In The
United States Court Of Appeals
For The Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAWRENCE E. WARNER and GEORGE H. RYAN, SR.,
Defendants-Appellants.

On appeal from the United States District Court for the
Northern District of Illinois, Eastern Division, Nos. 02-CR-506-1, 4
The Honorable Judge Rebecca R. Pallmeyer, presiding.

CONSOLIDATED BRIEF AND REQUIRED SHORT APPENDIX OF THE DEFENDANTS-APPELLANTS LAWRENCE E. WARNER and GEORGE H. RYAN, SR.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	On Appeal from the United States
	)	District Court for the Northern
Plaintiff/Appellee,	)	District of Illinois, Eastern Division
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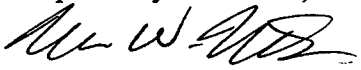
v.	)	No. 02-CR-506-1
	)	
LAWRENCE E. WARNER and	)	Hon. Rebecca R. Pallmeyer
GEORGE H. RYAN, SR.,	)	District Judge.
	)	
Defendants/Appellants.	)	

DEFENDANT-APPELLANT LAWRENCE E. WARNER'S
RULE 26.1 DISCLOSURE STATEMENT

Undersigned, an attorney for Defendant-Appellant Lawrence E. Warner, furnishes the following in compliance with Circuit Rule 26.1:

1. The following lawyers and law firms appeared for Defendant-Appellant Lawrence E. Warner in the district court: Genson & Gillespie, Marc Martin, Ltd., Sam Adam and Marvin Bloom. The following lawyers and law firms appeared for Defendant-Appellant Lawrence E. Warner in this Court: Genson & Gillespie and Marc Martin, Ltd.

Respectfully submitted,



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December 14, 2006

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	On Appeal from the United States
	)	District Court for the Northern
Plaintiff/Appellee,	)	District of Illinois, Eastern Division
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v.	)	No. 02-CR-506-4
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LAWRENCE E. WARNER and	)	Hon. Rebecca R. Pallmeyer
GEORGE H. RYAN, SR.,	)	District Judge.
	)	
Defendants/Appellants.	)	

DEFENDANT-APPELLANT GEORGE H. RYAN, SR.'S
RULE 26.1 DISCLOSURE STATEMENT

Undersigned, an attorney for Defendant-Appellant George H. Ryan, Sr., furnishes the following in compliance with Circuit Rule 26.1:

1. The following lawyers and law firms appeared for Defendant-Appellant George H. Ryan, Sr. in the district court: Winston & Strawn LLP, Dan K. Webb, Bradley E. Lerman, Timothy J. Rooney, Julie A. Bauer, Adrienne Banks Pitts, George C. Lombardi, and Andrea D. Lyon. The following lawyers and law firms appeared for Defendant-Appellant George H. Ryan, Sr. in this Court: Winston & Strawn LLP, Dan K. Webb, Bradley E. Lerman, Timothy J. Rooney, Julie A. Bauer, Raymond W. Mitchell, Michael D. Bess, and Andrea D. Lyon.

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), Defendants-Appellants Lawrence E. Warner and George H. Ryan, Sr., respectfully request oral argument. This consolidated appeal presents a number of important issues, including questions of first impression in this Circuit related to the standards governing the removal and substitution of deliberating jurors and the removal of a holdout juror when there is a possibility that the removal is being sought because of the juror's view of the evidence. This appeal also raises a significant question regarding the exclusion of exculpatory, good-faith evidence. The Defendants believe that oral argument will assist the Court in deciding this appeal, which presents serious issues that are closely intertwined with a voluminous record.

STATEMENT OF JURISDICTION

This is a consolidated appeal from final judgments of conviction entered on September 20, 2006, R.887 (SA.1), R.888 (SA.19), announced orally on September 6, 2006, 9/6/06 Tr.92-98, 152-57 (S.A.40-44).[1] Defendant-Appellant Lawrence E. Warner filed a timely notice of appeal on September 18, 2006, R. 881, and Defendant-Appellant George H. Ryan, Sr. filed a timely notice of appeal on September 20, 2006, R.884. The district court had jurisdiction under 18 U.S.C. § 3231, and this Court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES

This appeal challenges the fundamental fairness of this highly-publicized six-month trial of the former governor of Illinois and his longtime friend. From the pretrial exclusion of exculpatory evidence; the district court's stated desire to reach a verdict after a lengthy trial despite serious juror misconduct; the removal of a holdout defense juror and substitution of two alternates after eight days of deliberations; the presumptively prejudicial external influence on deliberations stemming from a juror's external legal research; the novel and unprecedented RICO charge; to the vague, elusive "honest services" statute, Warner and Ryan were denied their Fifth and Sixth Amendment rights to due process, to a fair trial, and to an impartial jury.

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[1] Citations are designated as follows: common law record ("R.___"); trial transcript ("Tr.____"); the Defendants' short appendix ("SA.___") and joint appendix ("JA.___"); trial exhibits offered by the prosecution ("PX.___"), Warner ("WX.___"), and Ryan ("RX___"). Other transcripts are cited by date of proceeding (e.g., "5/5/06 Tr.___"). This Brief has been prepared based on the transcripts made available to the parties over the course of the proceedings because the court reporter had not yet transmitted the official transcript of proceedings before the due date of this Brief.

Common issues on appeal:

1. Whether a juror's Internet legal research on the power to remove jurors for failing to deliberate in good faith and her erroneous instruction based on her research as to how a defense juror must deliberate created a reasonability of prejudice warranting a new trial, because the external influence threatened to constrain the entire jury's deliberation process; and the government failed to meet its burden of showing that the external influence was harmless beyond a reasonable doubt.

2. Whether the arbitrary removal of a defense holdout juror violated the Defendants' constitutional rights to due process, trial by jury and a unanimous verdict, because the district court misled defense counsel as to the removal standard and permitted the government to strike a juror on a basis not afforded to the defense; and there is more than a possibility that the prosecution sought removal of the juror based on her view of the evidence.

3. Whether the substitution of alternate jurors created at least a reasonable possibility of prejudice because, despite the district court's admonition to "pretend" otherwise, the jurors had struggled through eight days of heated deliberations about the evidence, asked numerous questions about substantive jury instructions, deliberated to verdict on several counts, attempted to remove a defense holdout juror through juror misconduct, seen the removal of two fellow jurors, been interviewed about their false questionnaire responses and been subjected to tremendous media scrutiny.

4. Whether the erroneous exclusion of exculpatory good-faith evidence distorted the jury's view of the case and unfairly precluded Ryan from presenting a full defense.

5. Whether the RICO conspiracy charge is legally insufficient because the state of Illinois cannot be a RICO enterprise; and the district court erroneously directed a verdict for the prosecution on the enterprise element.

6. Whether the mail fraud statute is unconstitutionally vague because Congress failed to define the "intangible right to honest services," which has resulted in conflicting judicial interpretations.

Warner-only issue:

7. Whether Warner was substantially prejudiced by joinder in an indictment that included offenses to which he had no connection, the district court refused his proposed final instruction that identified inadmissible evidence and the jury repeatedly displayed inability to follow instructions.

Ryan-only issue:

8. Whether Ryan's counsel as Secretary of State ("SOS") was compelled to give grand jury testimony in violation of the attorney-client privilege.

