No. __ - _____

In the Supreme Court of the United States

GEORGE H. RYAN SR.,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 10-3964

GEORGE H. RYAN SR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ARGUED MAY 31, 2011—DECIDED JULY 6, 2011

Before EASTERBROOK, *Chief Judge*, and WOOD and TINDER, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. George Ryan, a former Governor of Illinois, is in federal prison following his convictions for racketeering, mail fraud, tax evasion, and lying to the FBI. The mail-fraud charge alleged that Ryan defrauded Illinois of its intangible right to his honest services by covertly acting in the

interests of some private supporters rather than as a fiduciary for the state's citizens. Ryan's convictions and sentences were affirmed on appeal. *United States* v. *Warner*, 498 F.3d 666, rehearing en banc denied, 506 F.3d 517 (7th Cir. 2007) (Posner, Kanne & Williams, JJ., dissenting), stay of mandate denied, 507 F.3d 508 (2007) (Wood, J., in chambers; Kanne, J., dissenting), cert. denied, 553 U.S. 1064 (2008).

After the Supreme Court held in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), that the honest-services form of the mail-fraud offense, see 18 U.S.C. §1346, covers only bribery and kickback schemes, Ryan began a collateral attack under 28 U.S.C. §2255. He contended that the jury instructions were defective because they permitted the jury to convict him on an honest-services theory without finding a bribe or a kickback, and he challenged several evidentiary rulings that had been influenced by this circuit's pre-*Skilling* understanding of §1346. Asserting that the errors could not be shown to be harmless under the standard used on direct appeal, Ryan asked for a new trial. The district court concluded that the errors are harmless under that standard and denied Ryan's petition. 2010 U.S. Dist. LEXIS 134912 (N.D. Ill. Dec. 21, 2010). He has appealed.

A collateral attack is timely if filed within one year from the date on which the judgment became final. See 28 U.S.C. §2255(f). Ryan took more than two. But §2255(f)(3) restarts the time when a "right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review". The prosecutor conceded in the district court that *Skilling* meets that standard. The Justices did not say in *Skilling*, a case on direct appeal, whether their decision applies retroactively on collateral re-

view, but *Fischer* v. *United States*, 285 F.3d 596 (7th Cir. 2002), and *Ashley* v. *United States*, 266 F.3d 671 (7th Cir. 2001), hold that a district court or court of appeals may make the retroactivity decision under §2253(f)(3). The language of that subsection differs from 28 U.S.C. §2244(b)(2)(A), under which a second or successive collateral attack may be authorized only when "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable" (emphasis added). See *Tyler* v. *Cain*, 533 U.S. 656 (2001). Because the United States has waived any limitations defense to Ryan's position, we need not decide whether *Skilling* applies retroactively on collateral review, though *Davis* v. *United States*, 417 U.S. 333 (1974), and *Bousley* v. *United States*, 523 U.S. 614 (1998), imply an affirmative answer. (We discuss *Davis* and *Bousley* in more detail later.)

Although the prosecutor's concession takes §2255(f) out of the case, this remains a collateral attack, and the arguments available on collateral review differ from those available earlier. Ryan contended at trial and on appeal (see 498 F.3d at 697–98) that §1346 is unconstitutionally vague, an argument that *Skilling* rejected. He never made the argument that prevailed in *Skilling*: that §1346 is limited to bribery and kickback schemes. Indeed, Ryan himself proposed some of the instructions that the judge gave, see 2010 U.S. Dist. LEXIS 134912 at *29 n.8, and with respect to them he has waived and not just forfeited the line of argument he makes now. See *United States* v. *Olano*, 507 U.S. 725, 732–34 (1993) (discussing how waiver differs from forfeiture). With respect to arguments that were not made at trial, the appropriate standard on collateral review for evaluat-

ing the content of jury instructions is "cause and prejudice". See *Engle* v. *Isaac*, 456 U.S. 107 (1982); *United States* v. *Frady*, 456 U.S. 152 (1982). Collateral review is not just a rerun of the direct appeal, in which a defendant can use hindsight to craft better arguments. Societal interests in the finality of judgments, and in inducing parties to focus their energies on the trial and initial appeal, limit the scope of collateral review. See, e.g., *Harrington* v. *Richter*, 131 S. Ct. 770 (2011).

Ryan sees "cause" in this circuit's pre-*Skilling* law. The district court's rulings and instructions followed the understanding of §1346 articulated in *United States* v. *Bloom*, 149 F.3d 649 (7th Cir. 1998). We concluded in *Bloom* that a public official deprives the public of its intangible right to his honest services, and thus violates 18 U.S.C. §§ 1341 and 1346, if he secretly misuses his position, or the information derived from it, for personal gain. It would have been pointless to argue otherwise, Ryan contends, which in his view establishes "cause" for the failure to ask at trial and on appeal for instructions limiting §1346 to bribery and kickback schemes. (Ryan also insists that by making a constitutional objection to §1346, and contending that any honest-services offense depends on federal rather than state-law standards, he preserved the argument he advances now. The forfeiture as we see it is that Ryan never made in the district court or on appeal an argument that §1346 is best understood to be significantly more limited than *Bloom* held. His current argument that the jury instructions were defective because they did not track *Skilling* is novel. What remains—as we discuss in more detail later—is a contention that he is not substantively culpable.)

There are two problems with an argument that Ryan has "cause" for any default: one practical, one doctrinal. The practical problem is that it would *not* have been pointless to argue that §1346 is limited to bribery and kickbacks. Both Ryan and Skilling were tried in 2006. Yet while Ryan's lawyers proposed instructions based on *Bloom*—which was more favorable to defendants than the law in some other circuits—Skilling's lawyers contended that §1346 is much narrower if not unconstitutionally vague. Skilling asked the Supreme Court to disapprove Bloom. That Court ruled in his favor. If Ryan's lawyers had done what Skilling's lawyers did, the controlling decision today might be *Ryan* rather than *Skilling*. (Ryan's petition for certiorari beat Skilling's to the Supreme Court.)

Nothing prevented Ryan from making the arguments that Skilling did. Many other defendants in this circuit contended that *Bloom* was wrongly decided. Conrad Black was among them. See *United States* v. *Black*, 530 F.3d 596 (7th Cir. 2008). (Black's arguments were not identical to Skilling's, but they came closer than Ryan's.) The Supreme Court heard Black's case along with Skilling's. See *Black* v. *United States*, 130 S. Ct. 2963 (2010). Because Black had preserved an objection to *Bloom's* understanding of §1346, we inquired on remand from the Supreme Court whether the errors were harmless. Black prevailed in part. See *United States* v. *Black*, 625 F.3d 386 (7th Cir. 2010). But that decision was a bona fide rerun (on remand from the Supreme Court) of a direct appeal. Ryan, who has resorted to collateral rather than direct review, is not entitled to the same benefit.

Ryan's doctrinal problem is that "cause" in the

formula "cause and prejudice" means some impediment to making an argument. That the argument seems likely to fail is not "cause" for its omission. So *Bousley* tells us. The Supreme Court held in *Bailey* v. *United States*, 516 U.S. 137 (1995), that 18 U.S.C. §924(c), which at the time made it unlawful to "use" a firearm in connection with a drug transaction, reached only "active" use of the gun; most courts of appeals, by contrast, had equated "use" with "possess". Kenneth Bousley had pleaded guilty to a §924(c) charge rather than contest the eighth circuit's understanding of §924(c). After *Bailey*, he filed a motion under §2255 seeking relief from his conviction. His guilty plea, however, meant that he had forfeited his opportunity to make an argument along the lines that the Justices adopted in *Bailey*. Bousley argued that the adverse circuit law constituted "cause" for this default. The Justices replied:

> While we have held that a claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause for a procedural default, *Reed* v. *Ross*, 468 U.S. 1, 16 (1984), petitioner's claim does not qualify as such. The argument that it was error for the District Court to misinform petitioner as to the statutory elements of §924(c)(1) was most surely not a novel one. See *Henderson*, 426 U.S., at 645–646. Indeed, at the time of petitioner's plea, the Federal Reporters were replete with cases involving challenges to the notion that "use" is synonymous with mere "possession." See, e.g., *United States* v. *Cooper*, 942 F. 2d 1200, 1206 (CA7 1991) (appeal from plea of guilty to "use" of a firearm in violation of § 924(c)(1)), cert. denied, 503 U.S. 923

> (1992). Petitioner also contends that his default should be excused because, "before *Bailey*, any attempt to attack [his] guilty plea would have been futile." Brief for Petitioner 35. This argument, too, is unavailing. As we clearly stated in *Engle* v. *Isaac*, 456 U.S. 107 (1982), "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.' " Id., at 130, n. 35. Therefore, petitioner is unable to establish cause for his default.

523 U.S. at 622–23 (footnote omitted). What the Court said in *Bousley* is equally true of Ryan.

But the Justices added that a forfeiture is not conclusive when a person is innocent. This is where *Davis* becomes important. That decision holds that collateral relief under §2255 is available when opinions released after a person's conviction show that he is in prison for an act that the law does not make criminal. Section 2255(a) authorizes relief for a person whose custody violates "the Constitution or *laws* of the United States" (emphasis added). Davis had argued that statutory exegesis after his conviction established his innocence. The Justices wrote: "such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under §2255." 417 U.S. at 346–47.

Bousley elaborated, holding that a prisoner is entitled to relief if actually innocent:

> To establish actual innocence, petitioner must demonstrate that, " 'in light of all the evidence,' " "it is more likely than not that no reasonable juror would have convicted him."

> *Schlup* v. *Delo*, 513 U.S. 298, 327–328 (1995) (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970)). . . . It is important to note in this regard that "actual innocence" means factual innocence, not mere legal insufficiency. See *Sawyer* v. *Whitley*, 505 U.S. 333, 339 (1992).

523 U.S. at 623–24. If *Skilling* establishes that Ryan is innocent of mail fraud, then he is entitled to relief notwithstanding his lawyers' failure to anticipate its holding. Jury instructions that misstate the elements of an offense are not themselves a ground of collateral relief; likewise with erroneous evidentiary rulings. See, *e.g., Henderson* v. *Kibbe*, 431 U.S. 145 (1977); *Estelle* v. *McGuire*, 502 U.S. 62 (1991); *Gilmore* v. *Taylor*, 508 U.S. 333 (1993); *Wilson* v. *Corcoran*, 131 S. Ct. 13 (2010). (Unconstitutional jury instructions are a different matter. See *Middleton* v. *McNeil*, 541 U.S. 433 (2004). But *Skilling* is about statutory interpretation.) *Davis* and *Bousley* afford relief if a person is in prison for acts that the law does not make criminal. That standard depends on the content of the trial record, not the content of the jury instructions.

Ryan maintains that the prosecutor forfeited reliance on the distinction between actual innocence and defective jury instructions by filing a brief that ignores *Engle, Frady, Davis*, and *Bousley*. On collateral review, however, a court may elect to disregard a prosecutor's forfeiture, because the Judicial Branch has an independent interest in the finality of judgments. See, e.g., *Day* v. *McDonough*, 547 U.S. 198 (2006) (holding a collateral attack barred as late, despite the prosecutor's erroneous statement to the district court that the petition was timely). Ryan's trial

lasted eight months, and his appeal led to more than 100 pages of opinions by four judges of this court. It would be inappropriate to treat this collateral proceeding as a second direct appeal. It is not as if the United States gave the game away; to the contrary, it argued that the errors in the instructions are harmless because the record at trial establishes that Ryan took bribes in exchange for official services. If he did, then *Skilling* permits his conviction for mail fraud.

The right question under *Davis* and *Bousley* is whether, applying current legal standards to the trial record, Ryan is entitled to a judgment of acquittal. If yes, then the mail fraud convictions must be vacated; if no, then they stand. This is the approach we took to §924(c) prosecutions after *Bailey*. See, e.g., *Gray–Bey* v. *United States*, 209 F.3d 986 (7th Cir. 2000); *Young* v. *United States*, 124 F.3d 794 (7th Cir. 1997); *Broadway* v. *United States*, 104 F.3d 901 (7th Cir. 1997); *Nuñez* v. *United States*, 96 F.3d 990 (7th Cir. 1996). It is equally applicable to mail-fraud prosecutions after *Skilling*.

On the record at trial, a jury could have convicted Ryan of mail fraud using the legal standard set by *Skilling*. He is therefore not entitled to collateral relief.

The record shows compellingly—indeed, Ryan admits—that he received substantial payments from private parties during his years as Secretary of State and Governor. The failure to report and pay tax on this income underlies the tax convictions. The debate at trial on the racketeering and mail-fraud charges was whether these payments were campaign contributions, plus gifts from friends and well-wishers, or were instead bribes designed to influence Ryan's offi-

cial actions. If a reasonable jury could find that the payments were bribes, then the mail-fraud convictions survive *Skilling*.

Our initial opinion summed up the core of the charges:

> The story behind this case began in November 1990 when Ryan, then the Lieutenant Governor of Illinois, won election as Illinois's Secretary of State. He was re-elected to that post in 1994. Throughout Ryan's two terms in that office, [Lawrence E.] Warner [Ryan's co-defendant] was one of Ryan's closest unpaid advisors. One of Ryan's duties as Secretary of State was to award leases and contracts for the office, using a process of competitive bidding for major contracts and selecting leases based on the staff's assessments of multiple options. Improprieties in awarding four leases and three contracts form the basis of the majority of the RICO and mail fraud counts against Warner and Ryan, as these leases and contracts were steered improperly to Warner-controlled entities. The result was hundreds of thousands of dollars in benefits for Warner and Ryan. These benefits included financial support for Ryan's successful 1998 campaign for Governor of Illinois.

498 F.3d at 675. Ryan observes that the jury was not required to determine whether Warner's payments were bribes or kickbacks. True enough; the question under the instructions, based as they were on *Bloom*, was whether Ryan had received a secret financial benefit. See also *United States* v. *Thompson*, 484 F.3d 877 (7th Cir. 2007). But there is no doubt that a

properly instructed jury could have deemed the payments bribes or kickbacks; the inference that they were verges on the inescapable. The district court's opinion canvasses the evidence and demonstrates why a reasonable jury could find that Ryan sold his offices to the high bidders. 2010 U.S. Dist. LEXIS 134912 at *52–83. It is unnecessary for us to repeat the exercise.

AFFIRMED

7-6-11

APPENDIX B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 3, 2011

Before

FRANK H. EASTERBROOK, Chief Judge

DIANE P. WOOD, Circuit Judge

JOHN DANIEL TINDER, Circuit Judge

No. 10-3964

GEORGE H. RYAN, SR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court

for the

Northern District of Illinois,

Eastern Division.

No. 10 C 5512

Rebecca R. Pallmeyer, Judge.

Order

Petitioner-appellant filed a petition for rehearing and rehearing en banc on July 19, 2011. No judge in regular active service has requested a vote on the petition for rehearing en banc,[1] and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

[1] Judge Flaum and Judge Rovner did not participate in the consideration of this petition.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE H. RYAN, SR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 10 C 5512
Judge Rebecca R. Pallmeyer

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.)[2] The court also sentenced Ryan to one year of supervised release. (*Id.*) The Seventh Circuit upheld Ryan's conviction on

[2] 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.

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,[3] 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 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

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[3] 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).

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* resets 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.[4] On

[4] 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.

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 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"

Alschuler, *The Mail Fraud & RICO Racket: Thoughts on the Trial of George Ryan*, 9 GREEN BAG 2D 113, 114 (2006).

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[5] 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,

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[5] 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.

the Court noted that "the honest-services doctrine had its genesis in prosecutions 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,[6] 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 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

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[6] 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.").

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[7] would have convicted Ryan of a legally

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[7] 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

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 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

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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).

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.[8] 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 coschemer' 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.

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[8] 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.*

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. *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*[9]

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[9] 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 instruc-

tion 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

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 fi-

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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), 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.

> nancial 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. 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 explain-

ing 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 Californi*a, 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 vi-

> olates 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 dis-

> close. 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[10], and that the "stream of benefits" flowing be-

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[10] 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

tween 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-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*

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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.

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[11] 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,

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[11] 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)).

> 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.
>
> . . .
>
> 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*.[12]

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:

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[12] 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.)

the first paragraph speaks of the acts involved in the scheme and the object of the frauds; the 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,[13] suggested such a

[13] 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

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.").

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

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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.").

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 in-

structed, 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.[14] (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 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

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[14] As noted, the jury was instructed that campaign contributions are unlawful only if given in exchange for a specific official act.

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 in-

tent 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 al-

ternate theory.[15] In several of these cases, the conduct

[15] 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

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

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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 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.").

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 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.[16]

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 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

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[16] 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).

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."[17] *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

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[17] 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.").

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 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 sa*Id.*" (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 States* 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. EV*ID.* 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. EV*ID.* 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

APPENDIX D

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 06-3517 & 06-3528

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAWRENCE E. WARNER and

GEORGE H. RYAN, SR.,

Defendants-Appellants.

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

ARGUED FEBRUARY 20, 2007—DECIDED
AUGUST 21, 2007*

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

WOOD, *Circuit Judge*. This appeal comes to us after an investigation that lasted for years and a jury trial that lasted more than six months. In the end,

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* This opinion is being released in typescript. A printed version will follow.

the two defendants, former Illinois Governor George H. Ryan, Sr., and his associate Lawrence E. Warner, were convicted on various criminal charges. The case attracted a great deal of public attention, and thus the district court handling the trial had to handle a number of problems, some of which were common and others less so. The fact that the trial may not have been picture-perfect is, in itself, nothing unusual. The Supreme Court has observed more than once that "taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial." *United States v. Lane*, 474 U.S. 438, 445 (1986) (quoting *United States v. Hasting*, 461 U.S. 499, 508-09 (1983)). It is our job, in this as in any other criminal appeal, to decide whether any of the court's rulings so impaired the fairness and reliability of the proceeding that the only permissible remedy is a new trial.

