coerce Covert into withdrawing the specifications. But the only motivations Ryan had to interfere with this contract were for legitimate law-enforcement reasons, as the defense suggested, or to compensate Warner for the stream of benefits he provided, as the Government urged. The jury rejected the good faith motive. Accordingly, the jury could only have convicted him on this count if it believed that his conduct was a response to the stream of benefits. Ryan suggests that the only "private gain" he received for his intervention in this transaction was the approval of his friend. As explained earlier, however, the jurors must have rejected this argument; they were specifically instructed that if the benefits Ryan received from Warner were merely the proceeds of a friendship, they could not be the basis for a conviction. *See* I.D *supra*. The court concludes that the jury must have found Ryan accepted gifts from Warner with the intent to influence his actions.

The Government did present the awarding of contracts and leases in these terms. In closing, the Government urged:

> George Ryan, as a public official, had a duty to provide honest services to the people of the state of Illinois who had elected him. And the evidence in this case has shown that he repeatedly violated that duty. He violated that duty by giving state benefits, like contracts and leases, to his friends—Warner, Swanson, Klein—while at the same time they were providing various undisclosed financial benefits to him and his family and to his friends. 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. Further, the Government presented a valid "stream of benefits," "retainer," or "course of conduct" bribery theory when it explained 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. And for Warner, Swanson, and Klein it was not a cash bar. This was an open bar during Ryan's terms as secretary of state and as governor.

Tr. 22852. While Ryan is correct that the Government also suggested Ryan could be convicted based on a conflict of interest, as explained earlier, that was not a tenable independent theory that would have supported conviction of Ryan on Count Two.

c. Counts Three and Eight

Counts Three and Eight both involve the steering of leases to Warner. In Count Three, the government charged that a mailing related to the State's lease of a Warner-owned building was in furtherance of the scheme. In evaluating the sufficiency of the evidence on this count, the court found that three witnesses "testified as to Ryan's (and Warner's) direct involvement. Ryan put Sherman in contact with Warner to look for a new site, and the jury could reasonably infer from Borisy's testimony that Ryan knew Warner owned the Joliet building at the time." *Warner*, 2006 WL 2583722, at * 8.

Count Eight similarly charged Ryan with mail fraud based on a mailing from the state to a company controlled by Warner, for the lease of a building in Bellwood by the office of the Secretary

of State. In evaluating the evidence on this count, this court pointed to "evidence from which the jury could have concluded that Ryan steered the lease to Warner, in a top-down fashion, and that the approval of his subordinate was a mere formality. Moreover, the layers of deception surrounding the transaction support the jury's finding that the Defendants acted with the requisite intent." *Id.* at *12.

The same analysis applied to Count Two applies here, and leads to the conclusion that absent good faith, the jury must have convicted Ryan on this count because he steered these leases to Warner in exchange for Warner's provision of benefits to Ryan. In other words, the lease was steered to Warner because he participated in a "stream of benefits" bribery scheme with Ryan. Ryan argues that the jury might have believed "that Ryan favored Warner in awarding leases and other business, but [that] did not indicate that Warner ever gave Ryan a bribe or a kickback." (Pet.'s Br. at 19.) The court disagrees. No reasonable jury would have believed that Ryan committed mail fraud by awarding these leases to Warner, but not believed that the lease was awarded in exchange for the benefits provided by Warner to Ryan. The jury believed that Ryan acted with the intent to defraud, and that Ryan "performed and authorized official actions" to benefit Warner's financial interests. As noted earlier, it rejected the argument that the benefits flowing from Warner to Ryan were innocent gifts from one friend to another. The evidence of benefits flowing from Warner to Ryan, and Ryan's significant involvement in the steering of these leases lead to one conclusion: that Ryan accepted the gifts from Warner with the intent to be influenced, and that these leases are the manifestation of that influence.

d. Count Four

Count Four charged that a check from IBM to a consulting company controlled by Ryan was mailed in furtherance of the scheme. The Government contended that Warner took advantage of information gleaned from his association with Ryan to profit through a consulting contract with IBM.

The court found sufficient evidence for a jury to find "that Warner's IBM proceeds were a direct result of the access to the SOS Office that Ryan gave Warner." *Warner*, 2006 WL 2583722, at *9.

This charge differs from those discussed earlier in that there is no suggestion that Ryan took any specific "action" related to the IBM contract—and the standard definition of bribery requires some sort of official action in exchange for the benefits received. A question left unanswered in *Skilling* is whether each act taken in furtherance of a bribery scheme must itself be an official act of the type that could support conviction of a bribery offense. *Skilling* spoke in terms of a bribery scheme, not in terms of specific acts of bribery. *Skilling*, 130 S. Ct. at 2931 ("The 'vast majority' of the [core] honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes."); *id.* at 2931 n.42 ("Apprised that a broader reading of § 1346 could render the statute impermissibly vague, Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes."). In a case decided one month after the *Skilling* decision, the First Circuit found (in a decision in which Justice Souter joined the panel) that a state legislator who took payments in order to arrange meetings between health insurers and his client could constitute honest services fraud on a bribery theory, even absent payment for a vote or other explicit action. The court explained that

> [l]egislators can and do convene meetings of constituents and seek to settle quarrels among them; but taking a bribe for the use of one's governmental power is a different matter and within the ambit of honest services fraud. . . . What distinguishes this aspect of the case from some others is that the bribe was not for Celona to press or oppose legislation directly through his votes; rather, the purchased use of official power was the implied threat of such action–and also the potential use of influence over legislation in committee–that Celona conveyed largely by implication through the orchestrated meetings. But the distance between this and paying outright for legislative votes is not great: both involve the misuse of office.

United States v. Urciuoli, 613 F.3d 11, 16-17 (1st Cir. 2010), *cert. denied*, ___S. Ct.___, 2010 WL 4052920 (Nov. 15, 2010). *See also United States v. Seminerio*, No. S1 08 Cr. 1238 (NRB), 2010 WL 3341887, at *6 n.9 (S.D.N.Y. Aug. 20, 2010) ("[T]he Second Circuit rejects the notion that

the 'quo' in a *quid pro quo* must be a narrowly defined official act.") (citing *United States v. Middlemiss*, 217 F.3d 112, 120 (2d. Cir. 2000); 18 U.S.C. § 201(b) (defining bribery as accepting a thing of value to induce an official "to do or omit to do any act in violation of the official duty of such official.").