STATEMENT OF THE CASE

A grand jury returned a 22-count indictment against Lawrence E. Warner and George H. Ryan, Sr. in December 2003. R.110 (JA.228). After a six-month trial, on April 17, 2006, a reconstituted jury found Warner and Ryan guilty on all counts. R.768, R.771. The jury found Warner and Ryan each guilty of RICO conspiracy (18 U.S.C. § 1962(d)) (Count 1) and mail fraud (18 U.S.C. §§ 1341, 1346, and 2) (Counts 2-8). The jury found Warner guilty 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 found Ryan guilty on two additional mail fraud charges (Counts 9 & 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). The district court set aside the jury's verdict with respect to two separate mail fraud counts against Ryan, but entered judgment on the remaining counts against both defendants. R.867:20-23 (JA.20-23); R.887 (SA.1), R.888 (SA.19). The district court sentenced Warner to 41 months imprisonment and one year supervised release, and ordered him to pay a $75,000 fine and $431,348 in restitution. R.887 (SA.3-4, 7). The district court also entered a $1.7 million forfeiture judgment. R.874. The district court sentenced Ryan to 78 months imprisonment and 12 months of supervised release. R.888 (SA.20-21). This Court granted Ryan bail pending appeal pursuant to 18 U.S.C. § 3143(b)(1).

STATEMENT OF FACTS

I. PRETRIAL EXCLUSION OF DEFENSE EVIDENCE

Before trial in this public corruption case, the prosecution moved to exclude evidence of "various practices in Illinois politics and government," "acts or conduct of other Illinois politicians" and policy initiatives that Ryan advanced in his career, including death penalty reform. R.248:3-5, R.249. The district court granted the motions in substantial part, rejecting arguments that this evidence tended to prove Ryan's intent to act in good faith. R.276:19 (JA.156). The district court reserved ruling on other political act evidence but cautioned that "any attempt to establish . . . innocence based on the fact that other administrations acted in the same manner would be improper." *Id.*

The district court adhered to its pretrial rulings and excluded evidence that Ryan's successor as SOS renewed contracts and leases at issue. R.439:7-8 (JA.113-14). Likewise, the district court excluded evidence that Ryan's successor and predecessor as SOS approved currency exchange rate increases more frequently and in larger amounts than the sole rate

increase Ryan approved as SOS. R.439:4-6 (JA.110-12). The court rejected Ryan's argument that the 1995 decision to increase currency exchange rates was a legitimate regulatory action consistent with increases approved during other SOS administrations. R.439:4-6 (JA.110-12); *see also* R.386:8-9, R.404:2-3.

The district court also excluded evidence of Ryan's policy initiatives, concluding that in this public corruption case there was no "meaningful relationship" between Ryan's work as a public official and the conduct underlying the indictment. R.276:25-26 (JA.162-63), Tr.14197, 19395-98. The court rejected defense arguments that in an honest services prosecution the jury should hear the public official's primary focus or how he approached his office. R.666:1-2. The court was so intent on excluding such evidence that it prohibited Ryan's character witnesses from explaining the context in which they knew Ryan. Tr.19396. The court even prohibited a defense cross for bias of a prosecution witness, a former Cook County prosecutor in a wrongful conviction case, who admitted outside the presence of the jury that he believed Ryan's death penalty work was "absolutely illegal and immoral." Tr.14192, 14197.

II. THE PROOF AT TRIAL

The prosecution presented more than 17 weeks of evidence consisting of testimony from 84 witnesses and 652 exhibits. Tr.2706-18453, 21394-860. Its case was presented, in substantial part, through the testimony of cooperating witnesses, such as Ryan's former chief-of-staff Scott Fawell, his assistant Richard Juliano and informal political advisor Donald Udstuen, who testified in exchange for shorter prison sentences for themselves (and in the case of Fawell, a shorter sentence for his girlfriend as well). Tr.2716, 7296-97, 11596-97.

The summary of the trial evidence discussed below is organized generally as set out in the indictment.[2]

A. RICO And Mail Fraud

The majority of the prosecution's proof centered around two allegations: (1) a RICO conspiracy alleging that Warner, Ryan and others conspired to conduct the affairs of the state of Illinois — the alleged enterprise — through a pattern of racketeering activity over a 12-year period spanning Ryan's terms as SOS and governor, R.110:1-16 (JA.228-43); and (2) an elaborate mail fraud scheme in which Warner, Ryan and others allegedly defrauded the people and the state of Illinois of money, property and the intangible right to the honest services of Ryan and other state employees, R.110:17-58 (JA.244-85). The underlying conduct related to state contracts and leases awarded to Warner, his clients and others; official actions benefiting Ryan's friends; use of state resources for political purposes; the restructuring of the Inspector General (IG) office; awarding of low-digit license plates; and receipt of benefits by Ryan and his family. *Id.*

Warner. A successful private businessman, Warner had a longtime friendship with Ryan and his family. Tr.2750. Following Ryan's election to SOS, Warner became a member of Ryan's "transition team," which advised Ryan about issues facing the SOS. Tr.2738-39, 2749. Warner was also a member of the "kitchen cabinet," Tr.12107-08, and had "walking around rights" in SOS offices, Tr.13441-42. A number of SOS employees raised concerns about Warner's access to SOS offices and employees. *See, e.g.,* Tr.8107, 13442-44.

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[2] Warner and Ryan are not raising sufficiency challenges, but that is not to say that the evidence at trial was anything other than close, and in some instances, insufficient. *See, e.g.,* R.867:20-23 (JA.20-23). "Word" limits, however, require limiting the issues presented and the summary of the trial evidence, *cf. Richards v. Kiernan*, 461 F.3d 880, 882 n.1 (7th Cir. 2006).

After Ryan was elected SOS, Warner became a lobbyist or consultant for various companies seeking to do business with the SOS — American Decal Manufacturing, IBM and Viisage. Tr.8664, 12994-96, 13180-81. Warner also maintained a prior relationship with Affordable Temperature Control. Tr.5422. In these roles, Warner had contact with SOS officials regarding the services of each company, *see, e.g.*, Tr.8054-55, 12555, 6691, 10159, and had some success obtaining business for them with the SOS, *see, e.g.*, Tr.8086, 10161-62. Ryan was aware of Warner's involvement with some but not all of these companies and his interaction with SOS personnel. *See, e.g.*, Tr.3118-19, 3096-98. Ryan approved some contracts in which Warner was involved, *see, e.g.*, Tr.12597-98, 4283, but did so on the recommendation of SOS officials, *see, e.g.*, PX.04-043, Tr.5346-47.

Warner earned fees from contracts that his clients entered into with the SOS. For example, two of Warner's clients — ADM and IBM — made payments to Warner through entities owned by Warner (NCC and Omega Consulting). Tr.16905, 16918. Warner then paid one-third of these proceeds to Udstuen by making payments to AMR, a company owned by Alan Drazek, who paid the taxes and then provided Udstuen with cash. Tr.11829-30; Tr.11649. These payments formed the basis of the money laundering charges against Warner. R.110:73-74 (JA.300-01).

Warner also sought to maintain his position with ADM when a new owner took over ADM's operations in 1998. Tr.9112, 9163-64, 9182-84. Warner's communications with the new owner formed the basis of the extortion charge against Warner. R.110:72 (JA.299).[3]

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[3] The indictment also charged Warner with structuring. R.110:75 (JA.302). On August 4 and 5, 1997, Warner cashed consecutively numbered checks, each dated July 31, 1997, in the amounts of $9,000 and $5,000, respectively, at different branches of North Community Bank — a bank in which Warner had invested and was a director. Tr.21197-98; Tr.12482.

