IN THE SUPREME COURT OF THE UNITED STATES

No. 07A373

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

v.

UNITED STATES OF AMERICA

ON EMERGENCY APPLICATION FOR BAIL PENDING CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General, on behalf of the United States, respectfully files this memorandum in opposition to the emergency application for bail pending certiorari.

STATEMENT

1. In November 1990, George Ryan won election as Illinois' Secretary of State. He was re-elected to that post in 1994. Throughout Ryan's two terms in that office, Lawrence Warner was one of Ryan's closest friends and unpaid advisors.

One of Ryan's duties as Secretary of State was to award leases and contracts for the office. Ryan engaged in improprieties in steering four leases and three contracts to his friends and associates, including Warner. The evidence showed, among other

things, that Ryan steered an $850,000 four-year office lease to Warner for a property that Warner had recently purchased for just $200,000. Ryan took regular Jamaican vacations paid for by a currency-exchange owner to whom Ryan later steered a $600,000 five-year office lease. Ryan took a Mexican vacation paid for by an individual to whom Ryan later steered another 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 office contract without registering as a lobbyist, and he included another of Ryan's friends in that arrangement at Ryan's request before the contract was awarded. The end result was hundreds of thousands of dollars in benefits for Warner and Ryan, including financial support for Ryan's successful 1998 campaign for governor of Illinois. 498 F.3d at 675; Gov't C.A. Br. 3-17.

2. In December 2003, a federal grand jury in the Northern District of Illinois indicted Ryan and Warner for racketeering conspiracy and mail fraud. Ryan was also charged with making false statements to the Federal Bureau of Investigation (FBI), obstructing and impeding the Internal Revenue Service (IRS), and filing false tax returns; Warner was charged with attempted extortion, money laundering, and structuring a financial transaction.

3. Prospective jurors filled out a 110-question, 33-page form, which covered, among many other topics, 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 district 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, and the prosecution presented approximately 80 witnesses against applicants. 498 F.3d at 675.

The jury retired on March 13, 2006, and deliberated for eight days. On 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. 498 F.3d at 675-676.

On the eighth day of deliberations, the Chicago Tribune reported 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. Ryan's counsel voiced no objection when Warner's counsel moved to dismiss Pavlick or when the court granted that motion. 498 F.3d at 676.

Background checks were run on all of the jurors and alternates. Those checks revealed that Juror Ezell had seven criminal arrests, an outstanding warrant for driving with a suspended license, and an arrest under a false name. 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 this case also involved charges of providing false information to law enforcement officers. The court questioned Ezell, who acknowledged her untruthfulness. Even then, however, she was not forthcoming about her use of the false name. The court concluded that Ezell was not being 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 not to the decision to remove Ezell based on her untruthfulness. See 498 F.3d at 676.

The court also questioned a number of other jurors about litigation matters. Gomilla and Talbot had filed for bankruptcy in the mid-1990s, but neither included that information in response to a question about whether they had ever appeared in court or been involved in a lawsuit. That question appeared in a section entitled "Criminal Justice Experience." Several other jurors failed to disclose criminal history: 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 had never appeared in court; Juror Casino, who had three arrests that he had not remembered when filling out the questionnaire, because they occurred about 40 years earlier, when he was in his early 20s; and Juror Masri, an alternate, who reported a 2000 DUI conviction but had said nothing about a 2004 DUI conviction or about being on probation at the time of the voir dire. See 498 F.3d at 676.

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 re-interviewed 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. 498 F.3d at 677.

In light of the dismissals, it became necessary to seat alternates Svymbersky and DiMartino on the jury in place of Ezell and Pavlick. As authorized by Federal Rule of Criminal Procedure 24(c)(3), the district court decided that the reconstituted jury would need to restart deliberations. 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 that instructed the jurors not to consider the court's questioning as part of their deliberations. The new jury began deliberating on March 29, 2006. After ten days, it returned guilty verdicts on all counts. 498 F.3d at 677; C.A. App. 590.