Though the specific act alleged here—the provision of access to material nonpublic information in return for benefits—may not have involved an "official act" of the type that commonly constitutes a plain-vanilla bribery charge, it is certainly misuse of office within the context of an honest services bribery scheme. *Seminerio* explained that Skilling was charged with failing to disclose a personal economic interest unrelated to the receipt of any payments, whereas "the conflict of interest that Seminerio was charged with failing to disclose was his receipt of a stream of 'corrupt payments'—i.e., bribes—in connection with, and with the intent to be influenced in, his actions as an Assemblyman." *Seminerio*, 2010 WL 3341887, at *6. The same reasoning applies here—the only conflict-of-interest Ryan failed to disclose was the receipt of benefits from Warner.

e. Count Five

Count Five charged that a check related to the ADM and IBM contracts was mailed in furtherance of the scheme. Specifically, Warner caused a company he controlled, Omega Consulting Group, to issue a check to a company controlled by Alan Drazek, American Management Resources. The check was sent to Udstuen, who sent the check to Drazek. Drazek cashed the check, kept a portion, and sent the rest to Warner. The court noted in examining this evidence that "[t]his arrangement served no purpose other than to disguise the provenance of the proceeds." *Warner*, 2006 WL 2583722, at *9. This count, like Count Four, did not identify a specific official action, but the mailing of the check was incident to the bribery scheme, and specifically to the ADM and IBM contracts. A reasonable jury must have found that if this mailing was in furtherance of the scheme, any conflict of interest being concealed was Ryan's role in interfering

with the ADM contract, and misusing his office with the IBM contract, in exchange for benefits from Warner and others.

f. Count Seven

The Government charged in Count Seven that the mailing of a check from Viisage to a consulting firm controlled by Warner was in furtherance of the scheme to defraud. As more fully explained in the court's ruling on Ryan's post-trial motions, regarding this count the "jury could reasonably have found that, by virtue of his relationship with Ryan, Warner obtained access to information about the digital licensing contract and secured a share of the profits for himself, and that Warner attempted to conceal his role." *Id.* at *11. This count, like some others, rests on the disclosure of material nonpublic information. Even post-*Skilling*, this court is comfortable in concluding that not every action in furtherance of an honest services bribery scheme must itself adhere to the elements of a paradigmatic bribery charge. In this instance, as part of the flow of benefits running between Ryan and Warner, Ryan allowed Warner access to information from which he was allowed to profit. Ryan's only interest in this was his financial relationship with Warner. No reasonable jury would have found Ryan provided Warner with access to this information and blessed his attempts to benefit from it, without also believing that Ryan did so as part of his exchange of benefits with Warner, and the jury's findings that such benefits were not merely incident to friendship supports this finding.

g. Ryan's Convictions on the Warner Mail Fraud Counts Survive Harmless Error

For the reasons described above, the court finds that the instructional errors regarding the mail fraud counts related to the relationship between Ryan and Warner were harmless. The Government demonstrated both circumstantial and direct evidence of a "stream of benefits" flowing between Ryan and Warner. The jury received instructions that if Ryan received these benefits without the intent to be influenced, there was no criminal act. Ryan's defense argued forcefully for

this proposition, and the jury rejected it. The jury was also instructed that if Ryan engaged in these activities in good faith, that would defeat the intent necessary for a scheme to defraud. The jury rejected this defense as well.

Even proceeding under a bribery theory, the Government was not required to prove that Ryan and Warner agreed on specific actions to be taken in exchange for specific benefits. The Government only needed to prove what it argued in most instances—that Ryan and Warner were engaged in an exchange of benefits in which Warner provided Ryan with gifts and cash, and Ryan provided Warner with opportunities to profit from the State's business in the form of leases, contracts, or inside information. Had some of the counts of conviction rested solely on the concealment of a conflict of interest, they might fail under the *Skilling* holding; but in this case, the only conflict of interest that Ryan could have concealed was the benefits he was receiving from Warner. On this record, it is not credible that the jury believed Ryan engaged in a pattern of concealment simply because he was doing "favors" for some friends, and, as discussed above, the jury affirmatively rejected this argument.

Further, the jury found Ryan guilty on numerous false statement and tax charges, suggesting it believed that he had accepted financial benefits and lied to the IRS and FBI about them, and lied about his personal financial relationship with Warner. While Ryan could well have had independent reasons for lying, in the context of the evidence presented, no reasonable jury that believed he concealed benefits and believed he played a role in these transactions could have believed one was not in exchange for the other.

3. Harry Klein-related Mail Fraud Count

Count Six is the sole count of mail fraud related to Harry Klein. That count charged that the mailing of a check from the State of Illinois to a company controlled by Klein was in furtherance of the mail fraud scheme.

Each year from 1993 to 2002, Ryan vacationed at Klein's home in Jamaica. The government demonstrated that Ryan engaged in sham transactions in which he would write a check to Klein for $1,000—purportedly in return for his accommodations in Jamaica—and then accept that same amount in a cash payment back from Klein. (Pet.'s Br. at 17; Tr. 2838-42; 2844; 9432-44.) In 1997, Ryan proposed that the Secretary of State lease a building owned by Klein for a commercial drivers' license facility. *Warner*, 2006 WL 2583722, at *10. This court found "ample evidence in the record to support the government's position that this lease was foisted on SOS staff because Ryan wanted to do his friend a favor. Ryan's personal intervention on Klein's behalf initiated the transaction, and Ryan remained involved thereafter." *Id.* Ryan now argues that this mailing was not in furtherance of a bribery scheme. He points to a separate count on which he was convicted for concealing this cash-back arrangement, and argues that he might have concealed these benefits solely because receiving gifts for more than $50 violated state law. (Pet.'s Br. at 17.) True enough, but merely concealing the cash-back arrangement would not be sufficient evidence on which the jury would have convicted Ryan for *this* mailing, which involved a payment from the State to Klein for the South Holland lease.