During Ryan's tenure as SOS, Warner became involved with properties leased by the SOS. Warner brokered the lease of 17 N. State, Tr.10154-55, and owned part of the Bellwood and Joliet properties, PX.07-501, PX.06-500. Warner's ownership in Bellwood was "buried" in paperwork through several corporate layers, Tr.2772-74, and he made efforts to keep his name off documents related to Joliet, PX.08-035, Tr.3007. Ryan knew that Warner was involved with Bellwood and Joliet, Tr.2777-78, 7823-24, but approved each lease on recommendation of SOS professionals, PX.07-011, PX.06-016, RX.1793.

Klein. Harry Klein also benefited during Ryan's tenure as SOS. The SOS recommended a processing rate increase in 1995 (the first increase in 10 years), Tr.5234-35, after Klein spoke to Ryan about the Currency Exchange Association's request for an increase, Tr.9497-98. Klein also discussed with Ryan the possibility of the SOS leasing Klein's building in South Holland. Tr.9474-75. Ryan asked Fawell to look into the matter, Tr.2862, and later approved the lease after SOS officials recommended it, PX.11-001, Tr.4785.

Swanson. Ryan took actions that benefited Arthur Swanson, a lobbyist and longtime friend. Swanson earned a commission after Ryan approved a lease in an office complex for which Swanson served as a rental agent, PX.16-002, Tr.2909-10. Swanson also earned fees from Wisconsin Energy and the Metropolitan Pier & Exposition Authority (McPier) after Swanson was hired as a lobbyist for each on Ryan's suggestion. PX.16-039, Tr.11718; Tr.2929-30. In connection with Wisconsin Energy, Swanson paid Udstuen a referral fee, and Udstuen claimed that Swanson said he "always takes care" of Ryan. Tr.11723. Swanson also earned fees related to the selection of Grayville for a new prison. PX.12-003. Following a prison selection meeting, Ryan told Swanson that Grayville was getting the prison. Tr.13603-04. Matt Bettenhausen, a Ryan staff member, immediately cautioned Swanson that the selection was

not yet public. Tr.13605. Swanson subsequently got himself hired by a Grayville civic group to lobby for the prison. Tr.14028-33. There is no evidence that Ryan knew of Swanson's lobbying engagement. Tr.13656-57. Ryan selected Grayville before Swanson was hired as a lobbyist. *Id.*

Low-Digit Plates. Ryan awarded low-digit license plates to friends and political supporters as SOS. Tr.3588-92. Warner made numerous requests for low-digit plates, Tr.15917-18, and he provided Ryan's secretary with advance funds to pay applicable licensing fees, Tr.15920. After expressing a willingness to contribute to Citizens For Ryan ("CFR"), Tr.6899, Anthony DeSantis wrote personal checks to Ryan and his wife and son, Tr.6904-06. DeSantis was later offered a low-digit plate. Tr.6919.

IG Reorganization. During Ryan's first term as SOS, the IG office was responsible for rooting out internal corruption. Tr.3502. Investigators suspected SOS employees might be purchasing political fundraising tickets with corrupt proceeds. *See, e.g.*, PX.38-004, PX.01-032. After Ryan was reelected in 1994, Fawell recommended, among other things, that the IG office be reorganized to get "someone in there who won't screw our friends, won't ask about FR (fundraising) tickets, and who will run a no-nonsense shop." PX.01-019. The IG office was reorganized, Tr.3584, and the SOS police took over internal investigations, which they had done before the IG's creation, Tr.14716.

Diversion of Resources. While Ryan was SOS, state workers sometimes conducted campaign work on state time, including work on a 1992 Illinois House race, Ryan's 1994 reelection campaign, Phil Gramm's 1996 presidential campaign, and Ryan's 1998 gubernatorial campaign. *See, e.g.*, Tr.3168; Tr.3165; Tr.14307; Tr.7051-52. There was no evidence that Ryan ever authorized state workers to perform campaign work on state time.

Benefits. Warner, Swanson and Klein provided Ryan and his family with gifts and favors. For example, Swanson gave the Ryans a figurine for their anniversary, Tr.15276, and paid for Ryan's daughter's lodging at Disney World, PX.16-046. Klein hosted the Ryans in Jamaica. Tr.9449-50. Warner gave Ryan a cigar humidor and a slot machine, Tr.3142-43, Tr.7825; provided insurance adjustment services after a flood, Tr.15540; loaned money to Ryan's brother's business, Tr.14069-70; invested in a cigar store operated by Ryan's son, Tr.15176-78; paid for the band at Ryan's daughter's wedding, PX.23-003; loaned money to Ryan's son-in-law, Tr.17092; and held CFR fundraising events, Tr.8205-8206. Udstuen said that Warner told him that he would "take care of George," Tr.11925, but Udstuen never spoke to Ryan about this and had no knowledge of Warner paying money to Ryan, Tr.11951; Tr.11774-75.

Cash. The prosecution offered a cash analysis against Ryan through an IRS agent. *See, e.g.,* Tr.16967-71. Although this analysis could not prove that Ryan's cash expenditures ever exceeded his known sources of legitimate cash, or quantify Ryan's available cash on hand, *see, e.g.,* Tr.17766-74, RX.3311, the agent testified that Ryan generated little cash, Tr.16969, PX.33-501.

False Statements. The prosecution introduced evidence that Ryan made false statements during FBI interviews concerning: trips to Jamaica, Tr.18102; contents and negotiations of the South Holland lease, Tr.18297; Warner's interests in and the terms of the Joliet lease, Tr.18154; Ryan's relationship with Warner, Tr.18157; the link between fundraising and improper licensing, Tr.18116-17; Ryan's appointment of Warner to the McPier board, Tr.18109; and interactions with DeSantis, Tr.18168-69.

B. Tax Violations

Ryan was charged with corruptly endeavoring to obstruct the administration of tax laws and making false statements in his tax returns. R.110:76-88 (JA.303-16). These charges primarily related to his use of campaign funds to pay personal expenses, *see id.*, which Ryan was required to report as income, Tr.17564. In some instances, Ryan failed to report personal use of CFR funds. *See, e.g.*, PX.20-006, PX.26-501, Tr.17430. Ryan made efforts to properly report the use of campaign funds, and relied on various CFR personnel to review his expenditures and reporting. Tr.4531-36; Tr.7545-49.

Ryan also received consulting fees related to work on Gramm's 1996 presidential campaign, Tr.3735-36, which Ryan gave to some of his daughters, Tr.4498-99. Ryan initially omitted those fees from his returns, but later amended them to reflect the income directed to his daughters (who had previously paid on these monies). Tr.10856-57.

III. THE JURY AND ITS DELIBERATIONS

In light of years of intense publicity surrounding the criminal probe into Ryan and the SOS office, the district court recognized at the outset the particular challenge in selecting a fair and unbiased jury. 12/22/04 Tr.14-17, 6/28/05 Tr.2-4. Potential jurors completed an extensive questionnaire containing 110 questions asking not only about their background (including criminal and litigation history), R.305:6-9, 23-27 (JA.326-29, 343-47), but also their knowledge of the license-for-bribes investigation and Ryan's positions on controversial public policy matters, R:305:19-21 (JA.343-44), as well as their impression of the case in light of the enormous publicity, R:305:17-21 (JA.343-47). After a four-day review of completed questionnaires, the district court and counsel questioned prospective jurors on an individual, one-on-one basis. Tr.27-2305. Six days of *voir dire* dug deeper into the issues raised in the

questionnaires and touched upon divisive matters such as Ryan's stance on capital justice and the jurors' knowledge of the tragic Willis accident. *See, e.g.,* Tr.1646-47, Tr.1272-73. The district court ultimately seated 12 regular jurors and eight alternates. Tr.2302, 2499.

