Exhibit

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

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

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

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

INTRODUCTION

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

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

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

I. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

II. THE *SKILLING* DECISION

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

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

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

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

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

III. THE *SKILLING* STANDARD: BRIBES AND KICKBACKS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 274-75.

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

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

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

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

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

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

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

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

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

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

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

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

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

To summarize the law described above:

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

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

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

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

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

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

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

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

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

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

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

criminal intent. *Id*.

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

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

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

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

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

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

R. 22956-58 (emphasis added).

> Now, did Ryan have a conversation with Anthony DeSantis in which they discussed: Well, you pay me for this, and I'll give a low-digit plate? No, they didn't do that. However, when Ryan had the opportunity to help DeSantis, a man who was interested in a low-digit plate, did he do it? Yes, he did. . . . You don't have to have a quid-pro-quo conversation here, but there is no doubt that Ryan's actions in connection with the low digit plate arena were influenced, were influenced by his receipt of the DeSantis money.

R. 22973.

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

R. 23764 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Klein testified:

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

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

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

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

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

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

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

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

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

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

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

VI. THE JURY INSTRUCTIONS WERE ERRONEOUS

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

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

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

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

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

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

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

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

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

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

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

rather than required.

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

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

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

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

The second standard was further from the mark:

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

[14] When the Court approved this instruction over Ryan's objection, it emphasized the instruction's negative message: "I think we do need to tell the jurors in some fashion that they don't need to find a direct quid pro quo in order to find a violation of the honest services obligation." R. 22080-81.

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

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

D. Undisclosed Conflicts. The Court told the jury:

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

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

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

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

R. 23906.

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

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

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

R. 23911.

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

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

VII. THE ERROR IN INSTRUCTING THE JURY WAS NOT HARMLESS

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

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

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

> The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. . . . We have also spoken of comity and federalism. "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."

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

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

standard announced in *Lanier*.

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

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

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

interest. The instructions were both erroneous and prejudicial.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

DATED: August 31, 2010

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