Ryan also argues, as the court noted, and as argued with the Warner counts, that Ryan must simply have been doing his friend a favor. The indictment, however, required the jury to find, if it believed that the receipt of money from Klein was in furtherance of the scheme, that the money must have been received with the intent to influence Ryan in the performance of his official duties—in other words, for the jury to believe that Ryan received the money in furtherance of the scheme, they must have believed he received a bribe.

Further, on this count specifically, the Government and Ryan both argued on the same terms. In its closing argument, the Government explained,

> Those $100 bills, those cash payments were corrupt payments. You see, those cash payments that Ryan received from Klein made that lodging a free gift. And during the period that George Ryan took that gift, he took official action that

> benefitted Harry Klein, both in the 1995 currency exchange increase and also in the 1997 South Holland lease. And he was doing this all while he was hiding that gift behind a sham paper trail. And Ryan knew that those payments were corrupt payments, because he never reported them. He never disclosed the free lodging that those payments accomplished. He never disclosed that free lodging on his Statement of Economic Interests. And he lied about them to the FBI, as you have heard. And he also lied about them to the public through his press spokesman.

(Tr. 23085.) Ryan argued, then as he does now, that any favor done for Klein was just that—a favor, nothing more. "It'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. 23159-23160.) Ryan pointed the jury to the instruction that explained that good faith is a defense, and argued that Ryan had arranged the lease because it was in the best interests of the State. Further, Ryan reminded the jury that the receipt of personal benefits is a crime only if the benefits were received with the understanding they were given with the intent to influence official action. (Tr. 23148.) In short, the jury was presented with two different versions of these payments, and adopted the Government's view.

No reasonable jury would have believed that Ryan concealed the benefits he received from Klein, steered a lease to Klein, and accepted illegal benefits from Klein, without also believing those benefits were given with the intent to influence his official action, and that he accepted those benefits with the intent to be influenced.

4. Count One (RICO)

Ryan argues that "[b]ecause his RICO conviction was predicated on the mail fraud charges, it is invalid as well." (Pet.'s Br. at 21.) Having determined that Ryan's conviction on Counts Two through Eight stand after harmless error review, the court finds that Ryan's conviction on the RICO count also stands.

II. Pecuniary Fraud

The Government argues that even if Ryan's conviction cannot be sustained based on an honest services bribery theory, it can be sustained on a pecuniary fraud theory. The vast majority

of the post-*McNally* cases found support for convictions based on this alternate theory.[14] In

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[14] Since *McNally*, in nearly every case where the conviction was arguably based both on a straight fraud theory and on an honest services fraud theory, the Seventh Circuit has upheld the conviction under a theory of pecuniary fraud. *See, e.g.*, *United States v. Ewing*, No. 95-2009, 74 F.3d 1242, at *2 n.4 (7th Cir. 1996) (defendant challenged his conviction of honest services fraud on the ground that his conduct pre-dated the statutory amendment generated by *McNally*; court held guilty plea of bribery and bid-rigging could be sustained as pecuniary fraud because "the loss suffered by [defendant's employer] was not 'incidental.' Instead, the money Ewing received as bribes flowed directly, if somewhat circuitously, from the coffers of [his employer] to Ewing."); *United States v. Catalfo*, 64 F.3d 1070, 1077 (7th Cir. 1995) (upholding conviction of options trader who made unauthorized trades under pecuniary fraud theory because "he deprived [the firm that sponsored him] of the right to control its risk of loss, which had a real and substantial value"); *United States v. Cherif*, 943 F.2d 692, 697 (7th Cir. 1991) (upholding mail fraud conviction of a bank employee who traded on the basis of confidential information obtained from bank because "it is not idle speculation to conclude that the confidentiality of the information was commercially valuable to the bank because breaches of confidentiality could harm the bank's reputation and result in lost business . . . ."); *Frank v. United States*, 914 F.2d 828, 834 (7th Cir. 1990) (rejecting petition for § 2255 relief; fixing DUI cases could constitute pecuniary fraud where the scheme involved the theft of surrendered licenses and court records, even though only one of numerous paragraphs describing the scheme included language referencing tangible property); *Ginsburg v. United States*, 909 F.2d 982, 987 (7th Cir. 1990) (concluding, in a § 2255 case, that defendant lawyer's payment of cash bribes for fixing tax appeals constitutes pecuniary fraud because it deprived the county of its right to collect taxes from defendant's clients); *Bateman v. United States*, 875 F.2d 1304, 1309 (7th Cir. 1989) (on § 2255 review of an "honest services" conviction, denying relief because defendant's bid-rigging scheme caused his employer "to pay substantially more for equipment than it would have if Bateman had not engaged in this scheme"); *Ranke v. United States,* 873 F.2d 1033, 1040 (7th Cir. 1989) (upholding conviction based on commercial kickback scheme because defendant's employer "was induced to part with its money on the basis of the false premise . . . that [defendant] would not receive a portion of that money"); *Messinger v. United States*, 872 F.2d 217, 220 (7th Cir. 1989) (upholding conviction of defendant lawyer where judge received cash bail bond in exchange for favorable ruling because "Cook County has a property right, albeit an intangible one, in its security interest represented by the cash bail bond"); *United States v. Cosentino*, 869 F.2d 301, 307 (7th Cir. 1989) (affirming conviction of defendants who looted the assets of an insurance company and deceived regulators; the scheme to deprive the insurer of its right to defendants' honest services was the same scheme that bled the insurer of assets and permitted it to write more insurance than authorized); *United States v. Doe*, 867 F.2d 986, 989 (7th Cir. 1989) (upholding conviction for fixing tax cases because the scheme deprived the county of tax revenue); *Moore v. United States*, 865 F.2d 149, 151 (7th Cir. 1989) (rejecting § 2255 petition for bid-rigging honest services conviction because the existence of a lower-cost bid demonstrates that his public employer suffered financial loss); *United States v. Bailey*, 859 F.2d 1265, 1276 (7th Cir. 1988) (bank official who manipulated the bank's net worth to evade regulators was charged with honest services fraud, but the content of each count of conviction "alleged schemes with the potential to expose [bank's] money and property to plunder by artificially keeping [bank] in operation"); *United States v. Bonansinga*, 855 F.2d 476, 479 (7th Cir. 1988) (upholding conviction where city councilman paid for personal supplies with public funds because indictment alleged single scheme which deprived public both of honest services and pecuniary fraud); *United States v. Wellman*, 830