After six months of testimony, the jury retired on March 13 to begin eight days of contentious deliberations over two weeks. On the eighth day, the *Chicago Tribune* revealed that certain jurors had given untruthful answers related to prior arrests or convictions on the questionnaire used six months earlier. Tr.24211-16 (JA.439-40), 24233 (JA.445). This news broke after the district court and counsel had spent days struggling to respond to a series of notes from the jury regarding substantive legal instructions, requests for transcripts and, most significantly, a serious conflict that developed between a group of jurors (Peterson, Rein, Losacco, Cwick, James, Talbot, Pavlick, and Chambers) and Evelyn Ezell — a juror later confirmed to be pro-defense. Tr.24022 (JA.390); Tr.23982 (JA.379); Tr.24074-76 (JA.405).[4] Ezell had complained about verbal abuse and intimidation during deliberations. Tr.24053 (JA.399).

Other jurors responded by asking the district court to remove Ezell for failing to deliberate in good faith and to empanel an alternate. Tr.24074-76 (JA.405). This note described a deeply divided jury and indicated that while personality conflicts plagued the deliberations, serious disagreement over the instructions and testimony split the jurors. *Id.* The jurors' notes confirmed what the court had already observed: audible "shouting going on" in the jury room (which the court itself could hear in chambers), Tr.24077-78 (JA.405-06), jurors caucusing on "different floors by empty courtrooms," Tr.24163 (JA.427), and a plea between jurors for the "name calling" to stop, Tr.24161 (JA.427).

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[4] This Brief refers to the jurors' names to the same extent as the district court's opinions. *See* R.931:10, R.867:65 (JA.65).

The district court suspended deliberations in response to the *Tribune*'s inquiry and conducted its own investigation. Tr.24243 (JA.447). The investigation initially focused on Pavlick and then moved on to Ezell. Tr.24223 (JA.442), 24271 (JA.454). Pavlick failed to disclose on his questionnaire a DUI conviction that resulted in his driver's license being suspended while Ryan was SOS. Tr.24227-28 (JA.443-44). Ezell had failed to disclose a series of arrests, none of which resulted in conviction, a warrant, and her daughter's criminal history. Tr.24450-66 (JA.449-53). Before questioning Ezell, the district court indicated that it was inclined to dismiss both Pavlick and Ezell and to substitute two alternates, reasoning that while it was a difficult decision that could be reversed, the court wanted to reach a verdict after such a lengthy trial. Tr.24343-46 (JA.447-48).

Investigation of other jurors and alternates revealed that four made similarly false or misleading statements in their questionnaires: Casino failed to disclose a DUI conviction, weapons arrest and three-day stay in jail from the 1960s, Tr.24641 (JA.549); Rein failed to disclose a domestic violence arrest, Tr.24738-39 (JA.574); Svymbersky (an alternate) failed to disclose a conviction for receiving stolen property, Tr.24721 (JA.569); and Masri (another alternate) misrepresented a DUI conviction, *id.*

After questioning Pavlick and Ezell, the district court removed them for being untruthful with respect to their criminal histories. Tr.24443 (JA.499), 24485 (JA.509). The district court described its decision as "difficult" but expressed a reluctance to start the trial anew. Tr.24798 (JA.589). The defense resisted Ezell's removal, Tr.24458-59 (JA.503), but the district court proposed to adopt a truthfulness standard, and the defense accepted Ezell's removal "in light of" the court's ruling and on the express condition that the same standard for removal —

untruthfulness in a questionnaire answer — be applied uniformly to all jurors and alternates, Tr.24387 (JA.485), 24481 (JA.508), 24483-85 (JA.509).

After removing Pavlick and Ezell, the district court questioned the other jurors and alternates to determine the pool of eligible jurors remaining. Tr.24501-61 (JA.519-29), 24625-69 (JA.545-59). Faced with the prospect of being forced to declare a mistrial because two jurors (Casino and Rein) and two alternates (Masri and Svymbersky) failed to disclose arrests or convictions, the district court abandoned the truthfulness standard and focused instead on whether the juror had failed to disclose a criminal conviction (which would not have included Ezell but would have included Casino, Masri and Svymbersky). Tr.24721-22 (JA.569-70). But then (at the prosecution's urging), the district court abandoned that standard, and for reasons that remain unclear, retained Casino and Rein, skipped over Masri (the next alternate), and seated Svymbersky and the first alternate to replace the two excused jurors. Tr.24745 (JA.575), 24741-42 (JA.574-75), 24759 (JA.579). The district court denied defense motions for a mistrial, re-instructed the jury and restarted deliberations after eight days with a reconstituted jury, including two alternates. Tr.24802-03 (JA.590).

IV. THE RECONSTITUTED JURY AND THE VERDICT

After ten days of deliberations free from conflict and failing to generate any substantive questions, the reconstituted jury returned guilty verdicts against both defendants on all counts. Tr.25422-25. Subsequently, a number of jurors gave media interviews. In one interview, Ezell described how another juror — later identified as Peterson — brought extraneous legal materials into the jury room and read them to the entire jury during deliberations. R.867:75 (JA.75).

Based on this news account, the district court held a "brief" inquiry into the matter. R.867:76 (JA.76). Interviewed by phone, Ezell testified that during the second week of deliberations Peterson brought a piece of paper into the jury room and read from it that "a juror could be dismissed for not deliberating in good faith." 5/5/06 Tr.11-12 (JA.625). Ezell initially believed Peterson to be reading legal instructions from the court and searched for them in her copy of the instructions. *Id.* Ezell testified that after Peterson finished reading from the paper, Losacco said, "No, read the one to her on bribery, because George Ryan was taking bribes and so are you [Ezell]." *Id.* at 12. According to Ezell, Peterson responded, "'No, we don't need to' — 'We've got her. We've got her right there. We've got her where we want her,' and she laughed at [Ezell]." *Id.* Another juror (Jesse Davis) defended Ezell, and Davis told Ezell to watch her back — which made her "even more afraid." *Id.*

Ezell testified that she and Davis were in tears, and when she tried to leave the jury room, another juror blocked the door. *Id.* at 13 (JA.626). She testified that other jurors threatened her not only with removal from the jury but with jail. *Id.* Ezell did not know where the outside materials came from, but said Losacco seemed to know. *Id.* at 17 (JA.627). Ezell planned to send another note to the district court, but stopped writing it because she feared the other jurors would not let her send it. *Id.* at 13-14 (JA.626).