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

gue criminal statute," see 18 U.S.C. § 1346. Warner additionally objects to the joinder of his trial with Ryan's, and Ryan argues that certain grand jury testimony violated his attorney-client privilege.

Some potential issues, we note, are not before us. The defendants do not argue that the problems with the jury had a cumulative, prejudicial effect, even though they made this argument in their motion for a new trial before the district court. Nor do they claim that the evidence was insufficient to support any of the charges on which they were convicted. Rather, their appeal is focused on particular alleged procedural and legal errors. As we would in any case, we review only those issues presented to this court. We conclude that the district court handled most problems that arose in an acceptable manner, and that whatever error remained was harmless. We therefore affirm the convictions.

I

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

The story behind this case began in November

1990 when Ryan, then the Lieutenant Governor of Illinois, won election as Illinois's Secretary of State. He was re-elected to that post in 1994. Throughout Ryan's two terms in that office, Warner was one of Ryan's closest unpaid advisors. One of Ryan's duties as Secretary of State was to award leases and contracts for the office, using a process of competitive bidding for major contracts and selecting leases based on the staff's assessments of multiple options. Improprieties in awarding four leases and three contracts form the basis of the majority of the RICO and mail fraud counts against Warner and Ryan, as these leases and contracts were steered improperly to Warner controlled entities. The result was hundreds of thousands of dollars in benefits for Warner and Ryan. These benefits included financial support for Ryan's successful 1998 campaign for Governor of Illinois.

Prospective jurors for the trial in this case filled out a 110-question, 33-page form, which covered among many other topics the subjects of their criminal and litigation histories, their knowledge of the investigation of Ryan, and their awareness of Ryan's positions on public issues. Counsel for all parties and the court reviewed the questionnaires for four days; voir dire consumed another six days. The district court seated 12 jurors and eight alternates. The trial lasted six months. The prosecution presented approximately 80 witnesses against the defendants. In the end, the evidence supporting the jury's verdict was overwhelming. We give only a few examples here from the extensive record that was created. To begin with, the evidence showed that Ryan steered an $850,000 four-year Secretary of State's office lease to Warner for a property that Warner had recently pur-

chased for just $200,000. Ryan took regular Jamaican vacations paid for by a currency-exchange owner to whom Ryan later steered a $500,000 six-year Secretary of State's office lease. Ryan took a Mexican vacation paid for by an individual to whom Ryan later steered another Secretary of State's office lease and a lobbying contract worth nearly $200,000 for virtually no work. Warner received more than $800,000 for helping a company land a major Secretary of State's office contract without registering as a lobbyist and added another of Ryan's friends into the arrangement at Ryan's request before the contract was awarded. Finally, and remarkably, despite evidence showing that they were enjoying a very nice lifestyle, Ryan's and his wife's total withdrawals from their bank accounts averaged less than $700 per year for ten years.

The jury retired on March 13, 2006. This jury deliberated for eight days. During their deliberations, the jurors were allowed occasional breaks so that some jurors could smoke outside. At the same times, some of the other jurors would go outside for fresh air or walk up and down the courthouse stairwells for exercise. No one formally objected to the court about these activities. On at least one occasion, the court noted that the jurors were accompanied by court personnel when on breaks. Putting media accounts and testimony that the district court discredited to one side, there is no basis in the record to conclude that any deliberations took place when the jurors were separated from one another.

It was not long before problems arose. On Monday, March 20, 2006, Juror Ezell sent the court a note, also signed by the foreperson, complaining that other jurors were calling her derogatory names and

shouting profanities. The court conferred with counsel and responded with a note instructing the jurors to treat one another "with dignity and respect."

Two days later, the court received a note from Juror Losacco signed by seven other jurors, asking if Juror Ezell could be excused because she was refusing to engage in meaningful discourse and was behaving in a physically aggressive manner. The court again conferred with counsel, noting that "[Losacco] has not told us anything about the way the jury stands on the merits. She really has not." The next morning the court responded with a note, which began "You twelve are the jurors selected to decide this case." The note then reiterated that the jurors were to treat each other with respect and reminded them of their duties.

On the eighth day of deliberations, a few hours after the court responded to the Losacco note, media reports surfaced claiming that one of the jurors had given untruthful answers on the initial juror questionnaire regarding his criminal history. The court stopped the jury's deliberations while it looked into the new allegations, After a background check confirmed that Juror Pavlick had not disclosed a felony DUI conviction and a misdemeanor reckless conduct conviction, the court questioned him individually. The court asked counsel if there would be any objection to dismissing Pavlick. Neither the prosecutor nor Ryan's counsel voiced any objection when Warner's counsel moved to dismiss Pavlick or when the court granted that motion.

It turned out that Juror Ezell's record was also problematic. A background check turned up seven criminal arrests, an outstanding warrant for driving

on a suspended license, and an arrest under a false name, "Thora Jones." The fingerprints of the "Thora Jones" arrestee matched Ezell's, and it turned out that the name "Thora Jones" might belong to Ezell's daughter, who also has a significant criminal history. The government told the court that it would have moved to excuse Ezell for cause had it known during voir dire that she had given law enforcement officers false booking information, as the Ryan-Warner case also involved charges of providing false information to law enforcement officers. The court replied that "I suspect there would not have been an objection [to that cause challenge]. She would have been excused." The court proceeded to question Ezell, who acknowledged her untruthfulness. Even then, however, she was not forthcoming about her use of the name "Thora Jones" nor about her daughter's criminal history. The court concluded that "some of the answers she just gave me ... aren't truthful." Warner's counsel agreed that Ezell should be excused, while Ryan's counsel took no position initially. When the government moved to dismiss Ezell, Ryan's counsel objected to the standard employed but did not object to the decision to remove Ezell based on her untruthfulness.

The court also questioned a number of other jurors. It turned out that Jurors Gomilla and Talbot both had filed for bankruptcy in the mid-1990s, but neither included this information in response to a question about whether they had ever appeared in court or been involved in a lawsuit. That question, however, appeared in a section entitled "Criminal Justice Experience." Several other jurors had also left that question blank: Juror Svymbersky, an alternate, who stole a bicycle at age 18 or 19 in 1983 and thought that the charges had been expunged; Juror

Rein, who was arrested for assault for slapping his sister in 1980, but never appeared in court; Juror Casino who had three arrests that he had not remembered when filling out the questionnaire, because they occurred forty years earlier, in the 1960s, when he was in his early 20s; and Juror Masri, an alternate, who reported a 2000 DUI conviction but had said nothing about a 2004 DUI conviction nor about his conditional discharge or probation in September 2005.

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

In light of the dismissals, it became necessary to

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

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

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

II

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

A

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

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

The proper characterization of this note is a question of fact, which we review for clear error. *United States*

v. Mancillas, 183 F.3d 682, 695 (7th Cir. 1999). Juror Peterson told the district court that her handwritten statement came from her own, independent thoughts. The district court credited that testimony, noting the lack of overlap between the subject of the AJS article and Peterson's note as well as the similarities between Peterson's note and the court's instructions to the jury on their duty to deliberate.

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

B

The AJS article was indisputably extraneous information in the jury room. It dealt generally with the subject of juror removal and substitution. The excerpt that Peterson read to the jury was the following:

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

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

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

Washington v. Recuenco, 126 S.Ct. 2546 (2006). The Court explained:

> We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.'" *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. at 8 (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal.

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

The defendants do not contend that anything that *Recuenco* recognized as structural error occurred here. Instead their argument is about jury instructions and external influences on the jury. The Court repeatedly has subjected challenges to external influences on jurors to harmless error analysis. In *United*

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

In evaluating it in this light, we bear two things in mind. First, we have held, and we reaffirm, that district courts "retain ... substantial discretion over the determination of whether the prejudice arising from the unauthorized contact is rebutted or harmless." *United States v. Sababu*, 891 F.2d 1308, 1335 (7th Cir. 1989); see also *Evans v. Young*, 854 F.2d 1081, 1084 (7th Cir. 1988). The relevant question is thus whether the court abused its discretion in making that determination. *Sababu*, 891 F.2d at 1334. Second, context matters. Many cases in which extraneous information made its way into the jury room involve evidence relevant to the defendant's guilt or innocence. See, e.g., *United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996) (unadmitted transcript of admitted recording that labeled one speaker as the defendant although identification was in dispute); *Sababu*, 891 F.2d at 1332-33 (unadmitted transcript of defendant's unadmitted recorded conversation with a co-defendant); *United States v. Bruscino*, 687 F.2d 938, 941 (7th Cir. 1982) (en banc) (Bureau of Prisons document about the defendant's possible membership in prison gang and a newspaper article about the

case). The excerpt from the AJS article did not. Compare *United States v. Estrada*, 45 F.3d 1215, 1226 (8th Cir. 1995), *vacated on other grounds*, 516 U.S. 1023 (1995) (differentiating between external information that merely supplements the court's instructions and factual evidence not developed at trial).

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

This court has looked to the Supreme Court's decision in *Remmer v. United States*, 347 U.S. 227, 228 (1954), in order to develop a legal standard in this area. *Sababu*, 891 F.2d at 1335. In *Remmer*, the Court considered the case of a juror who supposedly was offered a bribe for a vote to acquit. 347 U.S. at 228. The FBI was brought in to question the juror, and the district court concluded that the bribe was a joke, but the defendant was never told about the allegation. *Id. Remmer* held that

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

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

District courts have some flexibility in structuring an inquiry into this kind of problem. *Bruscino*, 687 F.2d 938 at 940. Sometimes the circumstances are such that the *Remmer* presumption does not even apply. Thus, in *Whitehead v. Cowan*, 263 F.3d 708, 723 (7th Cir. 2001), we held that it did not apply to the publication of jurors' names and addresses by the media. *Whitehead* also suggested that "no *Remmer* hearing is necessary" where a "comment heard by a juror was ambiguous and innocuous." 263 F.3d at 725-26. We need not explore when a hearing may not be essential, however, since the district court held one here. The general rule is that the district court "'should determine the circumstances [surrounding the improper contact] and the impact thereof on the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.'" *Sababu*, 891 F.2d at 1335 (quoting *Remmer*, 347 U.S. at 230).

The defendants argue that this standard does not adequately protect the deliberative process. They urge the adoption of a standard under which "any reasonable possibility of prejudice" from the external influence automatically entitles a defendant to a new trial. This, however, would represent a significant extension of the law. In our view, such an extension is

not warranted and would in fact be inconsistent with the Supreme Court's approach to harmless error. If the district court is able to take remedial measures that remove the possibility of prejudice, or if it finds after a hearing that the Government has rebutted the presumption of prejudice, no new trial is required.

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

C

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

thing important.

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

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

The district court also concluded that the AJS article "does not state or imply that jurors must reach any decision," and could not "lead a reasonable juror to change his or her determination for fear of punishment." Rather, based on the court's instructions about deliberations, the "jurors may have reasonably

believed, even without consulting extraneous material, that they could be removed if they refused to 'deliberate.'" This differs significantly from the situation faced by the Ninth Circuit in *United States v. Rosenthal*, in which a juror asked an attorney friend whether she had "any leeway" in following the court's instructions on the law and her friend advised her that she "could get into trouble" if she strayed from the instructions, which implies a more severe penalty than simply being removed from a jury. 454 F.3d 943, 950 (9th Cir. 2006).

We now come to what may be the most powerful reason for concluding that Peterson's reading of the paragraph from the AJS article did not prejudice the defendants: it occurred during the deliberations of the initial jury, and the district court took measures to assure that the new jury could and would put Round 1 behind them. After dismissing Ezell and Pavlick, the district court asked each one of the remaining original jurors individually if he or she could disregard the previous deliberations and start over. For example, the court asked one juror, "If I were to tell you that today we are bringing some other jurors back and you must start all over, is that something you think you can do?" and "Could you, do you believe, to the best of your ability, put out of your mind all the discussion that's happened in the last few days with your fellow jurors?" The juror responded, "Yes, I can. Put it over and just start new." The court continued, "Just start as though it never happened before?" The juror replied, "Yes." The court followed up yet again, "Any concerns about how –the difficulty that that would present for you?" The juror responded, "None whatsoever. I have no problems with it."

We approved a similar manner of proceeding in

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

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

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

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

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

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

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

> not occur. *You also should not discuss or mention any statements or comments made during the prior deliberations when you begin these new deliberations*. (emphasis added).

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

D

The defendants make one final argument about the alleged external influences on the jury. They claim that the district court "*acknowledged* presumptive prejudice, [but] it effectively required a showing of *actual* prejudice." We do not see it that way. The

defendants are forgetting that there is a middle ground, in which the court finds presumptive prejudice, but it then goes on to find that the government has rebutted that presumption. After interviewing both Ezell and Peterson, the district court stated "I am comfortable, based upon what I have heard, at least at this point, that the jurors' brief consideration of that material did not [cause] prejudice." The court did not conclude that the defendants lost because they failed to show actual prejudice, or that it was their burden to do so. It found that the government satisfied its burden to show that there was no prejudice, as it is entitled to do under *Remmer*. For all of these reasons, the district court did not abuse its discretion in concluding that the extraneous information at issue did not prejudice the defendants.

III

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

The revelations of the possible criminal records of some of the original jurors led, as we have said, to the district court's decision to excuse Jurors Pavlick and Ezell and to replace them with alternates. Defendants raise five arguments relating to the process of removal and replacement: first, they accuse the district court of misleading defense counsel about the standard that would be used for removing jurors;

second, they assert that the court applied an arbitrary standard for dismissals; third, they claim that the prosecution knew that Ezell was a holdout juror for the defense at the time it moved for Ezell's removal; fourth, they speculate that the removal of Ezell chilled pro-defense jurors; and finally, they fear that the investigation into the jurors' backgrounds biased the jurors against the defense.

A

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

resolve the problems that had arisen.

B

The next question is whether the district court applied this standard consistently. When the possibility arose that some sitting jurors would need to be removed because of their criminal records, the court asked the attorneys for their thoughts on the standard to apply to possible removals. All attorneys responded with arguments to the court. Less than an hour later, the court informed counsel that it saw a difference between jurors such as Pavlick and Ezell, for whom there were significant disparities between the questionnaires and their recent criminal histories, on the one hand, and jurors such as Casino, who may simply have forgotten long past criminal histories or may not have understood what was required to be disclosed.

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

Martinez-Salazar, 528 U.S. 304, 316 (2000).

Before Ezell was dismissed, the district court asked defense counsel if they were accepting its standard. The court again clarified the standard being used, stating that a juror's saying only that she did not understand a question, or a juror acknowledging that she may not have answered everything truthfully, might not be excusable solely for that reason. The government agreed and noted that even if it might have made a challenge for cause, the decision would have been the court's in the end. The defense counsel stated their disagreement "that that's the standard that should be applied," and again expressed a preference for removing any juror "the Court has found ... not [to be] truthful." When all was said and done, however, this was just a discussion about how to apply the *McDonough* standard to these facts. The court recognized this: in its order denying defendants' motion for a new trial, it reiterated that it had applied the *McDonough* standard to removing the contested jurors.

Ignoring this extensive exchange, the defendants claim that "the district court never made any findings with respect to any juror that would have constituted a valid challenge for cause." The record does not support that assertion. The dismissal of Ezell provides a good example. After explaining the applicable standard, the district court said, "Let's just start with the use of an alias. I think that probably would have been a basis for cause...." Prior to Ezell's dismissal, the government told the district court that it would have challenged her for cause had it known that "she has an arrest with a false name" because "[h]ow somebody who gives law enforcement officers false information upon an arrest can possibly be an impartial

juror in this case, where one of the charges is giving false information to law enforcement officers, is well beyond me." The prosecution added, "Judge, there would not have been a contest" and that it was "[n]ot even an issue" because the government would always challenge for cause under such circumstances. The court responded that "if ... there would have been a cause challenge, I suspect there would not have been an objection. She would have been excused."

Soon after saying that, the court questioned Ezell about her arrest under a false name and concluded that her response was not forthcoming. As the court put it, "[Ezell] has never told us the truth about the [false] name Thora Jones." After listening to the attorneys' arguments, the court said, "I think she has concealed a great deal of information. And the critical question is, had this question been answered, would it have been grounds for cause? I can't imagine that the answer is anything other than yes. I think I have to excuse her." This is enough to convince us that Ezell was removed because she would have been removable for cause. This case is not like *United States v. Harbin*, where the district court told the parties that jurors would be removed only for cause once trial began, but then it allowed the prosecution to use a peremptory challenge to remove a juror during the trial. 250 F.3d 532, 547 (7th Cir. 2001). Based on the lengthy discussions among the court, the prosecutors, and defense counsel, it is apparent that everyone knew that the court was using the *McDonough* standard.

The defendants try to undermine this conclusion by arguing that the prosecution did not raise challenges for cause against all jurors with criminal convictions or family members with extensive criminal

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

Pavlick's dismissal during deliberations stemmed from an undisclosed felony DUI conviction during Ryan's tenure as Secretary of State. The Illinois Secretary of State sets many significant drunk driving policies, and this case dealt with locations of the Secretary's local motor vehicles administration facilities that might have connected Pavlick's conviction to Ryan's office. In fact, it appears that there was some action taken by the Secretary of State against Pavlick while Ryan was serving in that office. The conviction, coupled with Pavlick's negative association with Ryan's office, provide ample grounds for dismissal for cause. Even Warner's counsel stated, "[w]e have a real concern with a convicted felon sitting with a deliberating jury for eight days." There was no argument from any attorney before the district court that Pavlick would not have been removed for cause had he been honest during voir dire. Also, the only juror with similar convictions to Pavlik's—alternate Masri—was also dismissed. Again, the district court was entitled to remove Pavlick under the *McDonough*

standard.