(continued...)

several of these cases, the conduct at issue was similar to the conduct that Ryan was convicted of—the awarding of contracts by public officials because of bribes or kickbacks, often without any proof of a monetary loss. For example, in *Borre v. United States*, 940 F.2d 215 (7th Cir. 1991), the court upheld the conviction of an individual who helped the mayor of Fox Lake and one of its trustees award a cable franchise in exchange for an ownership stake in that franchise. The court found that the franchise was property, and that a "victim is defrauded of property when the victim loses control over the disposition of that property." *Id.* at 222. In *United States v. Keane*, 852 F.2d 199 (7th Cir. 1988), the defendant, a city councilman, had participated in a partnership that bought property from the city at below-market value using inside information and sold it at higher prices to other municipal bodies. The fact that the scheme may not have been profitable, or may not have victimized his employer, did not undermine his conviction; "the mail fraud statute proscribes fraudulent *schemes*; it does not confine penalties to those whose schemes succeed in raking off cash." *Id.* at 205 (emphasis in original).

These holdings are directly relevant in this case because in *McNally*, the Supreme Court struck down entirely the theory of honest services mail fraud, leaving only pecuniary fraud to support a conviction. Thus, in each case decided in the interim between *McNally* and the date on which Congress reinstated the honest services fraud theory, the court asked whether the honest services fraud conviction required the conclusion that the defendant had committed pecuniary fraud as well. Asking that same question post-*Skilling*, the Seventh Circuit recently upheld one of the fraud counts against Conrad Black based on a $600,000 payment that the court found had no plausible explanation, and therefore must have constituted pecuniary fraud. *United States v. Black*, 625 F.3d at 393. Though the court has concluded that the instructional error was harmless, a

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(...continued)
F.2d 1453, 1462 (7th Cir. 1987) (affirming conviction of honest services fraud under a pecuniary fraud theory where "the substance of the charge was that Wellman facilitated the sale of the [chemical] tanks by falsely representing that they were in compliance with the regulations.").

finding that Ryan's mail fraud conviction necessarily constitutes pecuniary fraud would be an alternate basis for upholding the conviction.

Ryan argues that this pecuniary fraud theory was never presented to the jury, and thus may not be a basis for upholding the verdict. (Reply Br. at 27.) The indictment itself, however, did state that the scheme charged was one "to defraud the people of the State of Illinois, and the State of Illinois, of *money*, *property*, and the intangible right to honest services" (emphasis added). The instructions also referred to a pecuniary fraud theory, explaining that the first element of the mail fraud charge was that "the defendant knowingly devised or participated in the scheme to defraud or to obtain money or property. . . ." (Instructions at 75; Tr. 23902.) The instructions, too, explained that "the phrase 'intent to defraud' means that the acts charged were done knowingly with the intent to deceive or cheat the people of the State of Illinois in order to cause a gain of money or property to the defendants or others, or the potential loss of money or property to another." (Instructions at 80; Tr. 23904-05.) Finally, the record defeats Ryan's assertion that the Government failed to present the pecuniary fraud theory to the jury. *See, e.g.* (Tr. 23771 ("So, folks, there is two different types of schemes. There is one that's for money or property. That is when you are given state business for leases and you are lying about it. You are giving away property. When you are given—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.")). This theory was indeed presented to the jury.

Ryan points to two post-*Skilling* cases that, he says, bar the Government from arguing that Ryan would have been convicted of pecuniary fraud. The first case cited by Ryan involved an honest services conviction based on a scheme wherein former Newark Mayor Sharpe James assisted Tamika Riley, a woman with whom he had an intimate relationship, in acquiring city-owned properties at prices significantly below their market value. *United States v. Riley*, 621 F.3d 312, 318 (3d Cir. 2010). The court explained that, "*[i]n the context of this case, where the fraudulent act is*

the non-disclosure of a conflict of interest, it would demean the judicial process to attempt to put the genie back in the bottle by essentially rewriting the charge to the jury on Count 5 and assuming the jury made distinctions the Government did not bring out in its summation." *Id.* at 324 (emphasis added). Ryan omits the emphasized portion in his brief, but it demonstrates why the reasoning of this case is inapplicable.

The other case Ryan emphasizes is also inapposite. The scheme to defraud there involved a state employee who set up a dummy company with another individual to which he arranged payments to be made for work completed by others and sold to the state at an inflated price. Br. in Opp'n to Writ of Cert., *United States v. Hereimi*, No. 09-1035, at *2 (U.S. filed May 17, 2010). The Ninth Circuit found the case was clearly tried only under a conflict-of-interest theory not involving bribery, and a pecuniary fraud theory was never presented. *United States v. Hereimi*, No. 08-30468, 2010 WL 3735898 (9th Cir. Sept. 23, 2010).

A. Loss Standard

Much of Ryan's argument against a finding of pecuniary fraud is based on the Government's failure to present evidence of a provable loss as a result of the scheme. (Reply Br. at 30-31.) Seventh Circuit precedent, however, does not require that there be a provable loss in such cases.[15]

The wire and mail fraud "statutes do not require the government to prove either contemplated harm to the victim or any loss." In *United States v. Leahy,* 464 F.3d 773 (7th Cir. 2006), the defendants postured as minority businesses in order to obtain city contracts they would otherwise not have won. The court rejected their argument that their scheme could not constitute pecuniary fraud because the city paid no more for the services defendants provided than it would

[15] In an earlier opinion addressing a similar argument from Ryan's co-Defendant, the court explained that in a bid-rigging scheme, loss is often inherent: "A vendor paying bribes to Warner for the privilege of doing business with the State presumably could have reduced the price it charged the State by the same amount it was willing to pay Warner. Thus, to the extent a vendor's price factored in payments made to Warner on the side, the State overpaid for that vendor's services." *United States v. Warner,* 292 F. Supp. 2d 1051, 1064 (N.D. Ill. 2003).