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 and 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 into the jury room "case and law" 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." Peterson acknowledged bringing into the jury room an article published by the American Judicature Society (AJS) about the substitution of jurors and a handwritten note recording her own thoughts about the duty to deliberate. She had read a portion of the article and the handwritten note to the rest of the jurors. The court concluded that those two excerpts "did not prejudice the outcome," and the court ultimately denied applicants' motion for a new trial on that (and several other) grounds. 498 F.3d at 677; Gov't C.A. Br. 20-37, 53-56.

4. Following their convictions, applicants moved in the court of appeals for release pending appeal. The court granted the motion and stated that "[i]f the judgment is affirmed, the grant of bail pending appeal will end automatically, without waiting for this court to issue its mandate." Application Addendum Ex. D.

5. The court of appeals affirmed applicants' convictions. 498 F.3d at 674-699.

a. The court of appeals held, among other things, that: Peterson's introduction into the jury room of the AJS article was improper but did not prejudice applicants, and thus was harmless error; the district court did not abuse its discretion when it ordered substitutions of Ezell and Pavlick after eight days of deliberations; the State of Illinois could serve as a RICO enterprise; and the honest-services statute, 18 U.S.C. 1346, is not void for vagueness as applied to applicants. 498 F.3d at 678-691, 693-696, 597-699.

The court of appeals noted that applicants did not argue on appeal that the problems with the jury had a cumulative, prejudicial effect, 498 F.3d at 674, or that any juror issues constituted structural error, id. at 704. Nor, the court explained, did applicants claim that the evidence was insufficient to support any of the charges on which they were convicted. Id. at 674. In the end, the majority observed that "the district court handled most problems that arose in an acceptable manner, and that whatever error remained was harmless" in light of the "overwhelming" evidence against applicants. Id. at 674, 675.

b. Judge Kanne dissented. 498 F.3d at 705-715. He relied on two arguments that applicants had not raised on appeal: that jurors' conflicts of interest created structural error, and that the cumulative effect of multiple errors regarding jury management and jury deliberation resulted in an unfair trial. Judge Kanne

opined that "there is a structural error because of the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation" and that "the multiple errors regarding jury management generally and jury deliberation, when viewed collectively, were so corruptive that the verdicts cannot stand." Id. at 706.

6. On August 22, 2007, the court of appeals granted applicants' motion to continue bail pending appeal, but only until the court issued its mandate. Application Addendum Ex. E.

7. On October 25, 2007, the court of appeals denied applicants' petition for rehearing en banc. Judges Posner, Kanne, and Williams dissented. Although they agreed that the "evidence of the defendants' guilt was overwhelming," they stated that the trial did not meet minimum standards of procedural justice. Application Addendum Ex. B at 5.

8. On October 31, 2007, the court of appeals denied applicants' motion to stay the mandate and continue bail bending certiorari. Judge Wood wrote:

> Appellants here have shown neither a reasonable probability that the [Supreme] Court will grant certiorari nor a reasonable possibility that this court's decision will be reversed. Most of the arguments presented in the dissent to the panel's opinion were not preserved in the district court, and none of the arguments in the dissent to the order denying rehearing en banc has ever been advanced by the appellants. Before it could reach these questions, the Supreme Court would have to disregard a series of forfeitures. It is unlikely that the Court would do so, especially given the strength of the government's case.

> The voluminous record here demonstrates that the appellants were guilty of the crimes with which they were charged. Although they would undoubtedly like to postpone the day of reckoning as long as they can, they have come to the end of the line as far as this court is concerned.

Application Addendum Ex. H. Judge Kanne dissented. Ibid.

9. Applicants have been ordered to self-surrender to the Bureau of Prisons on November 7, 2007, before 5:00 p.m. Application Addendum Ex. F, G.

ARGUMENT

THE EMERGENCY APPLICATION FOR BAIL PENDING CERTIORARI SHOULD BE DENIED

The Bail Reform Act of 1984, as amended, 18 U.S.C. 3141 et seq., applies to requests for bail pending certiorari. See Robert L. Stern, et al., Supreme Court Practice § 17.5, at 762-763 (8th Ed. 2002). It provides:

> Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds --
>
> > (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released * * *; and
> >
> > (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in --
> >
> > > (i) reversal,
> > > (ii) an order for a new trial,
> > > (iii) a sentence that does not include a term of imprisonment, or
> > > (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. 3143(b)(1).