Other jurors also found themselves under the court's scrutiny. Alternate juror Svymbersky failed to disclose a 23- year-old conviction charge for purchasing a stolen bicycle, explaining that he had not thought of it when filling out his questionnaire. The court ultimately believed this explanation. Juror Casino had three arrests (including one conviction) in the 1960s. He too testified that he did not remember these incidents when filling out the questionnaire. The district court remarked after interviewing Casino that "[t]his juror is as credible as any juror I have ever had." The court listened to the attorneys argue about Casino and then said, "somebody who really, truly doesn't remember it and hasn't gotten in any trouble since, it seems to me could hardly have a bias." Juror Rein was arrested in 1980 for assault for slapping his sister, but never appeared in court for the charge and thought that the matter had been expunged from his record. He testified that he did not recall the event when he filled out his questionnaire. By contrast, alternate juror Masri had reported a DUI conviction in 2000 but had not disclosed another DUI conviction in 2004 or that he was on probation in September 2005. The district court ultimately allowed the defendants' cause challenge against Masri, and we have already noted the similarities between Pavlick's and Masri's criminal records. Although one of Masri's DUI misdemeanor convictions came out during voir dire, that one did not occur while Ryan was the Secretary of State and therefore it is not unreasonable that neither party would have moved to remove him for cause for that conviction alone. Only when it turned out that there were multiple, recent convictions, and that Masri was trying to hide them,

did the likelihood that he would have been removed for cause become significant.

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

C

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

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

already reviewed) for dismissing Ezell for cause were genuine.

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

D

The defendants also contend that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations." Based on our discussion above, we believe that the instructions that the court gave to the reconstituted jury prevented any chilling of pro-defense views in the new jury. It is also worth noting that the jurors who served on both juries would have recalled that when the court initially received the note about Ezell, it responded by instructing the jury that "you twelve are the jurors selected to decide this case." This instruction also operated to prevent any potential chilling of pro-defense views (or any other dissenting views).

Moreover, the first juror dismissed after that re-

sponse from the court was Pavlick, who had signed the note, not Ezell.

E

The defendants' last argument relating to the jury is that the background checks on jurors that the court ordered when word of the criminal backgrounds hit the media prejudiced the defense. The government rightly points out that the defense asked for many of these checks. Although this comes close to waiving this point for appeal, we are willing to assume that the defense's waiver was not complete.

Nevertheless, the district court's specific instructions to the reconstituted jury, as well as its repeated admonitions to avoid media coverage of the trial, precluded any bias against the defense by preventing the jurors from knowing about the extent of the background checks. The defendants' only real support for their argument comes from Juror Losacco's testimony that she was "scared" during her interview. But this trepidation appears to have resulted from the number of lawyers in the room during her interview rather than any feeling that she needed to serve the prosecution's interest or risk punishment. Therefore, we see no abuse of the court's discretion in its decision to call for the background checks.

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

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

IV

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

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

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

decision to replace deliberating jurors rests firmly within the district court's discretion.

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

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

[the defendant] by affecting the jury's final verdict." *Id.* At 842. Thus, *Register* undertook a prejudice inquiry only because the district court had no discretion under the old Rule 24(c) to retain alternate jurors.

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

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

We have no intention of deciding this case based

on anything but what is properly in the record. The only allegation that we need address is the one of jury misconduct, and it is easily rejected. The district court, based on its assessments of the jury's notes to the court, concluded that there was no concerted effort to remove any juror based on her viewpoint. This conclusion, which is supported by the record, provides all the basis this court needs to affirm the district court's decision to order substitutions of jurors.

The defendants complain that we have no way of knowing whether the jury really started its deliberations anew, as the court told it to do. They also charge that the record reveals a likelihood that empaneled alternate DiMartino discussed the case with outsiders while the first jury's deliberations were ongoing. We have no quarrel with the Eleventh Circuit's practical observation that "the further along deliberations proceed, the more difficult it becomes to disregard them and begin anew." *United States v. Kopituk*, 690 F.2d 1289, 1310-11 (11th Cir. 1982). *Kopituk* also held, however, even before the amendment to Rule 24, that even though

> the jury spent a total of approximately five days deliberating prior to substitution of the alternate ..., the jurors' individual assurances that they could and would begin deliberating anew, combined with the fact that the jury deliberated for a full week subsequent to substitution of the alternate juror, is sufficient indication that the jurors were able to and did in fact obey the court's extensive instructions regarding their duty to eliminate all prior deliberations from their minds and begin with a clean slate.

Id.; see also *Edwards*, 303 F.3d at 631 (dismissing a juror after eleven days of deliberations, although not discussing seating an alternate); *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (overturning verdict where reconstituted jury deliberated for only 29 minutes). In the case before us, the original jury deliberated for eight days and the reconstituted jury deliberated for ten. As in *Kopituk*, there is nothing here to suggest that the jurors did not obey the court's instructions and begin deliberations anew. Indeed, the reconstituted jury even requested additional instructions from the court on specific counts in the indictment during its deliberations that the original jury had not sought.

The record also gives no reason to be especially concerned about alternate DiMartino. She testified before being seated that every time someone would approach her about the case while the first jury was deliberating, she would cut them off immediately. When asked by the court if there was anything she had heard that could "interfere with your ability to become – to start fresh with the jury," she replied "No ... because, like I said, we never sat down and had a conversation and discussed anything, what they heard or anything.... I would just go, 'Please don't talk about it to me,' I said, 'I am still involved.'" As the district court made clear in its denial of defendants' motion for new trial, it found these statements to be credible. We have no reason to second-guess that factual determination.

Rule 24(c) therefore furnishes no basis for a finding that the district court abused its discretion in replacing jurors Ezell and Pavlick with alternate jurors DiMartino and Svymbersky. Defendants have made no showing that this replacement of jurors does not

fall squarely within the allowable bounds of the new Rule 24. As they confess in their brief, they seek a holding that "almost any decision to substitute [during deliberations is] prejudicial." This cannot be the proper standard under the new Rule 24(c).

V

Moving, at last, away from the jury issues, the defendants claim that the district court erred in excluding evidence that showed Ryan's good faith, Ryan's lack of fraudulent intent and the reasonableness of Ryan's belief about the bona fides of the transactions at issue in this case, including those that involved Warner. We review a district court's evidentiary decisions for abuse of discretion. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). Mail fraud is a specific intent crime, and so defendants are entitled to introduce evidence of good faith or absence of intent to defraud. *United States v. Longfellow*, 43 F.3d 318, 321 (7th Cir. 1994). This court, however, "do[es] not require that any evidence, no matter how tangential, irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith." *Id.* at 321-22.

A

The first evidentiary dispute arose when Ryan wanted to introduce evidence to the effect that his successor as Secretary of State, Jesse White, had renewed some of the leases and contracts at issue here. The district court excluded this evidence as irrelevant. It reasoned that "the naked act of some other official, whether he preceded or followed Ryan in office, does not shed any light on what Ryan himself intended when he took that same act, absent evi-

dence that Ryan actually considered the official's act." It continued, "[t]he decision to renew a lease is, moreover, one influenced by many factors other than the decision to enter into a lease in the first place." The question for us is whether this decision was an abuse of the district court's discretion.

Many of the leases at issue here involved property for long-term operations, such as DMV locations and a police department office. These are not the type of facilities that the state can pack up every few years and move just because rent is slightly cheaper a few blocks away. Thus, a later administrative decision to renew such a lease shows only that the lease is not so disadvantageous to the state that it outweighs the costs that would be required to move to a new location. It sheds no light on whether the original lease or contract was proper.

In making its determination, the district court was not applying any sort of "inflexible rules." In *Riordan v. Kempiners*, one of the cases the defendants cite, the district court had drawn a line in time and prohibited all evidence that developed after a specific date. 831 F.2d 690, 698 (7th Cir. 1987); see also *CERAbio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 993 (7th Cir. 2005) (holding that evidentiary exclusions should be made based on the substantive value of the evidence rather than the date of the evidence). The district court's ruling here, in contrast, was based on the substance of the evidence that would be offered and the court's evaluation of the probative value of that evidence.

The limited nature of the district court's ruling becomes even more evident when one sees that it did not even apply to all evidence post-dating the leases

and contracts. Both the prosecution and defense provided experts to assess the soundness of the contracts and leases at issue in this case. The government's expert offered only a retrospective analysis of the extent to which some of the subject leases reflected fair market value. The defense expert, in contrast, appears to have based his opinion in part on an analysis of leases and properties that were not available until years after the leases at issue were awarded.

Defendants therefore had the opportunity to justify the contracts and leases at issue using economic analysis and expert testimony; they were not deprived of the opportunity to assess these deals with the benefit of hindsight. This means as well that the defense was not arbitrarily foreclosed from putting forth relevant evidence, the error criticized in *CERA-bio*, 410 F.3d at 994.

The defendants' argument that prosecution witness Glen Good's testimony unfairly crossed some temporal line fails because there was no such line. The proper comparison, in any event, is not between Good's testimony and evidence that Secretary White renewed the leases. It is between Good's testimony and the defendants' evidence about lease decisions and the results of those decisions during Ryan's tenure as Secretary of State. Good, who was in charge of property maintenance during Ryan's term in office, testified about the soundness of particular lease decisions during Ryan's tenure. Good's testimony also rebutted the argument that Ryan made lease decisions only on the basis of recommendations from his staff. Ryan was free at trial to introduce evidence about his decision-making process for the leases and contracts in question, and he took advantage of that opportunity. The defense was also allowed to cross-examine

Good extensively (over the government's objection) about the information he omitted from his reports about certain various properties at issue in this case.

It is conceivable that another court would have reached different conclusions about the relevance of this excluded evidence, but that does not mean that the district court abused its discretion here. We conclude that its ruling was one that it reasonably could have made, that it was not a result of arbitrary line-drawing, and thus that it did not give rise to reversible error.

B

The district court used a similar rationale to exclude evidence of rate increases made by other Illinois Secretaries of State. The defendants claim that the district court "refused to admit defense evidence showing that such rate increases were a regular practice of the SOS." This mischaracterizes the district court's holding. The specific rate increases by other officials were excluded where they played no role in Ryan's rate increase. The court allowed Ryan to introduce evidence that his predecessor (and his predecessor's advisors) recommended a rate increase as overdue, but held off on the increase for election reasons. This type of evidence is arguably probative because it provides support to Ryan's contention that the increase was a sound policy decision. See *Longfellow*, 43 F.3d at 322.

The defendants claim that the rate hikes approved by other Secretaries of State were "evidence of the routine practice of [an] organization[]" and should have been allowed as evidence under FED. R. EVID. 406. A "routine practice," however, requires more repetition and mechanization than the occasional rate

decisions here displayed. See Advisory Committee Notes for Rule 406, emphasizing the need for a "repeated specific situation" before something qualifies as "habit." The Note comments that "[e]quivalent behavior on the part of a group is designated 'routine practice of an organization' in the rule." The practice that the defense wanted to demonstrate here was not the type of "regular response to a repeated specific situation" required for admission under Rule 406. Here again, we conclude that the district court did not abuse its discretion by excluding the proffered evidence.

C

Finally, the defendants challenge the exclusion of certain policy decisions that Ryan made while in office. The defense argues that "the prosecution attacked Ryan at trial as [a] 'greedy,' 'shameless' politician who treated his public offices as 'personal kingdoms' in which he was 'pillaging the state, stealing from the taxpayers' in breach of the public's trust." Ryan, they argue, was entitled to an opportunity to correct this impression. If these quotes had come from the government's case-in-chief, then they might have a point. But they did not. The quoted statements come from the prosecution's closing argument. The government did not use evidence of Ryan's general dishonesty in its case-in-chief; it focused on the bad faith associated with the criminal acts charged in this case. The district court permitted Ryan to introduce evidence of many of his policy accomplishments and goals. It also allowed him to call numerous character witnesses, who testified about such achievements as strengthened drunk-driving laws, improvements in the state library system, the development of

an organ-donor registry, and reform of Illinois's death-penalty laws. The government's closing argument was therefore an allowable response.

The defendants also point to a particular government witness, Patrick Quinn, whom the defense sought to impeach through his opposition to Ryan's death penalty work. The district court was prepared to allow the defense to impeach Quinn, but it was willing to permit reference only to a "public policy" disagreement, not to the death penalty. Ryan chose not to impeach the witness. The defendants have not shown how they were prejudiced by this limitation.

In a more general argument, the defendants contend that had the jury been able to view the charged acts alongside the excluded evidence of Ryan's policy work, it would have seen that the evidence overall "did not fairly indicate the existence of a scheme to defraud." *Worthington v. United States*, 64 F.2d 936, 942 (7th Cir. 1933). The link between the excluded evidence and the charged acts, however, is not so direct.

Had it existed, evidence that Ryan steered leases or contracts away from his financial benefactors might have cast some doubt on the existence of the conspiracy and scheme charged. But Ryan's work on issues of importance to the public, such as the death penalty, important and admirable though it may have been in many people's eyes, does nothing to show that Ryan was not at the same time accepting financial benefits in exchange for other specific, official actions. So long as the government did not allege specifically that all of Ryan's acts as Governor were for his own financial gain, the district court was within its rights to exclude discussion of various official

acts that were wholly disconnected from the charges in this case. Courts have held that excluding evidence of satisfied customers is not an abuse of discretion in cases charging a defendant with a fraudulent scheme. See, *e.g.*, *United States v. Elliott*, 62 F.3d 1304, 1308 (11th Cir. 1995). Excluding evidence of activities even further removed from the charged acts is not an abuse of discretion either.

VI

In the next part of their appeal, the defendants raise a question of law: is it permissible for the government to charge and prove the State of Illinois itself is an "enterprise" for RICO purposes, and secondarily, did the district court err when it instructed the jury that the State of Illinois is a "legal entity." We consider these arguments in turn.

A

The question whether a state may be an "enterprise" for purposes of a RICO prosecution is one of first impression. The defendants' first reason for arguing that it cannot be relies on the remedies allowed under RICO. The statute provides for remedies including court-ordered "dissolution or reorganization of any enterprise," 18 U.S.C. § 1964(a). Since it is obvious that no court would have the power to disband a sovereign state, the defendants argue that the remedial provisions of the law implicitly mean that the state cannot be a RICO enterprise.

The only problem with this attack is that the Supreme Court rejected it long ago:

> Even if one or more of the civil remedies might be inapplicable to a particular illegiti-

> mate enterprise, this fact would not serve to limit the enterprise concept. Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions.

United States v. Turkette, 452 U.S. 576, 585 (1981). RICO provides a menu of remedies; it does not matter if one or more of the items on that menu might be unavailable in a particular case. Instead, what is important, according to *Turkette*, is that Congress meant the term "enterprise" to be "inclusive." 452 U.S. at 586.

This court has held that other public bodies, which similarly cannot be dissolved, may be the "enterprise" through which a RICO conspiracy or operation proceeds. See, e.g., *United States v. Murphy*, 768 F.2d 1518, 1531 (7th Cir. 1985) (the Circuit Court of Cook County); *United States v. Lee Stoller Enterprises*, Inc., 652 F.2d 1313, 1318-19 & n.9 (7th Cir. 1981) (en banc) (RICO enterprise can be a public body, citing cases). We conclude that for purposes of defining a RICO "enterprise" there is no difference between the state and its subdivisions.

The defendants next argue that comity interests prevent the use of a state as a RICO enterprise in a criminal case. The only court to consider directly whether a state can be a RICO enterprise was the District Court of Maryland. *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976). The defendants urge us to accept the reasoning in *Mandel*, which found that the *State of Maryland* was not a RICO enterprise in the prosecution of a Maryland governor. 415 F. Supp. at 1021. District court opinions have no au-

thoritative effect on this court, so we look to the analysis of district courts only to inform, rather than instruct, our decisions. *RLJCS Enters. v. Prof'l. Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 494, 499 (7th Cir. 2007).

It is enough to note that Mandel did not limit its analysis to states as potential RICO enterprises. The district court there expressed concern about the possibility of finding that any public entity was a RICO enterprise. 415 F. Supp. at 1020. Since *Mandel* was decided, the Fourth Circuit has criticized its analysis on several occasions. *United States v. Long*, 651 F.2d 239, 241 (4th Cir. 1981); *United States v. Altomare*, 625 F.2d 5, 7 (4th Cir. 1980); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980). In each of these cases, the Fourth Circuit explicitly rejected the rationale of *Mandel*. *Long*, for example, referred to *Altomare* and *Baker*, noting that "[i]n two recent RICO cases ... we have indicated our disapproval of that [*Mandel*] decision. We have held, in accord with the majority of the cases, that RICO should be construed to include public entities as enterprises." 651 F.2d at 241.

Long justified the use of major governmental entities as RICO enterprises in indictments, stating that "[n]either the Act nor the courts' interpretation of it support the contention that its enforcement threatens the discretion state officials must exercise in the discharge of their duties[, but instead] ... [t]he Act sustains, rather than threatens, the integrity of the South Carolina Senate," which was the named RICO enterprise in that case. 651 F.2d at 241. Our sister circuits have reached similar conclusions about the use of governmental entities as RICO enterprises. See, *e.g.*, *United States v. Angelilli*, 660 F.2d 23, 33

(2d Cir. 1981) ("[W]e view the language of § 1961(4), defining enterprise, as unambiguously encompassing governmental units, and we consider that the purpose and history of the Act and the substance of RICO's provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public governmental entities."); *United States v. Frumento*, 563 F.2d 1083, 1091 (3d Cir. 1977) (comparing the Commonwealth of Pennsylvania to a major corporation and concluding that if the RICO enterprise concept does not reach governmental entities, then "private business organizations legitimately owned and operated by the states ... would be open game for racketeers"); *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993) ("We adopt the view of seven circuit courts and hold that a governmental entity may constitute an 'enterprise' within the meaning of RICO.'").