have paid a legitimate contractor. The scheme at issue, the Seventh Circuit observed, "precisely and directly targeted Chicago's coffers and its position as a contracting party. . . . [The] object was money, plain and simple, taken under false pretenses from the city in its role as a purchaser of services."). *See also United States v. Sorich*, 523 F.3d 702, 705 (7th Cir. 2008) (finding a scheme that "doled out thousands of city civil service jobs based on political patronage and nepotism" could constitute pecuniary fraud). Numerous recent cases have upheld this theory, finding that no proof of actual or contemplated loss is necessary. *See, e.g., United States v. Azteca Supply Co.,* No. 10 CR 80, 2010 WL 3940717, at *3-4 (N.D. Ill. Oct. 6, 2010) (finding pecuniary fraud in circumstances similar to *Leahy* despite the fact that the lowest bidder received the contracts, observing that "a jury is entitled to find that by depriving a governmental entity of a 'fundamental basis of [its] bargain,' a defendant can deprive that entity of a property right") (citation omitted); *United States v. Fenzl*, ___F. Supp. 2d ___, 2010 WL 3236774, at *2 (N.D. Ill. Aug. 16, 2010) ("As the law stands, the government does not need to establish pecuniary harm or economic loss as an element of the alleged offenses."); *United States v. Villazan*, No. 05 CR 792, 2007 WL 541950, at *5 (N.D. Ill. Feb. 15, 2007) ("Cook County's right to control its own spending is not a regulatory interest but a property right.").

Ryan cites *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993), in which the court reversed the conviction of a sports agent for mail fraud based on his signing contracts with college athletes in violation of NCAA rules. The Government there alleged that the mailings of scholarship checks to these athletes were in furtherance of the scheme, but the court found they could not be because the universities "were not out of pocket to Walters." *Id.* at 1224 (emphasis omitted). As the Seventh Circuit explained in *Sorich*, this holding "was not a requirement that the defendant receive the money or property, but rather a way of illustrating a deeper problem with the case. The scholarship money that the university sent the athletes was incidental, rather than the target of the scheme." 523 F.3d at 713. In this case, in contrast, the awarding of contracts and leases was the

subject of the mailings and the object of the scheme. The Supreme Court reversed a mail fraud conviction in *Cleveland v. United States*, 531 U.S. 12 (2000), based on the fraudulent receipt of a video poker license, finding that interest to be regulatory, and holding "that § 1341 does not reach fraud in obtaining a state or municipal license of the kind here involved, for such a license is not 'property' in the government regulator's hands."[16] *Id.* at 20. In the case before this court, in contrast, Ryan and Warner were convicted of a scheme that deprived the state of the power to control how its money was spent—the type of deprivation deemed sufficient to support a pecuniary fraud prosecution by other courts that have distinguished *Cleveland*. *See, e.g., United States v. Sorich*, 427 F. Supp. 2d 820, 828 (N.D. Ill. 2006), *aff'd* 523 F.3d 702, *reh'g en banc denied*, 531 F.3d 501 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1308 (2009).

Several of the charges against Ryan also involved the misappropriation or disclosure of nonpublic information. In a case decided shortly after *McNally*, the Supreme Court decided that the *Wall Street Journal* had a property interest in the content of one of its columns, which was kept confidential prior to publication. "Confidential business information has long been recognized as property," the Court observed. *Carpenter v. United States*, 484 U.S. 19, 26 (1987). *See also United States v. Cherif*, 943 F.2d 692, 695 (7th Cir. 1991) (holding that a scheme involving receipt

[16] The Seventh Circuit did hold in a number of additional instances that convictions did not survive review after *McNally* where the Government had not proved deprivation of a property interest. *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989) (holding that city not deprived of property because "[a]ccepting bribes to issue licenses did not deprive Chicago of property; it fattened the City's treasury by $50 (the license fee) for each extra license issued."); *United States v. Gimbel*, 830 F.2d 621, 626 (7th Cir. 1987) (reversing conviction after *McNally* for scheme where attorney caused bank to fail to disclose structured currency transactions because "conceal[ing] information from the Treasury Department which, if disclosed, might have resulted in the Department assessing tax deficiencies" did not result in deprivation of a property right); *United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir. 1988) (vacating conviction of judge for bribery scheme because "Holzer is not accused of having diverted to his own pocket money intended for his employer; the State of Illinois does not sell justice.").

of confidential business information held by bank, for purpose of trading stocks on such information, resulted in deprivation of a property right).

B. Count Two

Count Two involved Ryan's interference with proposed changes to specifications for vehicle registration stickers that might have resulted in Warner's client, ADM, losing its contract to manufacture those stickers for the Secretary of State. The Government argues that "Ryan caused the state to continue to pay ADM for a contract based on specifications that the relevant state official no longer believed were in the state's best interest." (Response Br. at 38.) Ryan argues that the only false representation made by Ryan regarding this contract was that the security mark was necessary for public safety, and that "the Government presented no evidence that Ryan did not believe what he said." (Reply Br. at 32.)

The jury was instructed that good faith was a defense to every count—that "[g]ood faith on the part of the defendant is inconsistent with intent to defraud." (Instructions at 81; Tr. 23905.) Had the jury believed that Ryan made representations about the ADM contract in good faith—in other words, that he genuinely believed the specifications needed to be changed—it would not have convicted him under either a pecuniary fraud or an honest services theory. The court concludes that the jury must have believed that these statements were made with the intent to defraud, and in that case, no reasonable jury that convicted Ryan on this count of honest services fraud would have failed to convict him of pecuniary fraud.

C. Counts Three and Eight

Count Three involves the State's lease of a building in Joliet owned by Warner, and Count Eight involves the State's lease of a building in Bellwood owned by Warner. At trial, the Government presented ample evidence that Ryan steered the leases to Warner, and, again, the jury necessarily rejected any good faith defense. Ryan argues that the only misrepresentation or

nondisclosure involved in these leases was Warner's, and that Ryan "bore no responsibility for Warner's nondisclosures." (Reply Br. at 33.)

The jury, however, convicted Ryan on Count Twelve, which Ryan does not now challenge, of making false statements to the FBI concerning the Joliet lease. The jury found that Ryan lied when he said he never had any discussions with Warner about the lease and did not know that Warner would have profited from the lease. This suggests, at least as to the Joliet lease, that at a minimum, Ryan failed to disclose Warner's interest in the property.