Thus, applicants must show that a "substantial question" is "likely" to result either in the overturning of their convictions or in reduced sentences of imprisonment that are shorter than the time that would expire between their imprisonment starting November 7, 2007, and the conclusion of this Court's proceedings. See 18 U.S.C. 3143(b)(1)(B). Because this Court's certiorari jurisdiction is discretionary, that means that applicants must show that it is "likely" (ibid.) that this Court would both grant a writ of certiorari and reverse.

Thus, as Justices of this Court have explained, albeit in cases predating the enactment of the Bail Reform Act, "[a]pplications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, 'the lower court refused to stay its order pending appeal.'" Julian v. United States, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers) (citing Graves v. Barnes, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)). Cf. Beame v. Friends of the Earth, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers) (when the court of appeals has denied a stay, the applicant's burden "is particularly heavy"); Planned Parenthood of Southeastern Pennsylvania v. Casey, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers) ("The burden is on the applicant to 'rebut the presumption that the decision below -- both on the merits and on the proper interim disposition -- is

correct.'") (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). "At a minimum, a bail applicant must demonstrate a reasonable probability that four Justices are likely to vote to grant certiorari." Julian, 463 U.S. at 1309 (citing Bateman v. Arizona, 429 U.S. 1302, 1305 (1976) (Rehnquist, J., in chambers)).

Applicants fall well short of demonstrating the "extraordinary circumstances" required for bail pending certiorari. As Judge Wood determined in denying bail pending certiorari, there is no reasonable probability that this Court will grant certiorari on any of the issues raised in the application, let alone reverse the judgment below. Application Addendum Ex. H; see Gov't C.A. Answer to Pet. for Reh'g or Reh'g En Banc (attached). While applicants focus on alleged juror errors, they forfeited or waived most of the juror issues advanced in their application. To the extent that some of those arguments were preserved, they are refuted by the district court's findings of fact, which were affirmed by the court of appeals. As the court of appeals explained, "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." 498 F.3d at 704. Those fact-bound rulings -- made in the context of this highly unusual fact pattern that is not likely to recur -- are correct and would not warrant

this Court's review even if applicants had properly preserved their challenges.

Applicants' other challenges relate only to their RICO and honest-services convictions, and are not relevant to this application. Applicants would remain subject to significant prison sentences even if their convictions on those particular counts were overturned. And their convictions on those counts, which do not implicate circuit splits, would not warrant this Court's review in any event.

1. Applicants argue (Application 13-18) that the court of appeals erroneously considered the effect of each alleged jury error in isolation rather than considering their cumulative effect. The court of appeals did not reach that contention because, in that court, the applicants did "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." 498 F.3d at 674. Because applicants abandoned their cumulative-error challenge in the court of appeals, and that court did not address the challenge, it is not properly before this Court. See United States v. Williams, 504 U.S. 36, 41 (1992). Applicants make no effort to explain why this Court should grant certiorari to consider a forfeited argument; indeed, their application does not even acknowledge the forfeiture.

Applicants' contention (Application 15-17) that the court of appeals' decision is in conflict with decisions of this Court and other courts of appeals simply ignores the fact that the court of appeals did not consider the cumulative error question because applicants had abandoned it. Cf. United States v. Jawara, 474 F.3d 565, 581 n.10 (9th Cir. 2007) (declining to conduct cumulative error analysis where the defense did not raise such a claim on appeal).

Moreover, the district court and the court of appeals both determined that only one jury error occurred (the jury's consideration of the AJS material concerning the duty to deliberate). See 498 F.3d at 696-697. Because the cumulative error doctrine looks to the cumulative effect of multiple errors, it is inapplicable here. "If there are no errors or a single error, there can be no cumulative error." United States v. Allen, 269 F.3d 842, 847 (7th Cir. 2001).[1]