Represented by legal counsel, Peterson confirmed the substance of Ezell's account when interviewed by telephone. *Id.* at 75-94 (JA.641-46). Peterson explained that after a discussion concerning Ezell, other jurors encouraged Peterson to conduct extraneous research, telling her, "Teacher, do your homework." *Id.* at 80 (JA.642). Peterson then did a Google search on March 16 — during the jury's first week of deliberations — and found articles on dealing with difficult people. *Id.* at 68 (JA.639), 80 (JA.642). The next night, she found an American

Judicature Society article on juror removal and substitution. *Id.* at 80-81 (JA.642-43). Peterson showed that article to Pavlick and Talbot, and possibly to Losacco, Chambers, Cwick and Gomilla the next day. *Id.* at 82-83 (JA.643). She took the article home that night and cut out the following paragraph with pinking shears:

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

Id. at 59-60 (JA.637), 76 (JA.641). Peterson testified that the next day she read the paragraph to Ezell and the entire jury. *Id.* at 77-78 (JA.642).

In connection with her research, Peterson also crafted her own instruction on good-faith deliberation:

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

Id. at 63 (JA.638). Peterson then read that instruction to the jury repeatedly in the deliberations. *Id.* at 79-80 (JA.642). Peterson denied that Losacco ever said, "read the one on bribery," and denied bringing in any extraneous materials on bribery, *id.* at 82 (JA.643), but admitted that she and other jurors accused Ezell of taking bribes, *id.* at 84. She maintained that she was not violating the district court's instructions by doing Google searches because in her estimation her research had "absolutely nothing to do with the case." *Id.* at 81.

The district court concluded that Peterson's external legal research was regrettable, but characterized it as "a really innocent mistake." *Id.* at 94 (JA.646). The defense requested further inquiry and asked that all the jurors be interviewed about the extrinsic materials because the full extent and nature of Peterson's research were not established, R.817:46; Ezell stated in news accounts that Peterson brought additional legal materials into deliberations and that she had found them in her own Internet search, R.821:Ex.1; and there was a factual dispute about the impact that the external research had on Ezell and Davis, 5/5/06 Tr.13 (JA.626), 93 (JA.645). The district court denied the defense's request and prohibited defense counsel from interviewing any jurors, including those who stated in news accounts that they wished to speak with defense counsel. 5/5/06 Tr.100 (JA.647), R.867:98-99 (JA.98-99).

SUMMARY OF ARGUMENT

The district court's singular desire to bring this case to a verdict led it to commit an avalanche of errors that deprived Warner and Ryan of a fair trial before an impartial jury. These errors undermined the legitimacy of the verdicts, which were contaminated by outside influence and divorced from meaningful group deliberation. And because of the district court's unprecedented decisions, the jury that ultimately found Warner and Ryan guilty was very different from the one charged with determining their fate at submission. Significantly, the reconstituted jury did not include a known defense holdout juror removed under an arbitrary standard. The district court itself recognized that "it might very well be" that its unprecedented decisions related to this jury would warrant reversal. Tr.24343 (JA.473). The court, however, failed to see "any great harm" because "[i]f I am wrong, it will not be the first time I was reversed, and I am not afraid to be reversed." *Id.* at 24343-44. Indeed, these convictions must be reversed:

1. The jury's verdict was tainted by a juror's extrinsic legal research relating to the removal of jurors and an erroneous, coercive instruction based on that research. These improper actions contradicted the district court's instructions, and the court's decision to curtail further inquiry into this extrinsic influence prevents the prosecution from meeting its burden of showing no reasonable possibility of prejudice. This external influence constrained the jury's deliberative process, and was particularly prejudicial because it was used to intimidate a holdout defense juror.

2. The arbitrary removal of a defense holdout juror violated core constitutional protections because the district court misled defense counsel as to the removal standard when removing a holdout juror, only to then apply a different standard altogether to justify retaining other jurors who would have been removed under the original criterion. The district court's removal of this holdout juror permitted the government to effectively strike a juror under a standard not afforded to the defense and after knowing the juror's view of the evidence.

3. The district court substituted two alternates after eight contentious days of deliberations in which a splintered jury repeatedly requested the district court's assistance, deliberated to verdict on two counts, sought to purge a holdout juror and was subjected to intense media scrutiny. Despite the district court's instruction to "pretend" otherwise, the substitution of alternate jurors created a reasonable possibility of prejudice and compromised Warner's and Ryan's constitutional right to a unanimous verdict from an impartial jury.

4. The district court repeatedly excluded significant evidence that demonstrated Ryan's good faith. Ryan was not permitted to introduce evidence that his successor as SOS renewed the very contracts and leases that the prosecution claimed to be fraudulent, and the court excluded evidence showing that Ryan acted in accordance with regular

SOS practice and without fraudulent intent. Similarly, despite the breadth of the prosecutor's charges, the court prohibited Ryan from introducing evidence of policy decisions and accomplishments that demonstrated how Ryan conducted himself as a public official. This blanket ruling therefore prejudiced the trial by denying Ryan the ability to present a full defense.

5. The RICO conspiracy charge is based on a legal fiction because a "state" cannot be an enterprise. The district court effectively directed a verdict for the prosecution on the enterprise element, and erred in denying a defense theory instruction on this critical issue.

6. The mail fraud statute is unconstitutionally vague because Congress failed to define the "intangible right to honest services" resulting in the creation of a common law crime.

7. Because the indictment included offenses unconnected to a single conspiracy involving Warner, the district court erred in denying Warner's Rule 8(b) severance motion. Warner, a non-public official, was substantially prejudiced by joinder with his much maligned co-defendant. Evidence inadmissible against Warner was voluminous, complex and prejudicial. The district court deprived the jury of a tool to sort through such evidence by refusing Warner's proposed final instruction on the subject. The presumption the jury instructions cured prejudice has been rebutted, as the jurors repeatedly manifested an inability to follow instructions.

8. The Ryan prosecution is predicated on grand jury testimony compelled from Ryan's legal counsel in violation of the attorney-client privilege. While this Court has already decided the issue, the Second Circuit has since issued a published opinion in direct conflict with this Court's ruling.

ARGUMENT

I. THE VERDICT IS PRESUMED TAINTED BY EXTRANEOUS LEGAL MATERIALS USED BY THE JURORS IN THEIR DELIBERATIONS

There is no dispute about the facts. Peterson conducted external legal research during deliberations and used that research to instruct the jury that a juror could be removed for failing to deliberate in good faith, and that in deliberations a juror had to use "the facts, the testimony to support [her] opinion." 5/5/06 Tr.64 (JA.638), 77-81 (JA.642-43). Peterson committed this misconduct at the urging of other jurors, *id.* at 80 (JA.642), and she (and they) remained on the jury until verdict, *id.* at 82-83 (JA.643). The district court recognized that this misconduct intimidated a holdout juror, Ezell. *Id.* at 31-32 (JA.630). This external influence was coercive and presumptively prejudicial, and thus requires a new trial. While this Court typically reviews the district court's refusal to grant a new trial for an abuse of discretion, it conducts its own *de novo* review if the district court applied the wrong legal standard. *See United States v. Cotnam*, 88 F.3d 487, 498 (7th Cir. 1996).

A. The District Court Applied An Erroneous Legal Standard

Where there is any reasonable *possibility* of prejudice stemming from an external influence on the jury's verdict, a criminal defendant is entitled to a new trial. *See, e.g., United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996). The Constitution guarantees a verdict from impartial jurors and unaffected by external influences, including homemade jury instructions. *United States v. Neff*, 10 F.3d 1321, 1323-24 (7th Cir. 1993). Peterson's use of external research to influence the deliberations and to craft an erroneous legal instruction violated these core constitutional principles.