The decision that came closest to addressing the issue at hand is the Sixth Circuit's *en banc* opinion in *United States v. Thompson*, 685 F.2d 993 (6th Cir. 1982). There the court held that "The Office of the Governor" could be the enterprise in a RICO prosecution. *Id.* at 998-1000. The court supported its conclusion as follows:

> It seems clear to us that those who played the leading roles in the enactment of the RICO statute thoroughly understood organized crime's impact upon government entities. Senator McClellan, the chief sponsor of this bill and chairman of the committee which drafted it, said:
>
> "To exist and to increase its profits, Mr. President, organized crime has found it necessary

> to corrupt the institutions of our democratic processes, something no society can tolerate." Further, he said, "For with the necessary expansion of governmental regulation of private and business activity, its power to corrupt has given organized crime greater control over matters affecting the everyday life of each citizen."
>
> ...
>
> Representative St. Germain told the House that "the greatest danger from organized crime lies not in its provision of illegal goods and services, but in its penetration of the country's legitimate institutions."

Id. at 1000 (internal citations omitted).

The Sixth Circuit noted its concern that an indictment naming the governor's office as a RICO enterprise could be unnecessary and disruptive in some cases, and it recommended that prosecutors should try to avoid such charges in the future if possible. The court suggested that a modified indictment might work better in similar, future cases, based on the RICO definition of "enterprise" as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* (quoting 18 U.S.C. § 1961(4)). The court stated that "the language which could and we believe preferably should have been employed, would have alleged that the three defendants constituted a 'group of individuals associated in fact although not a legal entity which made use of the Office of Governor of the State of Tennessee' for the particular racketeering activities alleged in the indictment." *Thompson*, 685 F.2d

at 1000.

We endorse the Sixth Circuit's call for caution. We also agree with the Sixth Circuit's ultimate conclusion that the prosecution's approach to this issue in cases such as *Thompson* and the case at hand may often not be absolutely necessary under RICO, but it is not forbidden. Some cases, however, are exceptional, and ours is one of them. In such a case, the prosecution may have no real alternative to naming the state as the RICO enterprise. (This of course does not mean that the state itself has violated any federal law; it may instead be a victim of the overall scheme, as are many RICO enterprises.) In such a case, the use of the state as the RICO enterprise in the indictment is analogous to the courts' treatment of the state as a market participant in a dormant commerce clause case. If the CEO of a major corporation, who ascended to that position from other senior executive positions, engaged in comparable activities, we would not only accept but expect a RICO conspiracy indictment with the corporation itself named as the RICO enterprise, even knowing that the overwhelming majority of employees, shareholders, and consumers of the corporation were innocent of wrongdoing. The situation here is the same.

In this case, the prosecution thought that it had identified an ongoing scheme to defraud the State of Illinois through the illegal use of two of the most significant executive branch offices of the state and of the state's electoral processes during Ryan's campaign for Governor in 1998. The scheme revolved around an elected official throughout his tenure in these two offices – Secretary of State and Governor – and during the time he was a candidate for the latter office. No legal rule prohibited the prosecution from

concluding that there was no single entity or office that it could have identified, short of the state as a whole, that would have encompassed the enterprise that was used by the defendants. In these unusual circumstances, comity interests do not override the broad language of RICO, as interpreted in *Turkette*. The district court did not err by allowing the state to be the RICO enterprise in this RICO conspiracy prosecution.

B

We now turn to the district court's instructions to the jury on the question of the state as a RICO enterprise. All the district court said was that the State of Illinois is a "legal entity." Whether that is correct or not is a question of law, and as such, it was not one that could have been left for the jury to decide. See *United States v. Lee*, 439 F.3d 381, 388 (7th Cir. 2006) (upholding the district court's inclusion of a definition of "organization" in its instructions where the statute required that "the Government must prove ... that the defendant uttered or possessed a counterfeit and forged security of an organization"). The district court told the jury that the government had to prove three things, including that the State of Illinois was an enterprise. Some "persons" (legal or real) may be "entities" but they still may not meet the statutory definition of "enterprise." See, *e.g., Turkette*, 452 U.S. at 582 (examining the characteristics of a criminal structure to determine whether it was an "enterprise" under RICO). Nevertheless, because governmental or public entities fit within the definition of "enterprise" for purposes of RICO, this court has often rejected objections to jury instructions that a governmental entity is an "enterprise." See *United States v. Hocking*,

860 F.2d 769, 778 (7th Cir. 1988) ("In light of our clear precedent, appellant's claim that the district court erred in instructing the jury that the IDOT is an 'enterprise' within the reach of § 1962(c) is rejected."); see also James Morrison Mecone, *et. al., Racketeer Influenced and Corrupt Organizations*, 43 Am. Crim. L. Rev. 869, 881 (2006) ("When the enterprise under consideration is a legal entity, the enterprise element is satisfied by the mere proof that the entity does in fact have a legal existence."). We conclude, therefore, that the district court did not err when it accurately informed the jury that the State of Illinois is a legal entity.

VII

The next argument that Warner and Ryan present is that the term "intangible right to honest services" in the mail fraud statutes under which they were convicted, 18 U.S.C. §§ 1341 (basic mail fraud), 1346 (definition of "scheme or artifice to defraud" includes deprivation of intangible right to honest services), is unconstitutionally vague. The district court's instructions to the jury, they continue, "mirrored" this vagueness.

The constitutionality of a statute is an issue of law that is reviewed *de novo. United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003). The defendants acknowledge that this court recently upheld the constitutionality of the "intangible right to honest services" term in the federal mail fraud statute. *Hausmann*, 345 F.3d at 958. The constitutionality of § 1346 has repeatedly been challenged, and every circuit to address this issue has upheld it, even though the rationales have differed. See, *e.g., United States v. Rybicki*, 354 F.3d 124, 132 (2d Cir. 2003) (*en banc*); *United*

States v. Bryan, 58 F.3d 933, 941 (4th Cir. 1995); *United States v. Gray*, 96 F.3d 769, 776-77 (5th Cir. 1996); *United States v. Brumley*, 116 F.3d 728, (5th Cir. 1997) (*en banc*); *United States v. Frost*, 125 F.3d 346, 370-71 (6th Cir. 1997); *United States v. Frega*, 179 F.3d 793, 803 (9th Cir. 1999); *United States v. Welch*, 327 F.3d 1081, 1109 n29 (10th Cir. 2003); *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995). There have been dissenting opinions in two circuits' opinions on this issue. *Rybicki*, 354 F.3d at 162-64 (Jacobs, J. dissenting); *United States v. Brumley*, 116 F.3d 728, 742-47 (5th Cir. 1997) (Jolly, J. and DeMoss, J. dissenting).

Given this unanimity on the central point, our concern here is only with the question whether the district court's instructions properly reflected this court's approach to the details of the claim. Previous holdings on this issue are not necessarily dispositive because "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Powell*, 423 U.S. 87, 92 (1975). "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Posters 'N' Things, LTD. v. United States*, 511 U.S. 513, 525 (1994). If the defendants could not have known that the conduct underlying their convictions could be considered "depriv[ing] another of the intangible right of honest services," 18 U.S.C. § 1346, then the statute is void for vagueness as applied here.

In *Hausmann*, we held that

> under the intangible-rights-theory of federal mail or wire fraud liability, a valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed.

345 F.3d at 956. In *United States v. Bloom*, we similarly concluded that "[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty ... from federal crime." 149 F.3d 649, 655 (7th Cir. 1998). The opinion continued, "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain." *Id.* at 656-57.

In the present case, we are facing the same type of conduct that was before the court in *Hausmann* and *Bloom*. The defendants claim that the jury instructions in this case contradicted the holdings in those two cases, but we disagree. Those cases do not require the jury to find a violation of a specific state law in order to convict. The court told the jury that "the government [must] prove[] beyond a reasonable doubt that the public official accepted the personal financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." The court continued that the receipt of "personal or financial benefits ... does not, standing alone, violate the mail fraud statute.... Instead that receipt violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making."

The court also told the jury that "[n]ot every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation."

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

We are unpersuaded that the references to state law in the jury instructions were phrased in a way that makes the use of the mail fraud statute here unconstitutional. Many of the state law provisions in the instructions explained what kinds of financial transactions are not prohibited for state officials. This explanation was more likely to undermine than to assist the prosecution in showing the defendants' intent to deprive Illinois citizens of Ryan's honest services. The other cited provisions of Illinois law identified for the jury various ways in which a public official could "misuse his fiduciary relationship," but the instructions as a whole unambiguously required the prosecution to prove that misuse of the office was intended for personal gain, as *Bloom* and *Hausman* held.

We also note that this court in Bloom did not call the relevant section of the mail fraud statute a "common-law federal crime[]," as defendants suggest. It merely analogized this section to common law crimes on the way to concluding that the "intangible

right" term needs clear boundaries. 149 F.3d at 656. A court's interpretation of a term in a federal criminal statute does not create a federal common law crime.

Although the intangible rights theory of federal mail fraud may have its problems when applied to other fact settings, it is not unconstitutionally vague as applied here. The district court here focused the jury on the important points needed for conviction, and in so doing, gave instructions consistent with *Hausmann* and *Bloom*.

VIII

We turn, now, to Warner's assertion that the court erred by permitting the joinder of his trial with Ryan's and denying his motion for severance. This court has construed FED. R. CRIM. P. 8, which governs joinder in criminal trials, "broadly to allow liberal joinder in order to enhance judicial efficiency." *United States v. Stillo*, 57 F.3d 553, 556 (7th Cir. 1995). We have repeatedly stated that "joint trials are beneficial not only for efficiency but because they limit inconvenience to witnesses, avoid delays in bringing defendants to trial, and allow the 'total story' to be presented to a single jury." *Id.* At 557. We review misjoinder claims de novo. *United States v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003).

A

Joinder is proper, under Rule 8(b), if the defendants "are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Under the rule, "[t]he defendants may be charged in one or more counts together or separately"; all defen-

dants "need not be charged in each count." Rule 8(b) is satisfied when the defendants are "charged with crimes that well up out of the same series of such acts, but they need not be the same crimes." *United States v. Pigee*, 197 F.3d 879, 891 (7th Cir. 1999). See also *United States v. Stewart*, 433 F.3d 273, 314 (2d Cir. 2006); *United States v. Eufrasio*, 935 F.2d 553, 567 (3d Cir. 1991). "[T]he mere fact that two conspiracies have overlapping memberships will not authorize a single indictment if the conspiracies cannot be tied together into one conspiracy, one common plan or scheme," but a "conspiracy and its cover-up are parts of a common plan." *United States v. Velasquez*, 772 F.2d 1348, 1353-54 (7th Cir. 1985).

Whether there was an error in joining a defendant is determined by looking only at the indictment. *Lanas*, 324 F.3d at 899. In this case, the final indictment contained 22 counts. Count One was the RICO conspiracy for which both Warner and Ryan were charged. Count Two was the mail fraud scheme, which is listed in Count One as a racketeering act and a means and method of the RICO conspiracy; again, it charged both Warner and Ryan. Of the remaining twenty counts, both were charged in six (Counts Three, Four, Five, Seven, Eight, and Nine), Ryan alone was charged in ten (Count Six, Counts Ten through Thirteen, and Counts Eighteen through Twenty-two), and Warner alone was charged in four (Counts Fourteen through Seventeen). (The defendants were acquitted on Counts Nine and Ten.)

Examining the indictment, we see that both defendants were charged in the RICO conspiracy and the mail fraud scheme, the two primary courses of conduct charged in the indictment. The mail fraud scheme was also part of the RICO conspiracy. In *Ve-*

lazquez, the court found misjoinder of one count because "[t]he indictment does not relate those charges to any of the charges against the other defendants named in the indictment, and the defect is not merely a technical oversight in pleading." *Velasquez*, 772 F.2d at 1353. By contrast, in this case, all of the conduct in Counts One through Seventeen relates to the charges in either the RICO conspiracy, mail fraud scheme or both, which are charged against both Warner and Ryan.

The only charges unconnected to these two schemes appear in Counts Eighteen to Twenty-Two, Ryan's tax fraud charges. This court has held that "[j]oinder of a tax evasion count is appropriate when it is based upon unreported income flowing directly from the activities which are the subject of the other counts." *United States v. Anderson*, 809 F.2d 1281, 1288 (7th Cir. 1987). The tax fraud scheme charged in Count Eighteen was specifically related to Ryan's campaign committee "Citizens For Ryan." The factual allegations in Count Eighteen recount Citizens For Ryan's diversion of funds to pay for Ryan's and his family's personal expenses, "thereby depriving the IRS of accurate information as to his true income." The allegations of Count One, the RICO conspiracy charge, state that Ryan was obligated by law to report on his federal and state tax returns all expenditures by Citizens For Ryan that were made for personal expenses. Count One also states that part of the *modus operandi* of the RICO conspiracy was the provision of "personal and financial benefits to, and for the benefit of, defendant Ryan, Ryan family members, third parties affiliated with Ryan, and Citizens For Ryan … for the purpose of influencing and rewarding Ryan in the exercise of Ryan's official au-

thority." From the language of the indictment, we can see that the tax fraud scheme and the RICO conspiracy scheme are part of "the same series of acts or transactions, constituting an offense or offenses." FED. R. CRIM. P. 8(b). Many of the same underlying facts—the movement of funds through Citizens For Ryan, for example—are necessary to prove both claims. All of this is enough to explain why we find no improper joinder of the charges against Warner with those against Ryan.

B

Because joinder was proper under Rule 8(b), Warner must show that he has suffered from "prejudicial joinder," which is distinct from misjoinder. "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." FED. R. CRIM. P. 14(a). In order to prevail on his argument that the district court erred in denying his motion for severance under FED. R. CRIM. P. 14(a), it is necessary (though not sufficient) for Warner to show prejudice. *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993). See also *United States v. Souffront*, 338 F.3d 809, 831 (7th Cir. 2003) (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)). "Limiting instructions ... often will suffice to cure any risk of prejudice," and tailoring relief from prejudice is left to the district court's discretion. *Zafiro*, 506 U.S. at 539-541. Where joinder of defendants was proper, "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of

the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. "Actual prejudice" does not exist just because "separate trials would have given a defendant a better opportunity for an acquittal." Rather, the defendant must have been "deprived of his right to a fair trial." *United States v. Rollins*, 301 F.3d 511, 518 (7th Cir. 2002). The denial of a motion for severance is reviewed for abuse of discretion. *Id.*

Warner argues he suffered prejudice because the joinder violated his substantial rights in multiple ways. He objects first to the fact that his case was linked at all with Ryan's, but this argument goes nowhere, as the indictment demonstrates that the charges against him were closely connected with those against Ryan. Had he been tried separately, he would not have enjoyed the status of "an unknown businessman," as he suggests; he would have still faced charges as a coconspirator that centered around the activities of the former Governor. Therefore, Warner cannot show that the publicity around Ryan's trial affected his substantial rights in this case.

Next, Warner alleges that Ryan's out-of-court statements to the FBI were testimonial and therefore his constitutional right to confrontation was violated. These statements were not admitted for the truth of the matter asserted, however, and therefore are not hearsay and do not implicate the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). There was also no *Bruton* issue, because the statements admitted at trial were not inculpatory and did not amount to a confession from Ryan. *Bruton v. United States*, 391 U.S. 123, 127 (1968). The district court excluded the statements that it viewed as potentially inculpatory, including all of Ryan's

statements to the FBI naming Warner except those with innocuous or uncontested references.

Warner also contends that significant portions of the evidence introduced against Ryan could not have been introduced against him in his own trial. The record does not bear this out. Much of the evidence with which Warner takes issue described acts that were part of the conspiracy charged against both defendants in Count One or the scheme charged against both defendants in Count Two. "[E]vidence of one participant's actions in furtherance of a scheme to defraud is admissible against the other participants in that scheme, just as it is in a conspiracy case." *United States v. Adeniji*, 221 F.3d 1020, 1027 (7th Cir. 2000).

The only significant evidence that was unrelated to the charges against Warner was some evidence pertaining to Ryan's tax fraud scheme. Yet even these acts derived from a common set of facts that made up the RICO conspiracy and mail fraud scheme. Therefore, much of the evidence of "a decade of state business, as well [as] ... Ryan's lifestyle and personal and political campaign finances," was properly part of the evidence that was admissible against Warner because of Counts One and Two. For these reasons, the district court's denial of Warner's proposed limiting instruction for the tax counts was appropriate. The tax evidence relating only to Ryan was minor compared to the evidence presented to show the conspiracy and mail fraud scheme. The district court did not abuse its discretion in curing any possible prejudice from joinder through limiting instructions rather than severance. See *Zafiro*, 506 U.S. at 539.

Finally, Warner argues that the jurors were not following the court's instructions generally and there-

fore the limiting instructions were ineffective. We are reluctant to call into question the institution of the jury in this way. As we said in *United States v. Hedman*, we may examine "whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant" in considering whether severance was improperly denied. 630 F.2d 1184, 1200 (7th Cir. 1980) (internal quotation marks omitted). Nothing in this record convinces us that this jury was either unable or unwilling to follow the careful instructions that the district court gave. Warner does not claim that there was insufficient evidence to convict him on any of the charges against him (although we note the district court threw out to Ryan's convictions on two counts for insufficiency of the evidence).