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[1] The original jury was exposed to a paragraph from an AJS article regarding substitution of a juror who is unwilling or unable to deliberate. The court of appeals correctly determined that the district court had not abused its discretion in concluding that the jury's exposure to that material did not warrant a new trial. 498 F.3d at 681. The AJS material did not relate to applicants' guilt, and it was consistent with the court's instructions. Juror Peterson's testimony, which the district court credited, was that Juror Ezell did not change her approach to the deliberative process after the AJS material was read. C.A. App. 645. Ezell herself had forgotten about the article until days after the verdicts were returned. Id. at 625. In any event, Ezell was removed from the jury for unrelated reasons (at a time when her views were unknown to the litigants and the court), and the reconstituted jury was instructed to begin deliberations anew. See

In an attempt to establish a predicate for a cumulative-error claim, applicants rely (Application 14) on allegations of error that are both unsupported by the record and contrary to the district court's factual findings and credibility determinations (which were affirmed by the court of appeals). For example, applicants claim (Application 12) that there was an "astonishing effort" by the jurors to force out a "defense juror," when the district court found that there was no evidence to support such a claim. See C.A. App. 83-84, 646. Applicants also claim as error (Application 12) the removal of Ezell, a "defense juror," when they did not argue she was a defense juror at the time of her removal and the district court emphatically found that Ezell's views were unknown to the parties and to the district court at that time. See C.A. App. 84; 498 F.3d at 687 ("We cannot find any basis in the record to conclude that the district court dismissed Ezell because of her view of the evidence."). Finally, applicants allege (Application 12) "a raft of other juror misconduct," while ignoring the district court's specific findings that no such misconduct occurred. See, e.g., C.A. App. 87, 92 (no exposure to media coverage). This Court does not review the concurrent factual findings of two courts below "in the absence of a very obvious and exceptional showing of error," Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 841 (1996), which is not the case here. In any

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pp. 23-24, infra.

event, applicants abandoned their cumulative-error claim in the court of appeals.

2. Applicants argue (Application 18-22) that the district court's questioning of jurors about statements they made during voir dire constituted structural error requiring automatic reversal.

a. As with their cumulative error claim, applicants did not properly preserve that claim in the lower courts. Indeed, applicants themselves insisted on much of the questioning. As the court of appeals explained, "many of the investigations were done at the request of the defense." 498 F.3d at 703. For example, jurors Gomilla and Talbot were questioned about bankruptcy filings they made 10 and 11 years earlier, which the defense had discovered by combing court records over the weekend. Applicants insisted on those inquiries, over the government's objection, even though the only voir dire question that arguably called for such information appeared under the heading "Criminal Justice Experience." See C.A. App. 481, 487, 493. Applicants ultimately declined to move to dismiss Gomilla or Talbot. Id. at 518. As the court of appeals explained, applicants "cannot embed a ground of automatic reversal into a case" by insisting on questioning jurors and then arguing that the questioning they demanded requires automatic reversal. 498 F.3d at 703. Applicants do not attempt to refute that point; instead, they simply ignore it.

b. In any event, there was no error, much less structural error, in the questioning. As the court of appeals recognized (498 F.3d at 704), this Court's decision in Remmer v. United States, 347 U.S. 227 (1954), disposes of applicants' structural error argument by holding that even interrogation of a deliberating juror by law-enforcement officers about an extraneous contact is subject to harmless error analysis (as opposed to automatic reversal). Id. at 228 (remanding for determination whether extraneous influence was harmless). By requiring an inquiry into prejudice, Remmer makes clear that questioning of a juror does not per se prevent his continued service as a juror.

Applicants (Application 18) cite Remmer v. United States, 350 U.S. 377 (1956) (Remmer II), for the proposition that this Court ordered a new trial in that case "over the district court's finding of no prejudice." But the Court reversed in Remmer II not on the ground that prejudice was irrelevant, but on the ground that the district court had undertaken an "unduly restrictive" inquiry into whether prejudice had resulted in that case. Id. at 382. This Court then held that "on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident," the defendant had established prejudice and was entitled to a new trial. Ibid. Contrary to applicants' argument, therefore, neither Remmer I nor Remmer II treated law-enforcement

questioning of jurors as structural error; instead, they rested on whether the defendant had been prejudiced.

The proceedings in the district court here demonstrate that courts can evaluate, on a case-by-case basis, the prejudicial effect of questioning of jurors. As the court of appeals explained, 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." 498 F.3d at 704. The court of appeals correctly deferred to the district court's first-hand assessment of the jury: "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." Id. at 683 (quoting district court's findings). Those findings are fully supported by the record, while applicants' complaints are not. Id. at 688.