Because the harm from an external influence on a jury's deliberations can be difficult to measure and implicates important constitutional values, courts presume prejudice,

and the burden "rests heavily upon the Government" to prove the influence harmless beyond a reasonable doubt. *Remmer v. United States*, 347 U.S. 227, 229 (1954) (*Remmer I*); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984); *United States v. Bruscino,* 687 F.2d 938, 940 (7th Cir. 1982) (*en banc*). Because jurors cannot be questioned about their verdict, the analysis becomes "a matter of assessing the probabilities" objectively — independent of a particular juror's beliefs as to the material's influence on the verdict. *Bruscino*, 687 F.2d at 941. Here the district court applied an erroneous legal standard: while it *acknowledged* presumptive prejudice, it effectively required a showing of *actual* prejudice. 5/5/06 Tr.100-02 (JA.647-48), R.867:74-84 (JA.74-84). Indeed, in denying the defense request to investigate the full extent of the external influence, the district court concluded "there is not an adequate showing of prejudice to even pursue additional inquiries." 5/5/06 Tr.100 (JA.647). But the defense was under no obligation to make a showing of actual prejudice. And how could it do so if not permitted to investigate?

The district court concluded that no "possibility of prejudice" existed because Peterson made an "honest mistake of judgment" and believed "in good faith" that she had not violated the court's instructions in conducting her own legal research. R.867:83 (JA.83). Indeed, the court adopted Peterson's view that the extrinsic materials had "nothing to do with the case," 5/5/06 Tr.81 (JA.643), because, in the district court's words, it "just does not relate in any fashion to the merits of the case," *id.* at 104 (JA.648), and "it concerned *only* the process of deliberation," R.867:81 (JA.81) (emphasis added). But the "process of deliberation" is no trifling matter — it is integral to a fair trial. Presumed prejudice attaches to an external influence precisely because a taint on deliberations approaches a structural error. *United States v. Harbin*, 250 F.3d 532, 543-44 (7th Cir. 2001). More fundamentally, the district court's focus on Peterson's intent and

subjective beliefs in finding "no possibility of prejudice" demonstrates that the court applied an erroneous legal standard. It is the external influence on the jury as a whole that matters — not the subjective assessments of a single juror.

B. The Extrinsic Legal Material Is Presumptively Prejudicial

By any measure, there is more than a reasonable possibility of prejudice here. A group of jurors engaged in a calculated effort to obtain extrinsic legal information to quell dissent in the jury room. This situation presents an inherent possibility of prejudice. But it gets worse. Not only did Peterson instruct the jurors that any one of them could be removed for failing to deliberate in good faith; she gave an instruction on the manner in which jurors should deliberate.

That instruction imparted false extraneous information and contradicted the district court's instructions. Contrary to Peterson's instruction, a juror can engage in meaningful deliberation without using "the facts, the testimony to support your opinion." 5/5/06 Tr.63 (JA.638); *see United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973) (*en banc*). A juror need not refute the prosecution's case to acquit; a juror has the absolute right to reject the prosecution's case, to reject the credibility of prosecution witnesses and exhibits. *See United States v. Gaona-Lopez*, 408 F.3d 500, 505-06 (8th Cir. 2005). Each juror is entitled to determine for herself the credibility of witnesses and the sufficiency of evidence, *Silvern*, 484 F.2d at 883, and Peterson's instruction contradicted the district court's instructions on critical issues such as burden of proof, presumption of innocence and witness credibility, Tr.24807-11 (JA.591-92). A juror need *not* justify his or her vote for acquittal with "testimony" and "evidence," as Peterson instructed. By suggesting otherwise, Peterson used her extrinsic research to shift the burden of proof to the defense.

Not only was Peterson's instruction legally unsound, but the facts contradicted her position: Ezell did not refuse to deliberate; she simply disagreed with the other jurors. Tr.24074-76 (JA.405). Every juror is entitled to her view, and one juror's refusal to accept the majority view does not constitute bad faith. And yet this disagreement prompted a group of jurors to resort to extrinsic legal research on juror removal and substitution. The extrinsic material stated that a juror could be removed for failing to deliberate in an acceptable manner, and Peterson judged Ezell unacceptable. Threatened not only with removal, Ezell was even told she could be punished for her views. 5/5/06 Tr.13 (JA.626). A juror cannot be removed because of her views of the guilt or innocence of the defendant. *See United States v. Thomas*, 116 F.3d 606, 621-22 (2d Cir. 1997). The external influence injected into the jury's deliberative process the coercive effect of the threat of removal, which likely chilled and ultimately hampered free expression in the jury room.

When a juror is exposed to an external influence that threatens to constrain or circumscribe her judgment, a real possibility of prejudice exists. That is what this Court held in *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 919 (7th Cir. 1991), where a marshal erroneously told a jury that it had to reach a verdict and would not be discharged until it did so. This Court recognized that "[s]uch a threat was bound to distract and confuse the jury's deliberations." *Id.* The same situation arose here, where the extrinsic information threatened an adverse personal consequence for a particular conclusion reached by a juror. 5/5/06 Tr.11-14 (JA.625-26).

Where jurors fear repercussions from their deliberations, they cannot fairly determine the outcome of the case. The Ninth Circuit recently confronted this issue in a strikingly similar case when a deliberating juror consulted an extraneous legal source (an

attorney-friend) to inquire how much "leeway" for "independent thought" she had in deliberations. *United States v. Rosenthal*, 454 F.3d 943, 950 (9th Cir. 2006). The attorney told the juror that she had no leeway and "could get into trouble" if she strayed from the instructions. *Id.* The juror thought that her conversation was proper because it was not about the case, and she discussed her confusion with another juror. *Id.*

The *Rosenthal* court reversed the defendant's conviction and ordered a new trial because the juror's misconduct had a *potentially* coercive effect on members of the jury:

> Jurors cannot fairly determine the outcome of a case if they believe they will face "trouble" for a conclusion they reach as jurors. The threat of punishment works a coercive influence on the jury's independence, and a juror who genuinely fears retribution might change his or her determination of the issue for fear of being punished.

Id. Extraneous information that intrudes upon a juror's deliberations and purports to instruct the juror how to deliberate creates a reasonable possibility of prejudice because it is potentially coercive. *Id.* That is exactly the danger created by the extrinsic material here. By raising the specter of removal, the extrinsic material here injected highly coercive and false information into the case. *Cf. Jenkins v. United States*, 380 U.S. 445, 446 (1965) (*per curiam*).

The district court mistakenly discounted the significance of Peterson's erroneous instruction by suggesting that Peterson — a kindergarten teacher — could have somehow derived this instruction independent of her extrinsic legal research. R.867:80 (JA.80). But the court's interview of Peterson demonstrates otherwise. When the district court asked Peterson to describe "how and when" she read the extrinsic material to the jury, Peterson spoke of her legal research and homemade jury instruction interchangeably, and it is clear that she read them to the jury in conjunction. 5/5/06 Tr.77-79 (JA.642). Ezell described that as well. *Id.* at 10-15

(JA.625-26). Peterson's instruction was plainly her gloss on the external legal research. *Id.* at 79-81 (JA.642-43).

Everyone in the jury room knew that Peterson had performed external research, and whether she read directly from that research or put it into her own words, the result is the same: "There is no rational distinction between the potentially prejudicial effect of extra-record information which a juror enunciates on the basis of the printed word and that which comes from his brain." *United States ex rel. Owen v. McMann*, 435 F.2d 813, 820 (2d Cir. 1970) (Friendly, J.). Once jurors are exposed to an external influence, it is impossible to distinguish between their personal thoughts and the influence. *See, e.g., In re Beverly Hills Fire Litig.*, 695 F.2d 207, 213-15 (6th Cir. 1982).