Further, the jury could not have convicted Ryan on either of these counts without believing that Ryan and Warner intended to defraud the State of either property or honest services. To convict Ryan of honest services fraud, the jury must have found that, at the least, that Ryan failed to disclose his conflict of interest—i.e., that Warner stood to profit from the leases and that Ryan had a personal financial relationship with Warner (as the jury also concluded in Count Twelve). This requires the conclusion that the jury must have believed Ryan made material misrepresentations or nondisclosures regarding these leases, and that Ryan was guilty of pecuniary fraud on these counts.

Ryan further argues that he cannot be responsible for Warner's nondisclosures under a theory of conspiracy because "[t]he only conspiracy in which Ryan and Warner allegedly participated . . . was a conspiracy to conduct the affairs of an enterprise through a pattern of pre-*Skilling* honest services fraud." (Reply Br. at 33.) Ryan's responsibility for his own nondisclosures suffices to satisfy that element of the mail fraud charge here, for reasons explained earlier, the conspiracy conclusion that the jury reached is not undermined by *Skilling.*

D. Counts Four and Five

Counts Four and Five grow out of the award of a mainframe computer to contract to IBM, which at the time was a client of Warner's. The evidence at trial established that Ryan allowed Warner and Udstuen to choose the individual who would serve as director of the SOS department

that bid on the mainframe, essentially allowing them to fix the contract. Again, at a minimum, the jury found that Ryan failed to disclose a conflict of interest concerning this episode when they determined that he had deprived the State of its right to honest services. The only conflict of interest that Ryan could have failed to disclose, based on the evidence at trial, was that he was engaged in an exchange of benefits with Warner.

Ryan argues that the only material nondisclosure related to the IBM contract was the receipt of gifts from Warner that were unrelated to any specific action on this contract. Ryan asks whether "an official [could] be convicted of money/property fraud if he approved a contract without revealing that a beneficiary of this contract once took his aunt to dinner?" (Reply Br. at 34.) The answer, of course, is that if the jury found that the official acted in good faith in awarding the contract, then the incidental receipt of a gift to or from a relative would be immaterial. In this case, however, the jury found Ryan did not act in good faith, and it must have found, at least, that that Ryan concealed a conflict related to this transaction, a finding necessary either for either for honest services fraud or pecuniary fraud. The jury must have found Ryan guilty of pecuniary fraud.

Ryan urges that the contract may well have been awarded to IBM regardless of his or Warner's conduct; as explained earlier, however, the lack of actual or contemplated loss does not defeat a verdict of pecuniary fraud. Ryan and Warner perverted the bidding process by concealing their conflicts of interest and therefore denied the State of its power to control how its money is spent—and that is sufficient for a conviction of pecuniary fraud.

E. Count Six

In Count Six, the Government charged Ryan with mail fraud related to the award of a lease in South Holland to Harry Klein. As described earlier, the evidence supported a finding that Ryan steered the lease to Klein in exchange for free stays at Klein's home in Jamaica. These stays involved a sham cash-back transaction wherein Ryan would write a check to Klein, and Klein would pay Ryan back in cash.

Ryan's only argument regarding this transaction is that "the award of a contract or lease to the provider of a gift should not be sufficient in itself to establish a fraudulent deprivation of property." (Reply Br. at 35.) Ryan is correct that if that is all that the evidence shows, it is insufficient. Again, however, the jury found at the least that Ryan concealed a conflict of interest; and the only such conflict of interest that Ryan would have concealed was the stream of benefits that he had received from Klein before the lease was awarded. Such a finding establishes the intent to defraud under either an honest services theory or a pecuniary fraud theory. In addition, the jury found in Count Eleven that Ryan made false statements to the FBI when he said he paid his own expenses in Jamaica, and that he did not take part in, or know the details of, the South Holland lease. Based on these findings, the jury must have convicted Ryan of pecuniary fraud on this count.

F. Count Seven

Analysis of Ryan's conviction on Count Seven follows much the same pattern. Count Seven related to the awarding of a state contract to Viisage, a company that Warner worked for as an unregistered lobbyist. Ryan's alleged nondisclosure in the awarding of this contract was the stream of benefits Warner had provided to him, and Warner's failure to register as a lobbyist for Viisage. At a minimum, the jury found that Ryan failed to disclose a conflict of interest related to that contract, a conflict that must have consisted of the exchange of benefits with Warner. Though this contract also might have been awarded regardless of Warner and Ryan's interference, these nondisclosures and the absence of good faith suffice to establish pecuniary fraud, and because the jurors believed that Ryan concealed his interest in this transaction, they also must have believed that Ryan was guilty of pecuniary fraud. Finally, the State's interest in the confidential information related to this contract could also be considered a property interest.

III. Sufficiency of the Evidence

Ryan argues that the evidence produced at trial was insufficient to support his convictions under the *Skilling* standard, which requires that the honest services scheme involve bribes or kickbacks. "No rational jury could have found Ryan guilty of mail fraud or racketeering in light of the holding in *Skilling*. . . . None of [the] evidence remotely suggested a scheme to obtain bribes or kickbacks." (Pet.'s Br. at 15-16.)

A. Standard of Review

In reviewing a § 2255 petition for sufficiency of the evidence, the court "review[s] evidence and draw[s] all reasonable inferences from it in a light most favorable to the government. . . ." *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir. 1992). To determine whether the evidence is sufficient to support the conviction, "we view the evidence and all reasonable inferences derived therefrom in the light most favorable to the government, defer to the jury's credibility determinations, and 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." *United States v. Blanchard*, 542 F.3d 1133, 1154 (7th Cir. 2008) (quotation omitted).

Because the court has already engaged in harmless-error analysis, much of Ryan's argument regarding the sufficiency of the evidence has been addressed. "[D]etermining whether an evidentiary error is harmless necessarily requires some weighing of the sufficiency of the evidence." *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir. 2006). The court's brief consideration of the sufficiency argument follows.