When questioning jurors, the district court took pains to ensure that the questioning would not affect a juror's ability to be fair and impartial. See, e.g., C.A. App. 524, 578 (assuring Svymbersky that questioning was "generated by media, not by anybody in here," and receiving Svymbersky's assurance that the questioning would have "no bearing over [his] judgment in this trial"); id. at 548 (receiving assurance from Rein that questions did not make him

feel that he had to please the court or to "please one side or please the other in connection with your deliberations"); id. at 551, 575 (receiving assurance that Casino could be fair). The district court also explained to the reconstituted jury that the questioning and the dismissal of two jurors was "not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations, those of you who were here. Rather, the inquiry was generated by members of the media. It is not related to the lawyers in this case. * * * * [N]one of my questions should be considered in any way as you deliberate." Id. at 590.

Moreover, the conduct of the reconstituted jury demonstrates that it was not intimidated or pressured into returning a guilty verdict. After being painstakingly reinstructed, the reconstituted jury began deliberations that lasted for ten days. See 498 F.3d at 677. During the second round of deliberations, the jury asked for additional instructions that the original jury had not sought. Id. at 690. Those are not the actions of a jury that has been pressured or intimidated into returning a verdict for the prosecution. Instead, they show that the jury was diligently and impartially fulfilling its duty.

While applicants (Application 19) rely on press reports that jurors faced perjury investigations, they ignore the district court's finding that "there is no indication in the record that any jurors saw more than headlines in connection with this matter."

C.A. App. 87. Nowhere in the transcript is there an indication that the jurors were reading press reports about possible investigations of the jurors themselves. Instead, the record reflects that the jurors were not aware of the press reports and had only tangential exposure to them. See id. at 525, 546, 551-552.

While applicants state (Application 1) that the prosecutors "thought it necessary to immunize the jurors," no discussion of immunity took place in front of jurors. In the course of in camera discussions about the questioning of jurors, the court asked the parties whether the jurors should be given any warnings regarding self-incrimination. Tr. 24,366, 24,385-389, 24,392, 24,402-403, 24,405-410, 24,412-414. The government responded that anything the jurors said would not be used against them. Tr. 24,500-501. Although the court told one juror (Gomilla) that nothing he said would be used against him, that warning was not repeated for other jurors, and the defense raised no objection.

Applicants contend (Application 19) that Juror Losacco was fearful of prosecution because she said that she was "scared." The court of appeals correctly recognized that the record supported the district court's finding that Juror Losacco was uncomfortable because of the presence of a roomful of attorneys, not because she feared being prosecuted. 498 F.3d at 687. Losacco said, immediately preceding her comment about being afraid, that she felt

she was in a job interview. C. A. App. 581. One who is fearful of being prosecuted does not describe the setting as that of a job interview.[2]

c. There is no circuit conflict on this fact-bound question. Applicants claim (Application 21) that the court of appeals' decision conflicts with the Ninth Circuit's decision in United States v. Rosenthal, 454 F.3d 943, 950 (2006). As the court of appeals explained, however, Rosenthal is factually inapposite. 498 F.3d at 682. During jury deliberations in Rosenthal, one juror asked an attorney friend whether she must follow the instructions or whether she had "any leeway" for independent thought. Rosenthal, 454 F.3d at 1245-1246. The attorney advised that the juror "could get into trouble if [she] tried to do something outside those instructions," and the juror repeated that to another juror. Id. at 1246. Reasoning that "[j]urors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors," the Ninth Circuit held that there was a reasonable possibility that the extraneous information prejudicially affected the verdict. Ibid. Here, in contrast, the district court found that no juror was intimidated by

[2] While applicants point out (Application 19) that at least two jurors retained attorneys, they did so after the verdict, when the defense filed motions and made statements in the media alleging juror misconduct and requesting investigations of the jurors.

the questioning, and no juror was told that he could be in trouble because of the verdict. See C.A. App. 88.[3]