We conclude that Warner has not shown actual prejudice resulting from the joinder of his case with Ryan's. To the extent that there was a risk of prejudice, the district court took appropriate steps to exclude evidence, restrict the use of evidence, and provide specific limiting instructions to the jury. It did not abuse its discretion under Rule 14(a) by denying Warner's motion for severance.

IX

Finally, Ryan alone also asks this court to hold that it was error to compel the former chief legal counsel in the Secretary of State's office to provide grand jury testimony about his work with then-Secretary of State Ryan. This compelled testimony, Ryan argues, violated his attorney-client privilege.

We decline to consider this issue for two reasons. First, Ryan has failed to demonstrate what legally

cognizable prejudice he suffered from that decision. It is also not clear what relief he is seeking for this alleged infringement of the privilege. Generally, a defendant challenging an indictment seeks to have the indictment dismissed, but the relief Ryan seeks in this appeal is a new trial. This would do nothing to correct an error in the indictment. The Supreme Court has held that a

> petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt ... [and therefore] any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

United States v. Mechanik, 475 U.S. 66, 69 (1986). Ryan suggests no reason why this general rule should not apply here. Even in cases where indictments can be dismissed, a court "may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988).

Ryan states in his brief that he "re-raise[s] the issue here to preserve it for further review." While parties are free to make a limited argument in order to preserve the issue for further review, they must say something to allow this court to consider the argument on its merits, even if they have every expectation that we will reject it. Ryan has not developed this point enough for us to give it meaningful consideration; we thus consider it waived. See *United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000).

Second, this court has already spoken on this

point. Ryan was entitled to and did appeal the district court's determination in 2001 that the attorney-client privilege did not attach to his communications with the chief legal counsel in the Secretary of State's office. *In re Witness Before the Special Grand Jury* 2000-2, 288 F.3d 289 (7th Cir. 2002). We considered and rejected this argument at that time. *Id.* at 295. That is the law of the case, and Ryan has given us no reason to deviate from it. See *In re Oil Spill by The Amoco Cadiz*, 954 F.2d 1279, 1291 (7th Cir. 1992). We acknowledge that the Second Circuit, in a different case involving communications between a governor and his counsel, has concluded that the privilege applies. See *In re Grand Jury Investigation*, 399 F.3d 527, 535 (2d Cir. 2005). The Second Circuit acknowledged the tension between its holding and the decisions of three other circuits, including our court's 2002 decision. 399 F.3d at 533 (noting contrary decisions from the Seventh, Eighth, and D.C. Circuits); see generally *In re Lindsey*, 332 U.S. App. D.C. 357, 158 F.3d 1263 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). As matters now stand, three other circuits have weighed in on this issue, two of which agree with us. Even apart from law-of-the-case considerations, we respectfully decline to re-open that issue here.

X

We conclude with two final comments about this appeal. First, like all defendants who appeal their convictions, Ryan and Warner have presented certain arguments to this court and they have elected not to present other arguments. At oral argument, there was some discussion of the argument that our dissenting colleague has emphasized – an argument that

they chose not to raise: the allegation that members of the jury may have had too much freedom of movement and too much unsupervised time together, during which the opportunity to engage in premature discussions of the case may have arisen. Compare *United States v. Dellinger*, 472 F.2d 340, 373-74 & n.50 (7th Cir. 1972) (emphasizing need for thorough voir dire in presence of extensive pretrial publicity). Jury control measures, however, lie within the discretion of the district court judge; this is not an area in which a decision not to sequester, or a decision to permit jurors to walk around unsupervised, triggers such a strong presumption of error that we would have to reverse on that basis even in the absence of both (1) any objection at trial and (2) any complaint on appeal. See *Recuenco*, *supra*. District courts have no duty to "sequester the jury..., *sua sponte*, in every case involving prejudicial publicity." *Margoles v. United States*, 407 F.2d 727, 732 (7th Cir. 1969). There is no presumption or rule that sequestration is ever necessary, although we do not dispute that it is a good idea in some highprofile cases, and may well have been the better course here. See *United States v. Carter*, 602 F.2d 799, 808 (7th Cir. 1979) (Tone, J. concurring) (noting this and suggesting such a rule may be preferable). Our opinion, then, should not be taken as necessarily approving of the practices the district court adopted for this case; on the other hand, without the proper objections and briefing, it would be improper for us even to reach the question of plain error arising from the lack of sequestration or tighter controls on the jury's activities. Managing a jury for a trial that spans six months is not easy. We can only emphasize that if any party has an objection to the way the district court is handling that challenge, it has an obligation to raise it, preferably early enough

in the proceedings that the court can take prompt corrective measures. If Warner and Ryan believe that their counsel rendered constitutionally ineffective assistance by opting not to raise certain issues on appeal, they may raise that argument in post-conviction relief proceedings.

Our colleague in dissent believes that "there is a structural error because the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation," specifically the investigation of jurors during deliberations. Respectfully, we cannot agree that this provides a sound basis for reversal. First, many of the investigations were done at the request of the defense; defendants cannot embed a ground of automatic reversal into a case in this way. Second, neither the law nor the course of proceedings in the district court support such a characterization.

Even if the facts about the investigations and any possible juror reactions and anxieties were clear, we do not read the Supreme Court's decisions as including these kinds of errors in the narrow "structural error" category. In *Remmer*, *supra*, the Supreme Court addressed the issue of possible juror bias after the court called in an FBI agent to question a juror about the incident without consulting with defense counsel. The Court remanded the case for a determination of whether "such contact with the juror was harmless to the defendant." 347 U.S. at 229. That is not the language of structural error; prejudice (or harm) is presumed and irrebuttable in structural error cases. Once we are in "harmless error" territory, the nature of the error, the strength of the government's case, and the actions the court took in response to problems are all relevant. We have already explained why we have found the errors that were properly called to

our attention to be harmless, to the extent that error existed. The Supreme Court has repeatedly affirmed *Remmer* and held that "[d]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). As our own court has noted, "[we] afford deference to the trial court as the lower court has the primary responsibility to evaluate possible influences on the jury... [and a] decision to deny a motion for mistrial based on juror bias therefore is reviewed according to an abuse of discretion standard." *McClinton*, 135 F.3d at 1186 (Kanne, J.). Therefore, even if the defendants had argued that the problems with the jury that the dissent has described amounted to structural error, we would reject that characterization in favor of a harmless-error analysis.

More importantly, however, there is the problem we have already noted of finding structural error in the absence of any such argument asking for such a finding on appeal. Even when the Supreme Court's decisions call for structural error analysis, the factual basis for finding such error may be in dispute, as it is here. See, *e.g.*, *Bracy v. Schomig*, 286 F.3d 406, 409-11 (7th Cir. 2002) (en banc) (discussing type of proof necessary to prove trial judge's bias and, thus, structural error). *Remmer* tells us that an interrogation of a sitting juror by law enforcement is not structural error. Therefore the investigation of sitting jurors is not always structural error, even though there may be a risk, as the dissent points out, that the investigation is psychologically disturbing to the jurors. Just as in *Bracy*, we would need to determine what facts were necessary to conclude that this type of juror investigation constituted structural error. Yet the defendants raise the juror investigation issue only as

support for their argument that the removal of Ezell was improper. Unlike the dissent, we are unwilling to transform this modest point into an argument that the essential right to an impartial jury was violated. To repeat our earlier conclusion, the district court took every possible step to ensure that the jury was and remained impartial, and, through credibility findings and findings of fact, concluded that this one was.

Second, throughout their briefs, the defendants note that the district court judge described some of her rulings as "difficult" or "close calls." The impression they give is that this is some kind of signal that the court knew it was wrong. We draw no such inference. A district court's acknowledgment of the difficulty of an issue, if anything, is a sign that the court has given it full consideration. When all was said and done, the court made the necessary determinations of law, which we have reviewed *de novo*, and exercised its discretion, which we have reviewed deferentially. Counsel have argued in great detail every point that they chose to bring before us, and we have limited our review of the trial proceedings to those issues. The high-profile nature of these proceedings gave rise to some unusual problems with the jury, but we are satisfied that the court handled them acceptably. For all of the reasons discussed above, the district court properly denied the defendants' new trial motion. We AFFIRM the judgments of the district court convicting both Warner and Ryan.

KANNE, *Circuit Judge*, dissenting.

My colleagues in the majority concede that the trial of this case may not have been "picture-perfect," – a whopping understatement by any measure. The

majority then observes that the lack of a picture-perfect trial "is, in itself, nothing unusual." I agree that from my experience this is a realistic proposition. There is rarely perfection in any human endeavor – and in particular jury trials. What we expect from our judicial system is not an error free trial, but a trial process that is properly handled to achieve a fair and just result. That fair and just result was not achieved in this case.

The basis for my dissent lies not in the exceedingly drawn out evidentiary phase of this trial but in the dysfunctional jury deliberations. As to this point, the majority has taken great pains – in twenty-nine pages – to declare the flood of errors regarding the jury deliberations to be merely harmless. To understand the influences that came into play for the jurors in this case, I believe it is necessary to place various factors in overall perspective. Some of the factors would be unremarkable in a routine criminal case and other factors are totally astounding in any case. The following are highlights in summary fashion:

- In a case that was tried over a six month period, the jurors entered and exited the courthouse every day past scores of television and still cameras and reporters.
- The jurors used public elevators and brushed elbows with anyone who happened to be in them.
- Although the court's intent was not to make the jurors' names public, that effort was compromised when the jurors' names were used in the in-court voir dire.
- When jury deliberations were ready to commence in the most high profile case in

Chicago in recent memory, there was no thought of sequestering the jury.

- During the initial eight days of deliberations an apparent holdout juror was purportedly threatened by other jurors with a charge of bribery.
- Legal research gained by a juror from the internet was – contrary to the court's instruction – brought into the jury room in an effort to persuade the recalcitrant juror to change her position.
- A reporter for the *Chicago Tribune* advised the district court during jury deliberations that the newspaper's research had disclosed major inconsistencies between answers in a jury questionnaire and public records.
- Based on the information provided by the *Chicago Tribune*, the district judge, in concurrence with all parties, requested the U.S. Attorney's Office to conduct a background check on all jurors.
- Jury deliberations were halted following the *Chicago Tribune* disclosure and the hiatus continued during the investigation of the jurors by the U.S. Attorney's Office.
- During the five-day hiatus in jury deliberations, the exposé by the *Chicago Tribune* was published revealing that, indeed, false answers had been given on a jury questionnaire and that the sitting jurors were now under investigation.
- Amidst questions raised by the district judge concerning the necessity of advising

the jurors of their constitutional rights and their right to counsel, the individual examination of six sitting and three alternate jurors was begun.

- Through the judge's examination it was determined that a majority of jurors had provided false answers under oath and could face criminal prosecution. Many jurors who were interrogated told the district judge that they were scared, intimidated or sorry for what had occurred.
- During the course of the interrogations, the jurors were granted immunity from prosecution by the U.S. Attorney.
- Some jurors later hired lawyers in order to represent their own independent interests arising from their participation in the trial.
- Two jurors who provided untruthful answers were excused from further service while others so situated were retained.
- Before the hiatus in deliberation, jurors informed the court that they were having a conflict and yet after the interrogations the judge dismissed one of the jurors in the conflict without determining whether she was a holdout juror.
- Alternate jurors were seated, but not in the order required by Rule 24.
- After eight days of deliberation by the original jury, and five days in hiatus, a reconstituted jury deliberated for ten days and returned the verdicts in this case.

To describe the circumstances surrounding the jury management and jury deliberations summarized above as "nothing unusual" is to simply turn a blind eye to the realities of what occurred – in order to save the efforts expended during a six month trial.

Having summarized the factors that played upon the jurors, I'll now turn to an analysis of the various errors that accumulated. The errors in this case can be subdivided and analyzed in two groups. First, there is a structural error because of the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation. Second, the multiple errors regarding jury management generally and jury deliberation, when viewed collectively, were so corruptive that the verdicts cannot stand.

The Jury Questionnaire Issue

Although the defendants raised issues relating to the effect of false answers to jury questionnaires and "fearful" jurors in the trial court, they did not argue those issues on appeal. Nevertheless, the matters concerning false responses to the jury questionnaires concern structural errors in the trial that are not governed by the plain error analysis provided in Rule 52(b) of the Federal Rules of Criminal Procedure.

In fact, the structural errors that exist here make this case "subject to automatic reversal" because they affect the "framework in which the trial proceeds, rather than simply an error in the trial process itself." *Neder v. United States*, 527 U.S. 1, 8 (1999). "Such errors infect the entire trial process and necessarily render a trial fundamentally unfair. Put another way, these errors deprive the defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of

guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Id.* at 8-9. "Among these basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury." *Gomez v. United States*, 490 U.S. 858, 876 (1989) (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987); *Chapman v. California*, 386 U.S. 18, 23 (1967)).

As in this case, jurors take two oaths, the first requires them to answer questions truthfully in voir dire. The second requires that they faithfully perform their duties as jurors. A juror who violates either oath can face criminal prosecution. The Supreme Court has previously upheld the criminal conviction of a juror who intentionally lied during voir dire in order to gain entry onto, and then purposefully hang, the jury. *Clark v. United States*, 289 U.S. 1 (1933). Although Clark was decided almost seventy-five years ago, the prosecution of jurors for misconduct still occurs today. See generally *Dyer v. Calderon*, 151 F.3d 970, 973 n.1 (9th Cir. 1998) (*en banc*) ("We do not condone any lying by jurors; perjury is perjury."); *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989) (noting that jurors committing criminal misconduct can be prosecuted for perjury and contempt of court and can be subject to restitution claims from the government).

The government instituted this prosecution against defendants Warner and Ryan. But, of course, the government is also responsible for investigating and prosecuting crimes involving juror misconduct. The inconsistent jury questionnaire answers given in this case could lead to criminal investigations and prosecutions.

The verdicts here were delivered by a jury whose number included some who themselves faced potential future criminal prosecution for their actions that occurred during this trial.

Can sitting jurors fearing possible criminal investigations and prosecution for conduct involved in the case under consideration render valid verdicts?

In ruling on the defendants' post-trial motions in September of 2006, the district judge dismissed the concern of allowing jurors to return verdicts in the same trial in which their conduct might subject them to criminal investigation and prosecution. She concluded that "in spite of the difficulties generated by this very lengthy, high-profile trial, these jurors were diligent and impartial." R. 867 at pg. 65. "[I]t is implausible that the retained jurors would harbor any fears of prosecution. As for the remaining jurors, who were not specifically questioned about their questionnaires, they would have no reason to conclude that they were targets of any investigation." *Id.* at pg. 87.

Can this court, as a matter of common sense, accept the district court's factual determination that at least some jurors did not harbor fears of prosecution when they rendered their verdicts? Can the majority say that these jurors retained their capacity to render fair and impartial verdicts that can strip the defendants of their liberty and result in the defendants receiving significant prison sentences after the jurors themselves were the subject of an investigation?

In examining the district court's decision to allow these jurors to return verdicts, that decision should be examined in the extraordinary context that had developed. After serving for six months on an extremely high profile trial with overwhelming media

and public scrutiny, and eight days into the deliberations, on Thursday, March 23, 2006, the jurors' deliberations were stopped. When they returned four days later on Monday, March 27th, the jury was not allowed to continue deliberating. Instead, six of the sitting jurors and three alternate jurors were interrogated by the district judge. They were called one-by-one into the judge's chambers. Questions regarding inconsistent answers on the jury questionnaire form were asked. Jurors Ezell and Pavlick were ultimately dismissed, to be replaced by the two alternates. Four of the six sitting jurors were retained. The jury deliberations were stopped during this two day period and the reconstituted jury would not start the second round of deliberations until Wednesday, March 29th.

Much like children called into the principal's office, one could imagine the strain that this inquiry placed on both the jurors who were questioned and those who remained in the jury room unquestioned. It is noteworthy that in describing her experience in examining Juror Casino, the district judge stated, "Grilling Mr. Casino is one of the most distasteful things I have done in this job." Mar. 28, 2006 Tr. at pg. 24658, ln. 25 & pg. 24659, ln. 1. It is also reasonable to conclude that the jurors who were called into the judge's chambers began discussing their experience with the other jurors upon return to the jury room to figure out what was going on.

Even more telling is that the district judge on March 27th recognized, along with various counsel, the specter of juror prosecution lurking in the case and the impact this would have on the trial. March 27th and 28th are key days in the case because these are the two days that the district judge considered how to handle the juror questionnaire issue and thus

it is worth examining closely the record from these two days. The district judge, shortly before her examination of then-sitting Juror Ezell, recognized that the jurors faced possible criminal charges for juror misconduct when she observed:

A concern I have, beginning with Ms. Ezell, is that if we were to bring Ms. Ezell in to ask questions of her regarding her failure to disclose this arrest record that she has and other issues – for example, the apparent use of an alias – Do we have to advise her of her rights? **Do we have to give her an opportunity to have counsel?** Because it does seem to me that we will be asking her potentially about **criminal conduct**, specifically **perjury** in connection with her responses to the questionnaires.

Mar. 27, 2006 Tr. at pg. 24366, lns. 16-24 (emphasis added). Prosecutor Collins added that "I do think to the extent there are consequences to a criminal prosecution [of the jurors] we would be recused from it if there was even contemplation of such a thing." Mar. 27, 2006 Tr. at pg. 24386, lns. 19-22.