B. The Evidence Was Sufficient to Establish A Bribery Scheme

Ryan's main argument relating to the sufficiency of the evidence is that his activities, even taken in the light most favorable to the government, fail to establish a bribery scheme of the type required for conviction by *Skilling*. As discussed above, *Skilling* imposed limits on the theory of honest services mail fraud, but it did not impose a requirement that the government prove an explicit *quid pro quo*. A bribery scheme can rest on a "stream of benefits," "course of conduct," or

"retainer" theory of bribery. As the jury was instructed in this case, whether benefits or gifts were given with the intent to influence Ryan's exercise of office can be inferred from the evidence presented. In evaluating Ryan's post-trial sufficiency argument, this court observed that "[t]he government introduced a great deal of evidence of Ryan's acceptance of gifts and benefits." *Warner*, 2006 WL 2583722, at *6. The court need not repeat every charge examined in the harmless-error analysis it has just engaged in, for the evidence that Ryan took official actions favorable to Warner and Warner reciprocated with a stream of benefits is sufficient to establish bribery under *Skilling*. The evidence that Harry Klein paid for Ryan's stays at his home in Jamaica, and that Ryan performed acts favorable to Klein, was also sufficient to establish a bribery scheme that included the award of the South Holland lease charged in Count Six.

Because the standard for harmless-error review is more demanding than the standard in a sufficiency-of-the-evidence inquiry, Ryan's challenge to the sufficiency of the evidence of a bribery scheme necessarily fails. And, as explained earlier, the evidence is sufficient for a finding of pecuniary fraud, as well.

IV. Ryan Was Not Prejudiced By Non-Bribery-Related Evidence

Finally, Ryan argues that he was prejudiced by the admission of evidence that would not have been admissible in a post-*Skilling* honest services fraud prosecution. (Pet.'s Br. at 15; Reply Br. at 36-37.) "The Government charged Ryan with a wide-ranging scheme to defraud that extended over twelve years and with a RICO conspiracy predicated upon the alleged mail fraud scheme. Most of the conduct alleged to be part of the scheme cannot remotely be characterized as bribes or kickbacks. Evidence of this conduct would be inadmissible in a post-*Skilling* mail fraud trial and would be highly prejudicial in a trial of legitimate mail fraud charges." (Pet.'s Br. at 15.)

Ryan does not suggest a standard that should govern the court's review on this issue, although he appears to agree that *United States v. Owens*, 424 F.3d 649 (7th Cir. 2005) applies. *Owens* states that "[t]he test for harmless error is whether, in the mind of the average juror, the

prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded." *Id.* at 656 (citing *United State v. Eskridge*, 164 F.3d 1042, 1044 (7th Cir. 1988)).

Ryan identifies six specific pieces of evidence that, he claims, are inadmissible post-*Skilling*. The court addresses this evidence in turn.

A. Gifts in Excess of $50

Ryan contends that evidence he accepted gifts in excess of the $50 limit established by State regulations and Ryan's own personal policy would now be inadmissible. (Pet.'s Br. at 15.) The Government argues this evidence would be admissible to show his intent to defraud, and was therefore relevant to the mail fraud counts as well as to the false statement counts. (Response Br. at 42.)

The state law and personal reporting requirements are clearly relevant to Ryan's intent to defraud, and would therefore be admissible under either a bribery or pecuniary fraud theory. In each case, the evidence that Ryan failed to disclose gifts when required to do so is probative of whether he intended to conceal or misrepresent his relationships with those receiving state business. Whether this evidence would have been admissible solely on the false statement charges is a closer case, but since the evidence would have been admissible regardless, the court declines to reach that question.

B. Consulting Fee from Phil Gramm

Ryan next argues that evidence he accepted a consulting fee from the presidential campaign of Senator Phil Gramm and did not report that fee should not have been admitted. The Government noted that this conduct was specifically at issue in one of the tax counts: Count Eighteen charged Ryan with concealing payments from the Gramm campaign and failing to report them on his tax returns. Ryan responds that if these payments were admissible only on the tax charge, he could have sought a severance of the trial on those charges or, absent severance, could have asked for a limiting instruction with respect to this evidence. (Reply Br. at 36.) Nothing in

Skilling alters the analysis with respect to the evidence of the Gramm campaign payments. Had Ryan believed the Gramm matter supported a severance or a limiting instruction, he could have asked for such rulings at trial. This issue is not appropriate for § 2255 review.

C. Discharge and Reassignment of SOS Employees

Ryan argues that evidence of the discharge and reassignment of SOS Inspector General employees in order to stifle an investigation into wrongdoing was inadmissible. (Pet.'s Br. at 15.) The Government argues that this evidence was relevant to establishing his intent to use money from the Citizens for Ryan campaign for his personal use, and his failure to pay taxes on that money. (Response Br. at 42.) In fact, Count Eighteen does include a charge that Ryan used Citizens for Ryan money for personal purposes and failed to disclose it. Ryan makes the same severance and instruction arguments here, and for the reasons already stated, those arguments are unavailing.

D. Low-Number License Plates

Ryan contends that evidence he allowed Warner to assign low-digit license plates to friends should not have been admitted. (Pet.'s Br. at 15.) The Government responds that this evidence was relevant as it was part of the alleged scheme to defraud, and would be part of that scheme under either an honest services bribery theory or a pecuniary fraud theory. (Response Br. at 42.) This evidence, the Government contends, "made it more believable that SOS employees recognized Warner's clout and acceded to his demands about state contracts and leases." (*Id.*) Ryan cites FED. R. EVID. 404(b) in reply, which explains that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b) does, however, permit the introduction of such acts "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). Warner's access to and sway within the Secretary of State's office is clearly admissible and relevant to the charged conduct under this standard.

In any event, the court believes the license plate evidence remains relevant to honest services and pecuniary fraud, as well as to the RICO charge. The awarding of low-digit license plates was part of the charged scheme outlined in the summary indictment, and as the court noted earlier, "low-digit license plates appear to have a cachet in Illinois. In the court's view, awarding such items of value to specific campaign contributors is not comparable to generally supporting legislation favored by them." *Warner*, 2005 WL 2367769, at *3. To the extent that low-digit license plates have value, that value belongs to the State, not to Warner and Ryan or their friends. This objection is overruled.

E. Revealing Information About Grayville Prison

Ryan argues that in a post-*Skilling* prosecution, evidence that he leaked information to Swanson concerning the location of the Grayville prison would not have been admitted. (Pet.'s Br. at 15.) The Government responds that this information was admissible "to prove the flow of benefits between Ryan and Swanson" and that this conduct was directly charged in Count Ten. (Response Br. at 42-43.) Ryan again replies with a 404(b) objection.