3. Applicants claim (Application 22-25) that the district court's dismissal of two jurors and one alternate, and substitution of alternates for the two dismissed jurors, was unlawful. That contention is incorrect, was partially forfeited, and does not warrant this Court's review.

a. The substitution was authorized by Federal Rule of Criminal Procedure 24(c)(3), which authorizes replacement of a juror by an alternate "after the jury retires to deliberate," and specifies that "[i]f an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." As the court of appeals explained, the district court correctly determined that two jurors and one

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[3] Applicants argue (Application 21) that the court of appeals' opinion "squarely" conflicts with this Court's decision in United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006), which held that the denial of the right to retained counsel of choice is a structural error. Id. at 2564-2565. Gonzalez-Lopez noted in a footnote that whether error is structural depends on several factors, including the difficulty of assessing the effect of the error. 126 S. Ct. at 2564 n.4. While applicants argue (Application 21) that courts cannot "quantitatively assess or discern actual prejudice" in this context, the courts reasonably determined that there was no prejudice here, as discussed in the text. In any event, there is certainly no conflict on the question whether the alleged error at issue here is structural, because Gonzalez-Lopez involved the right to counsel, not an asserted right to jurors free from inquiries into the accuracy of their voir dire responses. While the denial of an impartial decision maker may be structural error, a court is entitled to consider all of the facts and circumstances before determining whether a juror was impartial.

alternate -- Pavlick, Ezell, and Masri -- should be dismissed because they deliberately withheld information that would have provided grounds for their dismissal for cause. 498 F.3d at 685-687. In connection with one of Ezell's seven undisclosed arrests, she gave false information to law enforcement authorities (C.A. App. 463-464, 506) -- conduct similar to a charge against applicant Ryan. One of Pavlick's undisclosed arrests and convictions was for a felony DUI offense that took place while Ryan was Secretary of State (id. at 460), and, unknown to the parties, during jury selection Masri was on probation for an undisclosed 2004 DUI conviction (id. at 543). Not only did the trial evidence focus on Ryan's tenure at the Secretary of State's Office, which sets drunk-driving policies, but the defense presented witnesses who testified about Ryan's achievements in strengthening drunk-driving laws. See 498 F.3d at 686-687.[4]

There was nothing wrong with the removal of those jurors. Indeed, applicants did not object to dismissing Ezell, Pavlick, or Masri (other than as to the legal standard employed by the district court), and thereby forfeited that objection as well. See 498 F.2d

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[4] The district court questioned three other jurors (Casino, Svymbersky, and Rein) about their contacts with the criminal justice system 23-44 years earlier, and found that those jurors credibly reported that they had not thought of their long-ago brushes with the law during voir dire. Thus, the court did not dismiss those jurors, who had not deliberately withheld information and had not committed crimes related to the allegations in this case. See C.A. App. 524-525, 528, 545-547, 550-552, 575, 577-578.

at 676-677. In addition, the court of appeals found no basis in the record for concerns that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations," or "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." 498 F.3d at 688. Rather, Ezell's views were unknown to the litigants and court at that time, and applicants never argued otherwise when she was dismissed. C.A. App. 411, 534. The jury was instructed that "the circumstances that brought about the fact that these two jurors were excused * * * were not prompted by * * * your previous deliberations." Id. at 590.

Nor is there any other indication that the substitution was improper. Before allowing the commencement of deliberations by the reconstituted jury, the district court ensured that the two new jurors had not discussed the case and had not been exposed to prejudicial media coverage, and that each of the remaining original jurors was capable of deliberating anew and disregarding what had gone before. C.A. App. 523-524, 579-584. Moreover, the reconstituted jury deliberated for ten days, and before returning a verdict, the jury asked for information that was not requested by the original jury. See p. 19, supra. As the district court found, the jurors who deliberated to judgment were "diligent and

impartial" and "made every effort to be fair, even amid extraordinary public scrutiny." C.A. App. 683.

b. The substitution of two jurors would not warrant this Court's review in any event. While applicants argue (Application 12) that the court of appeals "astonishingly held" that there is no constitutional limitation on the substitution of jurors, it did no such thing. Instead, the court of appeals rejected applicants' contention that "almost any decision to substitute [during deliberations is] prejudicial," and determined that the substitution was appropriate on the facts of this case. 498 F.3d at 688-691.