Mr. Genson, an attorney for defendant Warner, added that his client was in a Catch-22 situation:

> Certainly, when I have a client that's charged essentially – at least that was a good deal of the closing argument – with concealing, hiding, there is charges of obstruction, false statements, the idea that I want to tell these jurors, "You have a right to a lawyer," is ludicrous. It doesn't help me to do that. I don't want to do it.
>
> On the other hand, I am suggesting to your Honor that perhaps we should. It's not to my interest to tell these jurors, or at least in

> my client's interests to tell these jurors, they need a lawyer. I mean, I don't need to introduce all those things given the charges against my client.
>
> But I do think it's a valid – if something happens in this case and if some other prosecutorial body, given that Mr. Collins said that they would be recused, decides to prosecute people for false statement and we haven't given them their rights, I mean, I just feel that – I think that's at least an issue that your Honor has to consider.

Mar. 27, 2006 Tr. at pg. 24404, ln. 25 & pg. 24405, lns. 1-17.

The court recessed for lunch in the middle of its juror interrogation procedure on March 27th. After lunch, Mr. Collins informed the parties and the court that the U.S. Attorney had granted the jurors immunity.

> For the record, we did consult, your Honor, with the U.S. Attorney at the lunch break in terms of jeopardy any jurors would have going forward. And we did not address the issue in advance of Ezell and Pavlick, and I would make this of record.
>
> Our office – [U.S. Attorney] Fitzgerald has indicated that he believes that it's more important to get the candid information from the jurors than have them – the process chilled by them – any statements they say being used against them. And so he authorized me to make a statement that any statements these jurors make *going forward* would not be used against them.

Mar. 27, 2006 Tr. at pg. 24500, lns. 16-25 & pg. 24501, lns. 1-2 (emphasis added). Note that the immunity grant covered the jurors' statements "going forward." The record does not reflect whether the U.S. Attorney granted immunity to the jurors for their original conduct of their answers provided during voir dire on the questionnaire and therefore there is a potential that these jurors could still face criminal prosecution. The district court proceeded in questioning the jurors informally without an advisement of rights and without the presence of lawyers for the jurors.

Jurors who ultimately would render the verdicts now faced conflicts sufficient enough to have a federal district judge and several experienced attorneys consider whether these jurors needed to be advised of their constitutional rights. And we have an experienced prosecutor, the United States Attorney, who sees this situation as serious enough to grant immunity to the jurors. Yet these same jurors were returned to the jury room, instructed to begin anew their deliberations. The reconstituted jury ultimately rendered the verdicts in this case.

When the district judge wonders aloud whether warning jurors of their constitutional rights is required, when jurors could need their own lawyers, and when the U.S. Attorney is issuing immunity grants to jurors, it is impossible not to recognize the extraordinary nature of the case. These circumstances are not "usual" and far from the way our criminal justice system should work.

In addition, the district court's ruling from September 2006 that "it is implausible that the ... jurors would harbor any fears of prosecution," R. 867 at pg.

87, is not supported by the record. Although counsel was not appointed for the jurors, individual jurors would obtain private counsel in this case. Juror Pavlick had previous representation and mentioned his attorney when he was interrogated individually by the district court. Jurors Peterson and Losacco would both later inform the court that they had obtained counsel. Several of the individual jurors questioned during this period recognized that they had made inconsistent statements on the juror questionnaire and some apologized for the mistake. Other jurors specifically mentioned that they were scared or intimidated by the situation.

Furthermore, this is not a situation in which the district court can solve the problem by saying that the jurors made an honest mistake. The decision as to whether to investigate and prosecute a case is not the district court's to make but rather the prosecutor's decision. Additionally, the question of whether a juror incorrectly but honestly answered a question or intentionally lied to get onto a jury is a question of fact for a *second* jury in a future criminal proceeding.

Despite recognizing the potential of "fearful" jurors, the district court was unwilling to declare a mistrial. In addressing the defendants' argument that the investigation had impacted the jurors' ability to be fair and impartial the district court responded:

> The ... argument you are making is that we now have a bunch of fearful jurors. ***I just don't know how to address that***.
>
> Again, I understand that the defendants do have important interests to represent here. I have before me– nobody has called it this, but this is a motion for a mistrial at this point. If

> I grant this motion, these defendants are going to be tried again. I don't – I am just– I am really wondering whether if I grant the motion for a mistrial, I am effectively saying it isn't possible to pick a jury for this case.

Mar. 28, 2006 Tr. at pg. 24699, lns. 16-25 & pg. 24700, ln. 1 (emphasis added). The obvious – but onerous – way to address this situation was to declare a mistrial. In any event, the concern regarding the selection of a new jury should not have been a consideration. It is not difficult to understand the great pressure generated by a six month trial to reach verdicts in this case. Nevertheless, jurors in fear of prosecution for conduct involved in the case on which they are sitting should not be allowed to render verdicts, their bias is inherent.

As a matter of law, biased jurors cannot be fair and impartial. Fair and impartial jurors are required as part of the defendants' structural protection for a fair trial and therefore the defendants are entitled to an automatic reversal of their convictions. *Neder*, 527 U.S. at 9.

The majority responds that the defendants were afforded the structural protections of a fair trial before a fair and impartial jury and therefore any error relating to jury misconduct, improper influence of the jury and jury bias should be reviewed under harmless error. Maj. Op. 53-54.

"The bias of a ... juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." *United States v. Wood*, 299 U.S. 123, 133 (1936). As Chief Justice Marshall explained at the trial of Aaron Burr, there are certain situations in which a juror "may declare that he feels

no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807). Although the "[u]se of the 'implied bias' doctrine is certainly the rare exception," *Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992) (per curium), as we recognized in *United States v. Polichemi*,

> The concept of implied bias is well-established in the law. Many of the rules that require excusing a juror for cause are based on implied bias, rather than actual bias. For example, a court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case. *See*, *e.g.*, *United States v. Annigoni*, 96 F.3d 1132, 1138 (9th Cir. 1996); *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995). Such a juror may well be objective in fact, but the relationship is so close that the law errs on the side of caution.

219 F.3d 698, 704 (7th Cir. 2000) (Wood, D., J.); *see, e.g.*, *Smith v. Phillips*, 455 U.S. 209, 221-24 (1982) (O'Connor, J., concurring); *Conaway v. Polk*, 453 F.3d 567, 587-88 & n.22 (4th Cir. 2006) (noting that "implied bias [is] a settled constitutional principle" and providing citation to cases from ten different Circuits since 1982 recognizing the continuing applicability of the implied bias doctrine); *Brooks v. Dretke*, 418 F.3d 430, 430-31 (5th Cir. 2005) (overturning a conviction on the basis of implied jury bias when a juror faced a pending criminal charge filed by the same prosecutor's office that was prosecuting the case on which the jury was presiding); *Dyer*, 151 F.3d at 984 (citing *Dr.*

Bonham's Case, 77 Eng. Rep. 646, 652 (C.P. 1610) (tracing the lineage of the implied bias doctrine to Sir Edward Coke's dicta in *Dr. Bonham's Case* in 1610)).

A biased juror "is a juror in name only" who taints the court and the jury's verdict making it a "mere pretense and sham." *Clark*, 289 U.S. at 11. The verdicts returned by these biased jurors should be vacated because only a jury composed of fair and impartial jurors can strip the defendants of their liberty. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

General Management of the Jury and Jury Misconduct

It is also necessary to review additional jury misconduct and the jury management decisions of the district judge. Errors of a nonstructural nature are analyzed under Federal Rule of Criminal Procedure 52, where errors raised by the defendants are reviewed under a harmless error standard and those not raised are reviewed under a plain error standard.

The majority determines that on appeal the defendants raised three specific issues about the jury: (1) that the verdict was tainted by the jurors' use of extraneous legal materials; (2) that the dismissal of Juror Ezell was an arbitrary removal of a defense holdout, and; (3) that the substitution of jurors after deliberation had begun was prejudicial. Maj. Op. p.2. In addition, the majority notes that the defendants have not raised on appeal the issue of the cumulative and prejudicial effect of jury misconduct and therefore that issue is not before us – although raised below. *Id.*

The majority correctly observes that jury management or control measures properly lie within the discretion of the district judge. Maj. Op. p.52. Never-

theless, courts of appeal have supervisory authority in fashioning standards of criminal procedure to be followed by the district courts. WAYNE R. LAFAVE, et al., CRIMINAL PROCEDURE § 1.6(i) pg. 325 (2d ed. 1999).

I disagree with the narrowed scope of review advanced by the majority. What follows is a discussion of a more global look at the juror misconduct and jury management involved in this case.

Of course, as repeatedly pointed out, this court is guided by the Supreme Court's instruction that the defendants are guaranteed a right to a "fair trial," not a "perfect trial." *McDonough Power Equip. Inc. v. Greenwood*, 464 U.S 548, 553 (1984).

As to the internet research regarding the law, there is no dispute that Juror Peterson brought outside material into the jury room during deliberations while she and a number of jurors were in conflict with Juror Ezell. A number of jurors urged Juror Peterson to search the internet and bring back to the jury information on jury deliberation. Her research could be used to show Juror Ezell the "error of her ways." This entire episode was a deliberate disregard of the admonition of the court not to bring outside legal sources into the jury room.

Juror Peterson claims that the material was an American Judicature Society article about deliberations and she had no intent to inappropriately influence Juror Ezell. Juror Ezell disputes this claim, countering that the information related to bribery and was used to threaten her so that she would vote with the other jurors. Regardless, it is clear that Juror Peterson brought outside material into the jury room during the course of deliberations and used this

material as part of the jurors' efforts to convince Juror Ezell to join them in returning a verdict.

In her post-trial ruling, the district court determined that the article on jury deliberation "did not pertain to any substantive issue in the Defendants' trial. It concerned only the process of deliberation, and the substance of the article did not contradict any instruction that this court gave to the jurors." R. 867 at pg. 81. Errors in the jury deliberation process raise issues of law no different that errors relating to substantive matters, such as obstruction of justice. Both procedural and substantive areas of law are equally important. Moreover, a court cannot hide behind saying that the unauthorized article contained a proper statement of the law. It is axiomatic that jurors are not allowed to bring in any outside materials into deliberations regardless of whether they are a correct statement of the law. Jurors are restricted to receiving pronouncements on relevant law only from the trial judge.

The seriousness of this misconduct is demonstrated by the fact that Juror Peterson and Juror Losacco, who were involved with Juror Peterson in the conflict with Juror Ezell, both obtained private counsel to represent them on this issue. The record does not reflect whether Jurors Peterson and Losacco retained their attorneys during deliberations or after deliberations as Juror Ezell did not make a public allegation against Jurors Peterson and Losacco until after the verdicts had been returned. However, when the district court conducted a post-verdict inquiry on this issue, both Jurors Peterson and Losacco appeared through their respective counsel.

The jurors originally sent notes informing the dis-

trict court that they were in conflict. This is the conflict between Juror Ezell and several of the other jurors including Juror Peterson.

Juror Peterson was instructed by several other jurors to – "do her homework" – meaning to find information on the internet which the jurors could use in a hope of convincing Juror Ezell to join their views.

However, during the period that the district judge was considering what to do about the conflict among the jurors, she was also informed about the juror questionnaire problem. Thus, the court was faced with two independent problems, the jury conflict issue and the juror questionnaire issue. Yet, the juror questionnaire issue *wholly consumed* the district judge's consideration of the case at that point. The district judge left unresolved her consideration of the conflict between potential "holdout" Juror Ezell and other jurors. Nowhere in the record does the district judge make a ruling as to whether a conflict existed between Juror Ezell and the other jurors to determine if the jurors had deadlocked or if Juror Ezell was indeed a holdout. Nor did the court determine the impact that dismissing Juror Ezell would have on the other jurors in light of the conflict among the jury as expressed to the court in the jurors' notes, and whether this might give an indication to other jurors that the court was siding with the views of one group of jurors over another. However, the district judge ultimately excused Juror Ezell based on the inconsistent statements Juror Ezell made on her questionnaire.

At the beginning of the trial, the district judge ordered the juror questionnaires to be redacted, yet she used the jurors' names during in-court voir dire. This

allowed the Chicago Tribune to obtain the jurors' names from the transcripts of the in-court voir dire despite the fact that the court had originally placed the jurors' names under seal. As Prosecutor Collins later noted, "a trained monkey" could have matched the information together between the publicly redacted questionnaires and in-court voir dire transcripts. Mar. 27, 2006 Tr. at pg. 24591, ln. 22. Because jurors' names were "in effect" leaked to the media during the trial, the court was unable to avoid the larger issue of a juror background investigation by the media and the impact this had on the trial.

Apart from the general admonitions made by the court it appears that there was little control of the jurors' exposure to external influences outside of the courthouse. In addition to Juror Peterson's misconduct, the jurors continued to read newspapers and were exposed to media coverage of the trial, the jurors received inquiries from friends and family about the case, and the jurors discussed the case with outsiders while the case was pending. All of these actions were taken in violation of the court's instructions, yet a reconstituted jury was allowed to deliberate and return verdicts.

There is often a lack of a record on key issues. The district judge participated in a discussion with the parties but did not state that she was providing a definite ruling. Thus, the record is at best inconclusive, and at the worst nonexistent, on the district court's decisions on many of the critical issues in this case. The most striking example is the reseating of the alternate jurors. Once the district judge decided to excuse Jurors Pavlick and Ezell, the court was required, pursuant to Rule 24, to seat alternate jurors in the order in which they were selected. However, in

the reseating process the district judge skipped the next juror in line, Alternate Juror Masri. We know that he was skipped but the district judge did not say why he was passed over.

The majority deduces that Alternate Juror Masri was dismissed for his failure to disclose a prior DUI. But, there is no ruling from the district judge to support the majority's deduction. The government suggested at oral argument that Masri was excused because he received his juror certificate and was thanked for his service. But there is no record excusing him or indicating why he did not serve. Thus, the record does not demonstrate compliance with Rule 24.

At oral argument before this court, Prosecutor Collins stated that "Judge Pallmeyer is a consensus builder." Oral Arg. at 47:18. This insightful comment is the key to understanding the non-structural juror errors. Consensus building can help in finding common ground in disputes. It can also help to expose decision makers to alternative points of view. But consensus building can have negative consequences as this case demonstrates.

Consensus building by the district judge allowed a continual round robin of discussions between the attorneys and the court especially during the critical period of March 27th and 28th when the parties and the court were addressing the juror related issues. Transcripts from this period reveal a very conscientious but irresolute judge who is willing to contribute her views and concerns to the conversation involving contested issues, but is reluctant to provide firm rulings that end the court's consideration of those issues. The record from this period is full of conversations

but lacks definitive rulings. Consensus building does not always lead to the resolution of difficult issues.

A lack of definitive rulings by the trial court presents great difficulty in a review on appeal, for appellate courts review decisions, not commentary. Importantly, the lack of a firm ruling infects the consideration of excusing potential "holdout" Juror Ezell. In her post-trial ruling, the district judge said that Juror Ezell was "removed from the jury for reasons wholly unrelated to [the] conflict [occurring between the jurors] revealed in [Juror] Losacco's note." R. 867 at pg. 75. Yet, the district judge's post-trial decision did not provide citation to the record on this point. In fact, a review of the record during the March 27th and 28th period shows there was absolutely no consideration of the conflict between Juror Ezell and other jurors. As noted earlier, this very serious issue was forgotten once the court and parties were made aware of the trouble in the jurors' questionnaire answers by the *Chicago Tribune*.

The district judge is charged with the management and control of the jury. In the deliberation phase this includes ensuring that the jurors properly conduct themselves, avoiding outside influences, conduct proper deliberations without juror-on-juror intimidation, and scheduling deliberation times, among others.

As noted, many of the problems that plagued the trial after the case was submitted to the jury could have been avoided through sequestration. While it was certainly impractical to sequester this jury during the trial phase, sequestration during deliberations was a viable option.

In a full sequestration, deliberating jurors are typ-

ically under control of Deputy United States Marshals who are responsible for ensuring that the jurors are secure during their deliberations, in movement to and from the courthouse and jury room, and while housed offsite until a verdict is reached. Partial sequestration works less of a hardship on jurors. Under this system the deliberating jurors assemble at a remote location and are picked up by Deputy United States Marshals, transported by van to the courthouse and moved in a nonpublic elevator to the jury room. At the end of a days' deliberations the process is reversed. This continues until a return of the verdict.

Despite these available options there was no apparent consideration of such sequestration even in the face of the overwhelming media presence in the courthouse, the daily media reports of courtroom activity and the jurors' continued inability during the course of the trial to avoid media reports of the trial. The relative inconvenience to the jurors weighed against a possible mistrial makes the choice of sequestration during deliberation seem clear.

Turning again to the actual deliberations, it appears that jurors were inexplicably allowed to set their own schedule for deliberations with apparently little judicial intervention. There is undisputed evidence that the jurors separated into caucuses at times during deliberations. Perhaps most striking is the example of the division between the "healthy" and the "unhealthy" jurors. The healthy jurors exercised by running up and down internal courthouse stairs while the unhealthy jurors took smoke breaks outside the courthouse. The record does not tell us if the jurors continued separate deliberations during this period outside of the presence of the other jurors.

As noted above, I recognize that individual nonstructural errors are reviewed under either harmless error or the plain error analysis as provided in Rule 52 and we afford the district judge a level of deference. However, the nonstructural errors – in their totality – were so egregious that again a mistrial was the only permissible result. The majority's failure to consider all of these errors cannot be ignored as we must recognize that these errors undermine the public's confidence in the "fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736-37 (1993).

In the final analysis, this case was inexorably driven to a defective conclusion by the natural human desire to bring an end to the massive expenditure of time and resources occasioned by this trial – to the detriment of the defendants. Given the breadth and depth of both structural and nonstructural errors, I have no doubt that if this case had been a six-day trial, rather than a six-month trial, a mistrial would have been swiftly declared. It should have been here.