Even if Peterson's instruction were rooted in her personal knowledge, it would still constitute improper extrinsic information: "a juror's personal experiences may constitute extrinsic evidence. This is the case when a juror has personal knowledge regarding the parties or the issues involved in the litigation that might affect the verdict." *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991). Other jurors had no way of knowing what was the product of Peterson's research and what was not, and that fact in itself gave Peterson an extraordinary advantage over other jurors in deliberations. When Peterson read from "papers in her hand," Ezell initially thought they were "from the set of instructions" from the district court. 5/5/06 Tr.11 (JA.625). Ezell and the other jurors were in no position to know when Peterson read directly from an extrinsic source or when she read her own extrapolations gleaned from external sources: to the jury, it all sounded like legal instructions.

C. The Prosecution Failed To Meet Its Burden Of Proving That The External Influence Was Harmless Beyond A Reasonable Doubt

To rebut the presumption of prejudice, the prosecution bore the burden of demonstrating that the extrinsic material was harmless beyond a reasonable doubt. *See Remmer I*, 347 U.S. at 229. Rather than meeting that burden, the prosecution persuaded the district court to curtail the inquiry into the external influence while substantial questions remained unanswered. 5/5/06 Tr.97 (JA.647). On an incomplete record, the prosecution could not meet its burden of showing no reasonable possibility of prejudice.

The district court concluded that its self-described "brief" inquiry into the matter was adequate and that there was no possibility of prejudice. R.867:76 (JA.76), 5/5/06 Tr.100-01 (JA.647-48). But the district court reached that conclusion without knowing what other extrinsic materials Peterson reviewed beyond those that she brought into the jury room. We have seen some articles that Peterson brought into deliberations, but we do not know what other materials she read in her Internet searches. It is not sufficient to simply conclude, as the district court did, that the only extrinsic material that mattered was what Peterson judged "relevant from her perspective." R.867:79-80 (JA.79-80). It is practically impossible to review or to duplicate the variety of information that Peterson would have encountered in her multiple Internet searches, which is something the district court should have factored into its potential prejudice analysis.

Further, Ezell maintains that she located at least one other legal article on the Internet that Peterson read to the jury in deliberations. R.867:79 n.26 (JA.79), R.821:Ex.1. We have no idea of its contents because the district court prohibited counsel from speaking with Ezell, 5/5/06 Tr.100 (JA.647), R.867:97-99 (JA.97-99), and concluded that the issue did not warrant further investigation. R.867:79 n.26 (JA.79). Also unanswered is what material Losacco referred to when she said, "read the one on bribery," 5/5/06 Tr.12 (JA.625), and equally

unclear is the substance of the threat that Ezell could be jailed, *id.* at 13 (JA.626). Peterson's and Ezell's conflicting testimony on the reference to "the one on bribery," *id.* at 12 (JA.625), 81-82 (JA.643), provides no support for the district court's naked conclusion that it was "not made in connection with extraneous materials," R.867:79 (JA.79).

Similarly, the district court refused to resolve the factual dispute about whether Ezell and Davis wept in response to the external influence. R.867:78 (JA.78). A juror's fear or emotional response to an external influence — as opposed to how the external influence figured in the juror's verdict — is an appropriate topic for inquiry. *See, e.g., United States v. Rutherford*, 371 F.3d 634, 644 (9th Cir. 2004). Indeed, it is impossible to reconcile the district court's conclusions that Peterson's "good faith" belief about her misconduct ameliorates the possibility of prejudice, R.867:83-84 (JA.83-84), and that the profound emotional response the misconduct provoked in Ezell is of no consequence. On this incomplete record, with so many unanswered questions about the nature and extent of the external influence, there is no basis for holding that the prosecution proved this external influence "harmless beyond a reasonable doubt."

D. The Record Demonstrates Actual Prejudice

The record as it stands demonstrates actual prejudice — even though the defense is not required to prove it and was not permitted to develop it *fully* by the district court. *First*, the only testimony from a juror other than the one who committed misconduct suggests that this material provoked a profound response in the jury room. Ezell's statement that she "froze" and wept with another juror, 5/5/06 Tr.12-13 (JA.625-26), powerfully illustrates the impact of this external material. Ezell perceived Peterson's external material as coercion directed at a dissenting juror, *id.* at 12-13 (JA.625-26), 20 (JA.627), and, significantly, the district court itself found that Ezell was intimidated: "I recognize that whatever intimidation Ms. Ezell herself may

have experienced, so far as we know didn't affect other jurors," *id.* at 31-32 (JA.630). But every other juror witnessed this and had to be affected by it. *Cf. Navarro-Garcia*, 926 F.2d at 821 (possibility of prejudice exists if the extrinsic information may have affected the reasoning of even one juror).

Second, Peterson committed misconduct by bringing extrinsic materials into deliberations, and she remained on the jury until verdict. She violated the district court's first jury instruction that the law to be applied in the case comes from the trial court, Tr.23871, as well as the district court's repeated admonitions prohibiting jurors from conducting Internet searches related to the case, *see, e.g.*, Tr.8, 7695. Less than a week after being instructed to the contrary, Peterson started searching the Internet. 5/5/06 Tr.80 (JA.642). All the jurors knew that was improper because, on the second day of deliberations, the district court denied the jury's request for an extrinsic legal resource — a legal dictionary. Tr.23968-69. Yet none of the jurors — with the sole exception of Ezell — voluntarily came forward to report the misconduct. Indeed, after Peterson's misconduct came to light, some jurors *denied* it happened. *See* R.817:Ex.4 (juror media interviews). Even more remarkably, Losacco hired a lawyer and filed an *amicus* brief seeking to squelch any investigation into the misconduct. 5/4/06 Tr.3, 43. Further, Peterson retained counsel, and when the district court initially contacted her by phone, Peterson refused to speak without her lawyers present, burst into tears and said Ezell's statements were lies. 5/5/06 Tr.38-39 (JA.632). Peterson then later confirmed the substance of Ezell's account once under oath. 5/5/06 Tr.77-79 (JA.642). This misconduct was not accidental, but part of a concerted effort to influence the verdict.

Third, had Peterson's misconduct come to light during deliberations, she, and other jurors who encouraged her misconduct, should have been removed from the jury for cause.

See United States v. Vega, 72 F.3d 507, 512 (7th Cir. 1995). These offending jurors, however, deliberated to verdict, and that was prejudicial. *See United States v. Littlefield*, 752 F.2d 1429 (9th Cir. 1985) (remanding for a new trial where juror who introduced an article on tax shelters into deliberations regarding tax conspiracy charges and jurors who read the article all deliberated to verdict).

Fourth, that jurors were so persistent in their efforts to remove Ezell suggests a much more fundamental breach of their obligation to deliberate in good faith. Members of this jury thought that they could cause a fellow juror's removal, and their threat was not hypothetical. Peterson's improper legal research explained the grounds for potential removal and substitution. 5/5/06 Tr.59-60 (JA.637). Losacco prepared a lengthy note outside of the jury room complaining that Ezell "disagrees with whatever is presented to her" and asked "that your Honor remove this juror from the trial and replace her with one of the alternates." Tr.24074-76 (JA.405) (also signed by Jurors Peterson, Cwick, James, Pavlick, Rein, Chambers and Talbot). That note demonstrated that the jurors who signed it believed that they could force the removal and substitution of a fellow juror. That was highly prejudicial to the defense because any remaining juror who might be inclined to disagree with this group would fear removal from the jury.