Nor is there a circuit split on the correct legal standard. While applicants repeatedly contend (Application 1, 12, 22) that the substitution was unprecedented, two other courts of appeals recently reviewed high-profile cases involving juror replacement after days of deliberations. Like the court of appeals here, both of those courts deferred to the trial judges' findings and upheld the verdicts reached by reconstituted juries. See United States v. Kemp, 500 F.3d 257, 301-306 (3d Cir. 2007); United States v. Ronda, 455 F.3d 1273 (11th Cir. 2006), cert. denied, 127 S. Ct. 1327, 127 S. Ct. 1338 (2007).

As the court of appeals recognized, the cases on which applicants rely pre-date an amendment to Rule 24 that specifically provides for substitution of an alternate for a deliberating juror.

498 F.3d at 689. Thus, those cases say nothing about the standard of review following the change in the rule. See ibid.

Nor was there a conflict before the rule change. Applicants claim that United States v. Register, 182 F.3d 820 (11th Cir. 1999), cert. denied, 530 U.S. 1250 (2000), conflicts with United States v. Josefik, 753 F.2d 585 (7th Cir.), cert. denied, 471 U.S. 1055 (1985), but the two cases are in harmony. In Register, the Eleventh Circuit held that the substitution of an alternate for a deliberating juror requires reversal "only where 'there is a reasonable possibility that the district court's violation * * * actually prejudiced [the defendant] by affecting the jury's final verdict.'" 182 F.3d at 842. The Seventh Circuit in Josefik adopted a similar rule: "only prejudicial violations of the rule are reversible errors." 753 F.2d at 587. Thus, there is no conflict.

4. In addition to the juror issues, applicants advance (Application 26-30) two arguments that are specific to some but not all of the counts on which they were convicted: that a State cannot constitute a criminal enterprise under the RICO statute; and that the "honest services" fraud statute, 18 U.S.C. 1346, is void for vagueness.

a. Even if those claims were meritorious, they would not provide a basis for granting bail pending certiorari. Bail is appropriate only if a defendant "raises a substantial question of

law or fact likely to result in," among other things, "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. 3143(b)(1)(B)(iv) (emphasis added). Even if applicants prevailed on their RICO and honest-services convictions, that standard would not be satisfied because applicants would still be subject to significant sentences of imprisonment for their other counts of conviction.

Ryan was convicted of three false statement counts, in violation of 18 U.S.C. 1001 (Counts 11-13), each of which carries a maximum of five years of imprisonment. He was also convicted of obstructing the IRS, in violation of 26 U.S.C. 7212 (Count 18); and filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 19-22). Each of the Title 26 violations carries a maximum of three years of imprisonment. Under the Probation Office's Guidelines calculations, the false statement counts were grouped with the RICO and mail fraud counts (Ryan PSR, lines 595-607), which means that the advisory Guidelines range for the false statement counts standing alone is the same as the advisory Guidelines range of 78-97 months of imprisonment that the district court used in sentencing Ryan to 78 months of imprisonment. The Title 26 convictions were not grouped with the other counts, but the probation officer calculated that the offense level for the four

tax-related offenses was 14, resulting in an advisory Guidelines range of 15-21 months (Ryan PSR, line 790).

Thus, under any possible scenario, Ryan's advisory Guidelines range would call for a period of imprisonment significantly longer the time this Court will need to consider and rule on his certiorari petition. Especially considering that the district court imposed within-Guidelines sentences for both applicants, reversal of the RICO and honest-services counts would not be "likely to result in * * * a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. 3143(b)(1)(B)(iv) (emphasis added).