Based on either the structural errors or nonstructural errors described above concerning jury misconduct, the convictions in this case should be vacated and the case remanded for a new trial. Because the majority reaches a contrary result, I respectfully DISSENT.

APPENDIX E

UNITED STATES CODE

Title 18 — Crimes And Criminal Procedure

Part I — Crimes

Chapter 63 — Mail Fraud And Other Fraud Offenses

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

* * * *

APPENDIX F

UNITED STATES CODE

Title 18 — Crimes And Criminal Procedure

Part I — Crimes

Chapter 63 — Mail Fraud And Other Fraud Offenses

§ 1346. Definition of "Scheme Or Artifice To Defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

APPENDIX G

UNITED STATES CODE

Title 28 — Judiciary And Judicial Procedure

Part IV — Jurisdiction And Venue

Chapter 153 — Habeas Corpus

§ 2255. Federal Custody; Remedies On Motion Attacking Sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

APPENDIX H

ORAL ARGUMENT

DATE: MAY 31, 2011

GEORGE RYAN CASE – 10-3964

SEVENTH CIRCUIT COURT OF APPEALS

Albert W. Alschuler for Defendant Ryan
Laurie J. Barsella for the Government

COURT 1 — Our next case for argument this morning is Ryan against the United States. Mr. Alschuler.

Mr. Alschuler — Good morning and may it please the court. The jury instructions in this case marked four paths to conviction for honest services fraud and three of them told the jury to convict for conduct that is not criminal.

COURT 1 — Mr. Alschuler, I am puzzled why we are talking about jury instructions in this case. Your brief proceeds as if this were a re-run of the direct appeal, but of course it isn't. It's a collateral attack and my understanding of the Supreme Court's opinions in Davis and Bousley is that they don't al-

low challenges to jury instructions – belated challenges to jury instructions. They allow the person in prison to argue that he has been convicted of something the law does not make criminal. In other words that on the evidence at trial in light of the later statutory interpretation the only proper judgment is a judgment of acquittal. But I don't understand you to be arguing that on the evidence at trial the only proper judgment was a judgment of acquittal so I wonder what we have got here, if anything.

Mr. Alschuler First, the government has not suggested that these issues are not properly before this court. I think it has waived any point based on the cases cited by the court and, second, it is a constitutional violation – section 2255 affords relief to anyone who is in prison in violation of the Constitution or laws of the United States.

COURT 1 Well, Mr. Alschuler do you disagree with what I have said, I believe, is the holding of Bousley and Davis.

Mr. Alschuler Well, I don't recall the holding of Bousley and Davis and they were not cited by the government and I --

COURT 1 No, oddly - oddly they haven't been. The argument that you're making is an argument that the Supreme Court

rejected 9 to nothing in the United States against Frady which said that collateral attack absolutely cannot be used to challenge the jury instructions.

Mr. Alschuler Well, we are not simply challenging the jury instructions, Your Honor.

COURT 1 No, you are challenging rulings on evidence too.

Mr. Alschuler No, we are saying that George Ryan was convicted --

COURT 1 Look, Mr. Alschuler,

Mr. Alschuler -- in violation of the Constitution.

COURT 1 Mr. Alschuler -- Mr. Alschuler, trying to talk over a question from the bench won't do you any good. The arguments that you are making look like the kind of arguments that the Supreme Court squarely said in Frady cannot be raised on collateral attack. Now, am I misunderstanding Frady.

Mr. Alschuler My recollection -- I have Fredy once upon a time and my recollection of that case is dim. Uh, We are saying that George Ryan was convicted in violation of the Constitution. It is --

COURT 1 Right, I understand that. That's what the D.C. Circuit held in Frady and which the Supreme Court reversed.

Mr. Alschuler No, the Supreme Court has said --

COURT 1 It said that incorrect jury instructions are not themselves a violation of the Constitution. They are a violation of a statute maybe but not of the Constitution. And the Supreme Court has said more often than I care to remember that just getting the law wrong does not entitle one to collateral attack.

Mr. Alschuler Again, we are suggesting more than that the District Court got the law wrong. The law is that if the jury instructions permitted conviction on the basis of an invalid theory – permitted conviction of somebody who may be innocent then that is a Constitutional violation. It is a violation –

COURT 1 Okay, if that is your argument, it is inconsistent with both Frady and Engle against Isaac. Now, if you have got an argument that your position is compatible with those cases, I'd love to hear it.

COURT 2 Which I think means if you are arguing in fact that going beyond details like jury instructions is this a situation where the record simply

could not under any circumstance support finding that George Ryan has committed the offense that the Supreme Court has now recognized in Skilling. Maybe that is where you need to go.

Mr. Alschuler Well, we certainly do argue that the evidence is insufficient to establish bribery in this case. Uh– what are the alleged bribes? They all relate to transactions with two people – Larry Warner and Harry Kline. The only mail fraud counts that remain standing involve contracts and leases that benefited Warner and Kline. And what were the supposed bribes? Well, Warner, a long-time friend and political associate, was both a lobbyist and insurance adjuster and he failed to charge an insurance adjustment fee when Ryan's apartment flooded on Christmas Day. He also held two political fundraisers for Ryan, paid for the band at Ryan's daughter's wedding, gave other benefits to members of Ryan's family and split some of his lobbying fees with other Ryan associates. While Ryan was Secretary of State, his office entered into contracts with three of Warner's lobbying clients and leased two properties in which Warner had interest.

COURT 2 But you know there was a lot of – um – evidence at the trial suggesting

that this flow of benefits to Ryan and his friends was in return for favorable official action and I want to put campaign contributions off to one side because a great deal of it had nothing to do with campaign contributions. I don't see why it was not entirely permissible for the jury to infer that there was an exchange going on and I want to use that word as opposed to Latin phrases or other things that tend to get confusing. That there was an exchange. You know, I'll throw this business your way – you'll give me benefits.

Mr. Alschuler The touchstone of bribery is a quid pro quo exchange.

COURT 2 An exchange - let's just say an exchange.

Mr. Alschuler All right, but an exchange at the time that the benefits are received. Every definition of "bribery" looks to the moment when the benefits are received and, as of that moment, the official is either guilty or not guilty.

COURT 2 Well I'm not sure that that's right. I mean, there is this sort of what you could call stream of benefits or the government called it a meal plan in its argument and this stream of benefits theory suggests that at the time the benefit is received it's understood

that when the opportunity arises the other half of the transaction will happen.

Mr. Alschuler And, we agree that that is sufficient.

COURT 2 Okay, so --

Mr. Alschuler If there is an understanding that at the moment the benefit is received that George Ryan will provide some unspecified benefit to Larry Warner - that is a bribe.

COURT 1 Can't that be inferred from what happens later – that subsequently the Secretary of State kind of goes out of his way to do things that favor these individuals. That gives rise to an inference.

Mr. Alschuler Doing someone a favor who has done a favor for you is not bribery. There has to be an agreement of some sort, implicit or explicit, at the time the benefit is received.

COURT 2 Well, that is what Judge Tinder is saying. Why can't the jury infer from the lack of any other plausible explanation that there was such an agreement. You're only answer is well they were friends and that is not maybe that is a permissible inference but I don't see why it is a necessary inference.

Mr. Alschuler Well, go back to that hypothetical case we suggested in our brief. The governor has a benefactor named "Ben." Ben has given the governor a stream of benefits. He has supported the governor's political campaigns, he has contributed to a private fund to purchase furniture for the governor's mansion, he's entertained the governor and his spouse at Ben's ranch. Until now, Ben has never asked the governor for anything but now Ben's brother is seeking a government position and Ben tells the governor that his brother would be a fine appointment, the governor does appoint Ben's brother. The evidence shows no more. Should Ben and the governor be convicted of honest services fraud and sentenced to as much as 20 years in a federal penitentiary. Should this case even reach the jury. A prosecutor might call this the functional equivalent of bribery and it might have been. Ben might have cultivated the governor's favor with the thought that he might at sometime want a favor. The governor might have appointed Ben's brother because he wanted to encourage future contributions. One hand might have been washing the other, yet, that characterization toots only one horn of the dilemma – the benefits that Ben gave the governor didn't seem to be bribes when they were given.

COURT 2 Well --

Mr. Alschuler We want people to contribute to political campaigns. We want them to buy furniture for the governor's mansion. We don't think that public officials can't be entertained by their friends.

COURT 2 But you're assuming the answer to a lot of questions and I think going back to what Judge Easterbrook was first saying. If the evidence in this record would have permitted a jury to find that there was the kind of agreement – this is an exchange for that in this case – then I am not sure how this is an appropriate case for us to do anything but affirm in.

Mr. Alschuler Well, I don't think that's a reasonable inference. In the closing argument, the definition of "bribery" as I say is a quid pro quo exchange. In Evans against the United States, the Supreme Court said the offense is complete at the time when the public official receives a payment in return for his engagement to perform specific official acts.

COURT 2 And the jury could have thought in this case that just such an agreement is in place.

Mr. Alschuler Well, the government didn't even make that argument to the jury.

COURT 2 Well, they said they weren't doing the narrow. That is why I would rather not talk about quid pro quo. They said though that, you know, the governor's office was for sale. They said that George Ryan was --

Mr. Alschuler They wanted to imply that there was some reciprocity that was the equivalent of bribery.

COURT 2 Well, right, let's just say that they suggested to the jury that it could infer from the evidence in front of it that there was, in fact, an agreed exchange going on where the temporal moments of fulfilling that agreement might have been a little different but that there was an agreement.

Mr. Alschuler How did Ryan reciprocate this friendship with Warner, the government asks. Government business is how he did it. $3,000,000 worth of government business. Was it a quid pro quo? You may not want to talk about quid pro quo but the Supreme Court has in every majority concurring and dissenting opinion in every bribery case they have used those words. 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 is what we have charged and in several other statements the government conceded the absence of the defining element of bribery.

COURT 2 Now, of course, in Skilling, the Supreme Court cites with approval the Whitfield, Ganum (ph), and Kemp cases which are stream of benefits cases.

Mr. Alschuler And we don't quarrel with the stream of benefits theory at all. It can be inferred. It can consist of a stream of benefits but at the time some benefit is received there has to be an agreement to do something in return and I don't see any evidence that there was in this case. There are other explanations that are at least equally plausible that are innocent.

COURT 2 But why is that the standard? Isn't the standard as long as the jury could find that there was this kind of exchange then we're at least this isn't --

Mr. Alschuler As long as the jury could find – that is correct. And a reasonable jury cannot infer guilt, you know, when there are more plausible explanations consistent with innocence.

COURT 2 But you're inviting us now to be the jury and we can't do that. Actually,

we can't even do that on direct appeal and we certainly cannot on 2255.

Mr. Alschuler I mean I am astonished that you think I am asking you to take the place of the jury in this case when the jury in this case did not find bribery. When the jury was instructed on three theories of things that are not criminal and when the government all but displaying reliance in a bribery theory in its closing argument. The government now says that when it told the jury that it did not need to find a quid pro quo it meant that the jury did not have to find an express promise to give a specific benefit for a specific official action. And so --

COURT 2 Let me just ask you though. I mean this jury does have taking the instructions as a whole an instruction on personal and financial benefits. The record has a lot of evidence about that in it. The jury is told that there is an exchange element to it so I am not sure that the jury found in your client's favor. It didn't acquit on those counts.

Mr. Alschuler No, it did not acquit on those counts although there is no reason to believe that they found guilt on that theory.

COURT 2 Well, the District Court saw that quite differently. The District Court thought that the only reason that they could have come to the conclusions they did was because underneath it all was this kind of impermissible bribe or kick-back situation.

Mr. Alschuler Right uhm, and that was plainly wrong. The instructions permitted conviction on the undisclosed conflict theory that the government emphasized from the beginning of trial to the end.

COURT 2 But that's an instruction – I don't want to put words in Judge Easterbrooks' mouth here, but I think if we are beyond a point merely about the instructions and we are just looking at whether this is a person who is sitting in a federal prison for something that the law does not make criminal. That's Bousley. That's Davis. You know Bousley is the case that comes along after Bailey on the gun point. Then that's a problem but that in our post-Bailey and Bousley cases we looked at the full record to see if that kind of miscarriage of justice was happening. And if there was even an uncharged possibility that suggested the law had been violated. Somebody carried a gun instead of using the gun, we did not give relief.

Mr. Alschuler Well, as I say, the government did not rely on any of those cases in its brief and, I hope, that if the Court is thinking about relying on those cases they will give me a chance to file a supplemental brief and discuss them. I mean, as I think about them, I think Bousley was a guilty case. It applied to – it was when a guilty plea waived the objections but as I say my recollection of those cases is dim. Well, I would like to reserve the remainder of my time for rebuttal. Thank you.

COURT 1 Certainly Mr. Alschuler. Ms. Barsella.

Ms. Barsella May it please the court. I'll begin by just saying that the government did not make a specific reference at all to the issue that Judge Easterbrook brought up and we do apologize for that. Obviously any forfeiture on our part does not bind the court and, if the court does want to have additional briefing on those points, we will be happy to submit them.

COURT 1 Ms. Barsella, I have a question not only about this subject which the government seems quite mysteriously to have forfeited and it is very strange because this is a subject that was important enough to the United States that the Solicitor General took

it to the Supreme Court in Frady and now the United States having won Frady the U.S. Attorney in Northern Illinois just ignores it. But I don't understand why we are here at all. This petition was filed more than 2 years after Ryan's conviction became final and appears to be untimely. But with respect to that issue it seems like the United States has not forfeited. The United States has waived and I don't get it. 2255 F(3) says that the time restarts if the Supreme Court makes a new decision and "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." What decision of the Supreme Court has made Skilling retroactively applicable to cases on collateral review?

Ms. Barsella — I believe below we did look at that issue and it was determined that when a statute is now newly interpreted so as to make one interpretation no longer law that we believe that F(3) did allow the 2255 --

COURT 1 — But that's not what the statute says. The statute says that the decision has to be made "retroactively applicable to cases on collateral review." Now what you seem to have thought and I won't press this further because this is something the govern-

ment – untimeliness is an affirmative defense which seems to have been waived. What you seem to be thinking here is that if you're confident the Supreme Court will declare it retroactive then we just don't bother with details like the Supreme Court actually declaring it retroactive. And that is certainly not how this court has interpreted 2255 F(3) in the past.

Ms. Barsella I do apologize for the fact that we misinterpreted that – we thought that in light --

COURT 1 Did you misinterpret it or is this just a Department of Justice wide position?

Ms. Barsella No, it isn't. When we analyzed this below in the District Court we were satisfied that he could raise it in light of the Supreme Court's decision in Skilling and we were obviously mistaken.

COURT 2 The only reason that that baffled me is – I did some thinking about this as well – is that the only way I could reconstruct your thinking which did not appear anywhere was by thinking of Davis and Bousley and that is why I was surprised at the lack of discussion.

Ms. Barsella In any event, the District Court did correctly determine that Skilling

does not affect George Ryan's conviction. This was a bribery kickback case and any error was harmless because a reasonable jury could not have found Ryan guilty --

COURT 1 Why are you back to arguing harmless error. That's the approach that both Engle against Isaac and Frady expressly reject.

Ms. Barsella Well, Judge Easterbrook. The fact is, as I think the court has picked up, the facts in this case clearly showed a bribery kickback scheme – a flow of benefits bribery kickback scheme – and the defense's argument regarding our jury arguments on the issue of quid pro quo are just simply incorrect.

COURT 2 Well, I don't know about that. I mean the government went out of its way, understandably since Skilling handn't been decided yet, to tell the jury that it didn't have to find a quid pro quo. That it was enough to find undisclosed conflict, it was enough to do all of these other things, which was a responsible argument at the time it just doesn't happen to be where you want to be today. And I'm not so sure that the record is so crystal clear and so I would like some discussion about what you think the proper standard of review is. Uh, one

possibility is we just sit around and look at the record to see if we can find anything that would support a jury verdict. Another possibility is we have to say could a reasonable jury, properly instructed with the reasonable doubt standard, etc., do this. There is the Breck (ph) standard floating around out there. There is Lanier. I think we need your view on what the standard is.

Ms. Barsella — Our view is that the Breck standard should apply here because this is a collateral review and --

COURT 1 — You're contradicting Frady again but go ahead.

Ms. Barsella — It seems to me that the finality --

COURT 1 — Frady said the right standard if there is any standard is cause and prejudice and Bousley holds that there is no cause in a situation like this but go ahead.

Ms. Barsella — It seems to me that a higher standard needs to apply. That certainly the Chapman standard of beyond a reasonable doubt should not be applicable at this stage and that certainly, at a minimum, in order to reverse the court has to find that there was substantial and injurious effect on the verdict and in this record there just wasn't.

COURT 2 Mr. Ryan's point, as I understand it, is that he may have done quite a few bad things. He may have violated state law in all sorts of ways. He may have violated other laws but, he argues, as I understand it, what he did not do is violate the honest services branch of the fraud statute and that's what he was charged with. That's why we have indictments, that's how people structure their defenses so just because he may done other evil things in life isn't enough to keep him in prison for something that he didn't violate.

Ms. Barsella Well, Judge, we believe that the evidence was very strong that he did violate the honest services statute and he did it in spades and he did it over a long period of time and the government didn't say when it was talking about a quid pro quo what the government was saying is exactly what the record reflects which it was using the term quid pro quo to mean a specific quid pro quo – a one for one quid pro quo. The government explained that this was not like a menu where each item has a separate price. It did explain that it was meal plan where you paid an ongoing price and you got to take what you wanted. That message was brought across and that was not an original use of the term quid pro quo. That is how

the parties were using it throughout this entire trial. So the government was talking about an exchange and the government told the jury that George Ryan sold his office. They made that argument over and over again.