The evidence at issue related directly to a charged count and certainly would have been admitted; *Skilling* does not require the conclusion that this count would have been dismissed pretrial. In any event, the evidence at issue related only to a discrete occurrence, and although it did not portray Ryan in a positive light, the court is confident the Grayville Prison evidence was not unfairly prejudicial. This objection, too, is overruled.

F. Use of Government Employees and Supplies for Campaign Purposes

Finally, Ryan argues that evidence he allowed government employees to work on his campaign and allowed property belonging to the Secretary of State's office to be used for his campaign should not have been admitted. (Pet.'s Br. at 15-16.) The Government argues that this evidence was relevant to show how Ryan "used false pretenses, including false time sheets, to obtain state money and property." (Response Br. at 43.)

The court agrees with Ryan that this evidence would not be admissible, post-*Skilling*, to prove honest services fraud, as it alleges the very type of self-dealing that *Skilling* found could no longer supports a conviction under this theory. The evidence might have been relevant to a pecuniary fraud theory, but Ryan accurately points out there was no "mailing in furtherance of this alleged misconduct." (Pet.'s Br. at 16 n.11.)

Nonetheless, in a trial involving a complex scheme to defraud, dozens of witnesses, multiple counts, and spanning many months, the court is not persuaded that the prosecution's case would have been "significantly less persuasive" if this evidence were excluded. Nothing in the record of Ryan's petition suggests this evidence constituted a significant or particularly persuasive part of the Government's case. Therefore, the court concludes the admission of this evidence constituted harmless error.

V. Motion to Set Bail

Ryan has also moved to set bail pending the resolution of his § 2255 motion. (Mot. to Set Bail [8].) Ryan submits a number of factors for the court's consideration on this motion, including, most recently, the sad news that his wife of more than fifty years is suffering from a terminal illness. The Ryans' advanced years and their obvious devotion to one another were significant to the court at sentencing and remain so, and the court recognizes that Mr. Ryan poses no risk of recidivism nor danger, were he to be released.

In deciding a motion for release of an individual who has been convicted and sentenced, however, the most relevant factor must not be his or her personal circumstances, but instead the likelihood his § 2255 motion will succeed. Although § 2255 itself does not explicitly provide for setting bail pending the resolution of a petition, the Seventh Circuit has explained that "there is abundant authority that federal district judges in habeas corpus and section 2255 proceedings have inherent power to admit applicants to bail pending the decision of their cases, but a power to be exercised very sparingly." *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985). The

Government and Ryan disagree on the standard for setting bail, and Ryan admits that "[t]he standard for granting bail in this case is unclear." (Mem. in Supp. of Mot. to Set Bail at 2.)

This court takes no pleasure in depriving any defendant of his or her liberty. The court has had the painful duty to take such action in circumstances more compelling than these—where a young defendant with little education or resources is the sole support of small children, or is the only caregiver for a disabled relative, for example. Any sensitive judge realizes that a lengthy prison term effectively robs the convicted person of what we all value most: months and years with loved ones, some of whom will no longer be there when the sentence has been served. Mr. Ryan, like other convicted persons, undoubtedly wishes it were otherwise. His conduct has exacted a stiff penalty not only for himself but also for his family.

The court need not dwell on the appropriate standard for release of a convicted prisoner. In today's ruling, Ryan's § 2255 petition is dismissed on the merits and his conviction is upheld on all counts. Under any legitimate standard, this context is not appropriate for the "very sparing" exercise of the court's power to set bail. Ryan's motion for release is denied.

CONCLUSION

For the reasons stated herein, Ryan's motion to vacate, set aside, or correct his sentence [1] is denied. Ryan's motion to set bail [8] is also denied.

ENTER:

Dated: December 21, 2010

REBECCA R. PALLMEYER
United States District Judge

AO 450(Rev. 5/85)Judgment in a Civil Case

United States District Court

Northern District of Illinois

Eastern Division

George H. Ryan, Sr.

v.

United States of America

JUDGMENT IN A CIVIL CASE

Case Number: 10 C 5512

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Ryan's motion to vacate, set aside, or correct his sentence is denied. Ryan's motion to set bail is also denied.

Michael W. Dobbins, Clerk of Court

Date: 12/21/2010

/s/ Ena T. Ventura, Deputy Clerk

United States District Court, Northern District of Illinois

RRP

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 5512	**DATE**	12/22/2010
CASE TITLE	George H. Ryan, Sr vs. United States of America		

DOCKET ENTRY TEXT

In *Skilling v. United States*, 130 S. Ct.2896 (2010), the Supreme Court concluded that the law prohibiting "honest services" mail fraud must be limited to bribery and kickback schemes. Petitioner urges that his 2006 conviction for honest services mail fraud must be overturned. This court has concluded that the wrongdoing that the government proved at trial falls within the limits imposed by *Skilling* and that any error in the instructions was harmless. In the alternative, the conviction may be upheld because the evidence established pecuniary fraud. The court concludes, however, that Petitioner has made a substantial showing of the denial of due process and therefore grants his petition for a certificate of appealability.

Notices mailed by Judicial staff.

	Courtroom Deputy Initials:	ETV

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. GEORGE H. RYAN, SR., No. 16627-424 Defendant.	)	Case No. 10-CV-05512 Judge Rebecca R. Pallmeyer

DEFENDANT GEORGE H. RYAN'S NOTICE OF APPEAL

Notice is hereby given that Defendant George H. Ryan appeals to the United States Court of Appeals for the Seventh Circuit from the Court's Memorandum Opinion and Order dated December 21, 2010 and entered that same day denying Defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Docket Nos. 34 and 35.) The district court granted a Certificate of Appealability for its Opinion and Order on December 22, 2010. (Docket No. 36.)

DATED: December 27, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant George H. Ryan, Sr., hereby certifies that on December 27, 2010, he caused the foregoing Notice of Appeal to be electronically filed with the Clerk of the Court for the Northern District of Illinois using the ECF System, which will send notification to counsel of record.

DATED: December 27, 2010

Respectfully submitted,

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