Similarly, Warner was convicted of extortion, in violation of 18 U.S.C. 1951 (Count 14), which carries a maximum of 20 years of imprisonment. He was also convicted of structuring financial transactions, in violation of 31 U.S.C. 5324 (Count 17), which carries a maximum of 10 years of imprisonment. The Probation Office calculated that the offense level for the extortion count alone was 17, which would have equated to an advisory Guidelines range of 24-30 months. Warner PSR, lines 506-510. The offense level for the structuring count alone was 18, which would have equated to an advisory Guidelines range of 27-33 months.[5] Thus,

[5] Arguably, if the RICO and fraud convictions were overturned, the advisory Guidelines range for the structuring count could decrease two levels to 16, due to the absence of underlying

even if the RICO and fraud convictions were reversed, Warner, like Ryan, would likely be imprisoned for a significantly longer period of time than it will take this Court to consider and rule on his certiorari petition.

b. In any event, as applicants note (Application 26), the question whether a State is a RICO enterprise is one of "first impression" at the appellate level. 498 F.3d at 694. Accordingly, there is no circuit conflict requiring resolution by this Court. Moreover, as applicants acknowledge (Application 26), numerous courts have recognized that governmental entities can be RICO enterprises.

c. While applicants argue (Application 28-30) that the lower courts are in disarray on whether the "honest services" fraud statute, 18 U.S.C. 1346, is void for vagueness, they cite no case holding that the statute is unconstitutionally vague. Instead, they rely solely on dissenting opinions. See Application 29.

Nor does this case implicate any conflict concerning the application of the statute. Applicants assert (Application 29) a conflict between United States v. Bloom, 149 F.3d 649 (7th Cir. 1998), and United States v. Panarella, 277 F.3d 678 (3d Cir.), cert. denied, 537 U.S. 819 (2002). While in Bloom the Seventh Circuit held that honest services mail fraud consists of the misuse

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criminal activity. See Sentencing Guidelines § 2S1.3(b)(2). In that event, the advisory Guidelines range for the structuring count would be 21-27 months.

of office for private gain, 149 F.3d at 656-657, in Panarella, the Third Circuit held that an honest services violation can be proven where a public official "conceals a financial interest in violation of state criminal law and takes discretionary action in his official capacity that the official knows will directly benefit the concealed interest," regardless whether the concealed interest influenced the official's actions, 277 F.3d at 680.

While Panarella arguably takes a more expansive view of honest-services mail fraud violations than does Bloom, any conflict is irrelevant here because the jury instructions gave applicants the benefit of the most restrictive legal standard articulated by any court of appeals. The district court instructed the jury that, in order to be found guilty of honest services fraud, a public official must misuse his position for himself or another. The court then went even farther by requiring a nexus between the action taken and the benefit received: the government was required to prove 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." 498 F.3d at 698 (quoting jury instruction). Thus, as the court of appeals concluded, the conduct the district court required the jury to find would unquestionably constitute honest services fraud in any circuit. Id. at 698-699 ("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.").

Applicants also claim (Application 30) that this case presents a circuit conflict regarding the need to prove a violation of state law as a prerequisite for an honest-services violation. It is true that the Fifth and Third Circuits require the government to prove a violation of state law as a prerequisite to proving an honest services violation, see United States v. Brumley, 116 F.3d 728, 733-34 (5th Cir.), cert. denied, 522 U.S. 1028 (1997); Panarella, 277 F.3d at 694, while the Seventh Circuit does not, see United States v. Martin, 195 F.3d 961, 967 (1999), cert. denied, 530 U.S. 1263 (2000). But applicants argued below that violations of state law were irrelevant to honest services mail fraud. Applicants' C.A. Br. 61. Thus, they are not in a position to complain that the jury was not required to find a state-law violation.

To the extent that applicants are complaining that the jury should not have considered state law, the jury instructions address that matter as well. As discussed, the court made clear to the jury that it could not convict applicants based merely on a state-law violation, but instead had to find that Ryan misused his position for himself or another and "accepted the personal financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return." 498 F.3d at 698 (quoting jury instruction); see ibid.

(cautioning that "not every instance of misconduct or violation of a state statute by a public official or employee constitutes a mail fraud violation"). Because the jury instructions in this case were favorable to applicants, there is no likelihood that this Court would grant review and reverse on that issue.[6]

CONCLUSION

The application for bail pending certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2007

[6] The dissent from denial of rehearing en banc (at 7-15) relied primarily on the length of applicants' trial. Applicants do not challenge the trial's length, and for good reason -- they bear much of the responsibility for it. See, e.g., Tr. 10,404 (defense objection to government's motion to impose time limits on testimony).