COURT 2 But how do we know that the jury found that. There are two possibilities. The jury may have found that there was a pre-existing agreement between Mr. Ryan and Mr. Warner, for example, or Mr. Ryan and Mr. Kline that in a sense Mr. Ryan would be on retainer for them and would shoot benefits their way whenever the chance arose. Or it may have been that they were really just good buddies and he did that without, you know, any particular payment for it. He just did it.

Ms. Barsella The defense made that exact argument. The defense told the jury that if they found that George Ryan was giving these governmental benefits to his friends and that it was only based on friendship that they must acquit. Or that if the personal benefits that he was receiving were just gifts given out of friendship then they must acquit. We never challenged that at all. Instead in fact what we said is that he was selling his office brick by brick. We said in the first 10 minutes

of our argument that George Ryan that by handing out these governmental benefits to people and in return getting the personal benefits for himself and his family and his friends that he was selling his office and you might as well put a "for sale" sign on it. And in many of the points in our argument that is the point that we made and the evidence supported. With regard to Larry Warner, the evidence was very clear and both through the testimony of Donald Udston (ph) but also through all the events that happened afterwards that corroborated what Donald Udston said because what Donald Udston said is that from the very beginning when he was first elected what George Ryan did was that Larry Warner decided that he wanted to go into lobbying for the very first time in his entire life. And that he was going to do that so that he could capitalize on his relationship with George Ryan and the arrangement that Warner told Udston he had worked out with George Ryan is that Udston would be cut in and would get a cut and it was Udston who was a very close personal friend of George Ryan.

COURT 2 Don't you think most lobbyist do that. It seems to me every time the presidency changes parties in Washington a new group of people move

over to K Street so that they can go over to the Congress because they have personal relationships. of Ryan, not of Warner. He and Warner did not know each very well at all and that he would take care of George. And so that is how it began and over the course of the next 5 years the pattern was apparent. Because George Ryan worked very hard to make sure that Larry Warner got contracts, got leases, that his clients got contracts and leases, and Larry Warner, over the years, then gave back to George Ryan and did that in the form of financial benefits for Ryan's family and for Ryan's friends and this was in addition to all the evidence that the jury heard about George Ryan's relationship with Harry Kline and Ron Swanson because with Harry Kline that was the guy who was giving Ryan the free vacations in Jamaica. That relationship only began when he started giving George Ryan the free vacations in Jamaica after George Ryan was elected Secretary of State.

COURT 2 Apparently there is not much of an exchange for that though. I guess there is one time when the currency exchange fees go up which I understand the industry had wanted for a long time and there is another instance of renting some South Holland

property if I am remembering correctly.

Ms. Barsella — But these were very lucrative for Harry Kline and Harry Kline asked for the rate increase while he was giving George Ryan the benefit – the free vacation. And that is when he first asked for the rate increase

COURT 2 — And I bet you wouldn't have been making a different argument if he had waited 6 months after the Jamaica vacation. I mean $1,000 actually, I have to say, sounds a little cheap to go to Jamaica anyway but that's neither here nor there.

Ms. Barsella — And that's one of the things that we told the jury is that, over the years, George Ryan did sell his office on the cheap. He took all sorts of benefits – whatever size he could get. But more importantly with regard to Harry Kline, this relationship was an annual thing. Every year he got his free vacation from Harry Kline. And less than 2 years after the rate increase George Ryan just a couple of weeks before he went to Jamaica again for the annual vacation that's when he told the Secretary of State employees that they had to give Harry Kline a lease and he made sure that they gave him that--.

COURT 2 That's one of the leases he signed personally.

Ms. Barsella Yes, that is. And so when he was then in Jamaica just a few weeks later and they were sitting around the picnic bench talking about the South Holland lease George Ryan had already gotten it in motion so George Ryan's benefit to Harry Kline was already in progress. They were talking about it and then George Ryan came back after collecting his personal benefit and he made sure that lease not just was signed with Harry Kline but the terms of the lease were whatever Harry wanted. I mean it couldn't have been clear that George Ryan was there to repay Harry Kline, not to look out for the interests of the citizens of the State of Illinois and that's the way it was argued to the jury. When the government was talking about that exact episode what the government said is that when George Ryan went to his underlings and told his underlings that he had to do a lease with Harry Kline and to make sure that the underling told George when the lease was almost done. The way the government argued it – the government told the jury he wanted to know when the lease was done so I can tell Harry that I am reciprocating for his generosity to me from Jamaica. That was the theme of this

case. But there was a pattern here. It wasn't just Jamaica. There was a pattern that whenever George Ryan got a free vacation or his family got a free vacation, he reciprocated and indeed gave governmental benefit to the benefactor. The jury saw that with regard to the Ron Swanson trip to Cancun. He and Ron Swanson go off to Cancun and, as soon as George Ryan gets back, Ron Swanson gets the Lincoln Towers lease. The jury saw that when Ron Swanson paid for one of Ryan's daughter to have a trip to Disneyworld. As soon as the daughter gets back, now Ron Swanson gets a make-work contract at McPier.

COURT 2 So, I'm going to just summarize and to say to listen to your argument you are highlighting things in the record that could have supported a properly instructed jury to find on honest services fraud while Mr. Alschuler is highlighting the aspects of the record that might have persuaded a properly instructed jury that there is no offense here and that's where I really come right back down to the question that this case turns on the proper standard of review.

Ms. Barsella We do believe it is a higher– I mean a lower standard from the government's perspective than certainly a

direct appeal because there is an interest in finality of judgments. The evidence was --

COURT 2 Well, both Brett and Frady say that.

Ms. Barsella That is true and so certainly it has to be more than a reasonable possibility and, in this case on this record, there was much more than a reasonable possibility that George Ryan was properly found to have sold his office, to have given out government benefits in return for the personal benefits that he obtained from his benefactors. If there are no other questions, then –

COURT 1 It looks like there are none. Thank you Ms. Barsella. Anything further Mr. Alschuler.

Mr. Alschuler Skilling says that Constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a verdict that may rest on an invalid theory. I apologize to the Court for not having re-read Frady in many years and as I understand the Court's interpretation of Frady, it stands for the astonishing proposition that the government could have conceded that there was no bribery in closing argument and the jury would plainly have convicted on the basis of conduct that is not criminal and still

Ryan would have to remain in a penitentiary. I am – That's an astonishing proposition if when I look at Frady again --

COURT 1 It is not the proposition. Mr. Alschuler it is not proposition any member of this court has attributed to Frady.

Mr. Alschuler All right, well then I don't know what the Frady standard is but if it is that the jury might have convicted on an invalid theory then I think we have established that.

COURT 2 Well it's a cause and prejudice ---

Mr. Alschuler I think the jury probably convicted on an invalid theory. It almost certainly did not find a bribe or kickback on this case in light of the government's concessions in oral argument and in light of its failure to even mention the financial benefits instructions during its closing argument. The government now says that when it told the jury it did not need to find a quid pro quo it meant that the jury did not have to find an express promise to give a specific benefit for a specific official action and so when the Supreme Court said a quid pro quo was needed the court didn't mean an express promise for a specific benefit but when the government's argument spoke of a quid pro quo and said that

none was needed it did mean an express promise to give a specific benefit.

COURT 2 So what do you do with the instructions that the jury was given saying don't convict if you think it was just friendship. Don't convict if you think it was a gift. The jury did convict.

Mr. Alschuler There is no such instruction, Your Honor. The only instruction that mentions friendship concerns a provision of Illinois law ---

COURT 2 There is a good faith instruction. There is a good faith instruction. If he did these things in good faith.

Mr. Alschuler There is a good faith instruction. That good faith is inconsistent with an intent to defraud but the only mention of friendship comes in the context of an Illinois statute that prohibits gifts from lobbyists and other prohibited sources and it says that it does not prohibit gifts made on the basis of friendship. It doesn't say that failure to disclose a gift made on the basis of friendship can't be the basis for a conviction on a conflict of interest theory. It doesn't say that Ryan can't be convicted simply for favoring friends in the award of government benefits. And again the good faith instruction the jury could

find that Ryan did not act in good faith because he failed to disclose conflicts of interest or because he awarded contracts to his friends. So neither instruction precludes conviction on the basis of friendship. If there are no other questions, I will thank the court for its attention.

COURT 1 Thank you very much Mr. Alschuler and we will give both sides an opportunity to re-read Frady and a few other cases. We would welcome supplemental memos within 14 days addressing the bearing of four Supreme Court decisions – Davis against the United States 417 US 333; Engle against Isaac 456 US 107; United States against Frady 456 US 152; and Bousley against the United States 523 US 614. The case will be taken under advisement after the separate memos have been received. Thank you very much.

END OF HEARING

APPENDIX I

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

UNITED STATES OF AMERICA
Plaintiff,

v.

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

No.: 02 CR 506
Hon. Rebecca R. Pallmeyer

VOLUME 94

March 10, 2006

* * * *

[23902]

* * * *

Instructions regarding Counts 2 through 10, mail fraud, 18 U.S.C. section 1341. Defendants Ryan and Warner are both charged with mail fraud in Counts 2, 3, 4, 5, 7, 8, and 9, and defendant Ryan is charged individually with mail fraud in Counts 6 and 10.

To sustain each charge of mail fraud, the Government must prove the following propositions: first, that the defendant knowingly devised or participated in the scheme to defraud or to obtain money or property by means of materially false

pretenses, representations, or promises as charged; second, that the defendant did so knowingly and with the intent to defraud; and third, that for the purpose of carrying out the scheme or attempting to do so, the defendant used or caused the use of the United States Mails or a private or commercial interstate carrier in the manner charged in the particular count.

If you find that each of these propositions has been proved beyond a reasonable doubt as to a particular count, then you should find the defendant guilty of that count. If, on the other hand, you find that any of these propositions has not been proved beyond a reasonable doubt as to a particular count,

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then you should find the defendant not guilty of that count.

A scheme is a plan or a course of action formed with the intent to accomplish some purpose. A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the potential loss of money or property to another or to deprive the people of the state of Illinois of their intangible right of the honest services of their public officials or employees.

Counts 2 through 10, the mail fraud counts, charge that the defendants participated in a single scheme to defraud or to obtain money or property by means of materially false pretenses, representations, or promises. Proof that there were multiple schemes is not necessarily proof of a single scheme, nor is it necessarily inconsistent with the existence of a single scheme.

Proof of several separate or independent schemes will not establish the single scheme alleged in Counts 2 through 10 unless one of the schemes which is proved is included within the single scheme alleged in those counts. If, therefore, you find beyond a reasonable doubt that there were two or more schemes to defraud and that the defendant was a member of one or more of these schemes to defraud, and you further find beyond a reasonable doubt that the proved scheme to defraud was included within the charged scheme to defraud, you should find that defendant guilty of the particular count you are

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considering, provided that all other elements of the mail fraud charge have been proved.

If, on the other hand, you find that there were two or more schemes to defraud and that the defendant was not a member of any proved scheme included within the charged scheme to defraud, you should find that defendant not guilty of that count.

A false pretense, representation, or promise is material if it has the natural tendency to influence or is capable of influencing the decision of the decision-making body to which it was addressed. In order for the Government to demonstrate a scheme to defraud the public of its right to the honest services of a public official or employee, only one participant in such scheme must owe a duty of honest services to the public.

Accordingly, a defendant who schemes with a public official or employee to deprive the public of its right to that public official's or employee's honest

services may be guilty of a scheme to defraud the public of its right to honest services, provided all the elements of the offense as set forth in the instructions are met.

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat the people of the state of Illinois in order to cause a gain of money or property to the defendants or others or the potential

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loss of money or property to another or to deprive the people of the state of Illinois of the right to the honest services of their public employees -- officials and employees. Such intent may be determined from the evidence admitted as to each defendant.

Good faith on the part of the defendant is inconsistent with the intent to defraud, an element of the mail fraud charges. The burden is not on the defendant to prove his good faith; rather, the Government must prove beyond a reasonable doubt that a defendant acted with intent to defraud.

A public official has a duty to provide honest services to the people of the state of Illinois. The Government does not allege that defendant Warner was a public official during the time period relevant to this case. Because of his official position, defendant Ryan owed a duty of honest services to the people of the state of Illinois.

A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to

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

The law does not require that the Government identify

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

Likewise, the law does not require that the Government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the Government proves beyond a reasonable doubt that the personal and financial benefits were given with the understanding that the public official would perform or not perform acts in his official capacity in return.

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

A public official's receipt of personal or financial benefits or the receipt of the benefits by the public official's family, friends, employees, or associates, does not, standing alone, violate the mail fraud statute, even if the individual providing the personal or financial benefit has

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business with the state. Instead, that receipt violates the law only if the benefit was received with the public official's understanding that it was given to influence his decision-making.

Similarly, the providing of personal or financial benefits by a private citizen to and for the benefit of a public official or to and for the benefit of a public official's family, friends, employees, or associates, does not, standing alone, violate the mail fraud statute, even if the private citizen does business with the state, so long as the personal or financial benefits were not intended to influence or reward the public official's exercise of office.

A public official's receipt of campaign contributions, standing alone, does not violate the mail fraud statute, even if the contributor has business or expects to have business pending before the public official or the state in which the public official holds office. Rather, public officials may receive campaign contributions from those who might seek to influence the candidate's performance so long as no promise for or performance of a specific official act is given in exchange.

Similarly, the giving of a campaign contribution to a public official, standing alone, does

not amount to a violation of the mail fraud statute, even if the person making the contribution has or expects to have business pending before the

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public official. When a person gives and a public official receives a campaign contribution, knowing that it is given in exchange for a specific official act, that conduct violates the mail fraud statute if the other elements of the mail fraud offense are met. The intent of each party can be implied from their words and ongoing conduct. Not every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation.

I instruct you that the following state laws were among the laws applicable to state officials throughout the relevant time frame except as otherwise noted. One, Article 8 section 1(a) of the Illinois Constitution provided that public funds, property, or credit shall be used only for public purposes.

Two, 720 ILCS 5/33-3 provided that a public officer or employee commits misconduct when in his official conduct he, with intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority or solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

Three, 5 ILCS 420/4A-101 provided that a person holding an elected office in the Illinois executive branch which includes the office of the Secretary of State and the Governor's office, is

obligated to file annually a statement of economic interest with the State of Illinois wherein he is

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required to disclose various economic and associated information which is specified on the forms that are in evidence.

Four, from January 1, 1999, and continuing through 2002, 5 ILCS 425/10 provided that a public officer was prohibited from soliciting or accepting any gifts from any prohibited source or in violation of any federal or state statute, rule, or regulation.

Prohibited sources included, among others, anyone who is registered or required to be registered with the Secretary of State under the Lobbyist Registration Act, which act obligated persons to register as lobbyists if they undertook to influence executive, legislative, or administrative action, or employed another person for the purpose of influencing executive, legislative, or administrative action.

A number of items were specifically excluded from this prohibition, including lawful campaign contributions, gifts from relatives, gifts given to an officer or employee of the executive branch from another officer or employee of the executive branch, gifts of personal hospitality of an individual other than a registered lobbyist, and gifts from any one prohibited source during any calendar year having a cumulative total value of less than $100.

Also excluded from this prohibition was anything provided on the basis of a personal

friendship, unless the

officer had reason to believe that the gift was provided because of the official position of the officer and not because of friendship.

In determining whether a gift was provided on the basis of friendship, the officer was to consider the history of the relationship between the individual giving the gift and the officer, including any previous exchange of gifts between those individuals, whether the officer knew the individual who gave the gift personally paid for the gift or sought a tax reduction or business reimbursement, and whether the officer knew the individual who gave the gift also gave the same or similar gifts to other public officials.

Five, 10 ILCS section 5/9.25.1 provided that, quote:

"No public fund shall be used to urge any elector to vote for or against any candidate or proposition or be appropriated for political or campaign purposes to any candidate or political organization."

Under Illinois statute, 30 ILCS section 505/6, prior to July 1, 1998, certain purchases and contracts were not required to be competitively bid including, A, purchases and contracts for data processing equipment, software, or services, B, where the services required were for professional skills pursuant to a written contract and, C, in emergencies where immediate expenditure was necessary for repairs to state property in order to prevent or

minimize serious disruption of

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state service or to ensure the state records.

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

A public official may deprive the public of its right to honest services even if the same official action would have resulted absent the official's deprivation of the public's right to honest services. The mail fraud statute can be violated whether or not there is any loss to the victim of the crime or gain to the defendants.

A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrue to others so long as the Government has proved the other elements of mail fraud beyond a reasonable doubt. The public may be deprived of its public official's or employee's honest services no matter who receives the benefits of the fraud so long as the Government has proved the other elements of mail fraud beyond a reasonable doubt.

In order to prove a scheme to defraud, the Government does not have to prove that the defendants contemplated actual

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or foreseeable harm to the victims of the scheme. The Government must prove that the United States Mails or a private or commercial interstate carrier were used to carry out the scheme or were incidental to an essential part of the scheme.

In order to use or cause the use of the United States Mails or a private or commercial interstate carrier, a defendant need not actually intend that use to take place. You must find that the defendant knew that it would occur in the ordinary course of business or that the defendant knew facts from which that use could reasonably have been foreseen. However, the Government does not have to prove that a defendant knew that the carrier was an interstate carrier. The defendant need not actually or personally use the mail or interstate carrier.

Although an item mailed or sent by interstate carrier need not by itself contain a fraudulent representation or promise or request for money, it must further or attempt to further the scheme. Each separate use of the mail or interstate carrier in furtherance of the scheme to defraud constitutes a separate offense.

In connection with whether a mailing was made, evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion

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was in conformity with the habit or routine practice.

You should consider this evidence in the same manner that you consider all circumstantial evidence.

* * * *