This jury's conclusion that it could force a fellow juror's removal found further support in the earlier dismissal of another juror, McFadden. During the trial, the same jurors who sought to oust Ezell repeatedly accused McFadden of being inattentive — working a crossword puzzle, sleeping, and reading a book. Tr.9384, 9452, 15082, 17283. Each of these accusations proved baseless. Tr.9387-88, 9396, 15236-37, 17634. One of these jurors, Rein, told the district court he could not respect McFadden's opinion and "if it's 11 to 1 . . . if she was

that one I think I'd be so angry because we'd be like what are you basing your opinion on." Tr.17285-86.[5] Shortly after Rein expressed his concerns, the government sought McFadden's removal. Tr.19868.

Over defense objection, the district court later removed McFadden after a group of jurors (including Rein and Losacco) sent a note again accusing McFadden of sleeping. Tr.21016-17. A district court may only remove a sleeping juror when it finds that it is *impossible* for that juror to continue service. *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000). Here the district court made *no* such finding, but dismissed McFadden after she told the court that on occasions "I feel myself going asleep, and I wake myself up." Tr.21016; Tr.21014. Regardless of the district court's stated reason for removing McFadden, McFadden's removal confirmed for this group of jurors that it could force the removal of a fellow juror. That empowered this group of jurors and was highly coercive.

II. THE ARBITRARY REMOVAL OF A DEFENSE HOLDOUT JUROR DEPRIVED WARNER AND RYAN OF A FAIR TRIAL BEFORE AN IMPARTIAL JURY

Two critical facts render the district court's decision to remove Ezell from the deliberating jury fundamental error: (1) the district court misled defense counsel as to the standard governing the removal of jurors and applied an arbitrary standard in removing Ezell and retaining others, Tr.24485 (JA.509); and (2) at the time the prosecution moved for Ezell's removal, it knew that Ezell was a defense holdout juror, Tr.24484 (JA.509), 24582 (JA.534).

Early in deliberations, the jury sent notes seeking clarification on substantive instructions, at least one of which suggested it was leaning toward conviction. Tr.24022 (JA.390); Tr.24022-23 (JA.390), 24037-38 (JA.394). Later Ezell sent her note complaining that

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[5] Rein was proven correct in his identification of McFadden as a potential holdout juror. In post-verdict media interviews, McFadden — who sat through almost the entire trial — stated that she did not think the prosecution proved its case. R.820:Ex.5 (juror media interview).

she was being subjected to intense verbal abuse. Tr.24053 (JA.399). Other jurors responded with their own note seeking Ezell's removal and describing a jury's "dire situation" because Ezell disagreed with every other juror. Tr.24074-76 (JA.405). After the first eight days of deliberations — before any issue arose related to the juror questionnaires — it was clear that Ezell was a defense holdout juror, which the prosecution acknowledged, Tr.24582 (JA.534) ("we saw the notes"). This is significant because, while the district court has repeatedly asserted that it had no idea of the jurors' views of the evidence, the parties plainly did, and made that known to the court. *See, e.g.*, Tr.24582 (JA.534), 24595 (JA.537), R.931:27 n.9; Tr.24568 (JA.530), 24582 (JA.534). It was against this backdrop that Ezell was removed from the jury while other jurors with the same putative impediments to jury service remained.

After learning that half of the jurors had made significant misstatements or omissions in their questionnaires related to prior arrests, convictions or other legal issues, Tr.24365-66 (JA.479-80), 24370-71 (JA.481), the defense repeatedly asked the district court to articulate the standard governing removal. *See, e.g.*, Tr.24397 (JA.487), 24414-15 (JA.492), 24459 (JA.503), 24480 (JA.508), 24729 (JA.571). The defense and prosecution strongly disagreed over the applicable standard and briefed the issue. R.779, R.780. The defense argued for a more objective standard in which any juror who was untruthful should be removed, R.780, Tr.24482-85 (JA.509), while the prosecution argued that removal should be based on a more subjective assessment of whether a true statement would have supported a cause challenge in *voir dire*, R.779, Tr.24572 (JA.531). The defense even requested that information regarding all jurors subject to potential removal be reviewed before the district court interviewed or excused any particular juror in order to ensure that the same standard be applied to all. Tr.24379-85 (JA.483-84).

The district court declined to do that, Tr.24385-86 (JA.484-85), and ultimately applied one standard in removing Ezell but a different standard in refusing to remove other jurors. While a court has discretion over the removal of jurors, that is not boundless discretion that permits the application of an arbitrary or shifting standard. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005); *Nemmers v. United States*, 795 F.2d 628, 632 (7th Cir. 1986).

A. The District Court Applied An Arbitrary Standard In Removing Ezell And Misled Defense Counsel As To The Removal Standard

Within a few hours of learning of Ezell's undisclosed legal issues, the district court expressed its inclination to remove her from the jury — before interviewing Ezell or considering the applicable legal standard. Tr.24343 (JA.473), 24386 (JA.485). The district court later explained that if a juror was untruthful "in order to be chosen for a particular jury," that juror could be motivated by a desire to achieve "a particular outcome." Tr.24369 (JA.480). The district court's concern was well-founded. This was no ordinary criminal case. Pretrial publicity was intense, and media coverage from opening statements through jury deliberations was extraordinary. There was a real risk that jurors gave false or inaccurate responses in *voir dire* to be part of a historic trial involving a former governor. *See Dyer v. Calderon*, 151 F.3d 970, 982 n.19 (9th Cir. 1998) (*en banc*). Indeed, from the jurors' post-verdict press conference arranged by the district court, to a juror selling the shirt off her back (literally) and attempting to sell her trial notes and witness sketches on eBay, there was a "celebrity" factor that attached to jury service in this case. *See* R.820:Exs.11, 12, 20, 23 (juror media interviews), 21 (E-bay listing), 22 (5/17/06 E-mail from district court), Tr.25199, 25211.

Ezell had several drug-related arrests a decade old (but no convictions), a suspended driver's license due to unpaid tickets (later paid), a related warrant, and had signed a bond related to a criminal charge against her adult daughter — none of which she disclosed on

her questionnaire. Tr.24451-54 (JA.501-02), 24463-66 (JA.504-05). When interviewed, Ezell explained that she "didn't take the time to answer fully" but was uncertain whether charges, as opposed to convictions, needed to be disclosed. Tr.24451 (JA.501). Those charges and the driver's license issue related to a time, ten years earlier, when Ezell abused alcohol. Tr.24451 (JA.501). Regarding her adult daughter, Ezell explained that the two have not had much of a relationship over the last dozen years, but that she knew her daughter had trouble with the law, and she did go to the police station to sign a bond for her daughter's release in 2003. Tr.24453 (JA.501), 24463-64 (JA.504).

The district court accepted Ezell's explanation for her failure to disclose her prior arrests but expressed concerns over her daughter's criminal history. Tr.24459-60 (JA.503). The court's analysis focused exclusively on the truthfulness of the questionnaire responses:

> As a standard, Mr. Lerman, somebody who acknowledges that she did not answer the questions truthfully and that some of her answers were false – *let's call that a standard for the moment.*
>
> * * * *
>
> . . . she told us in so many words that the answers in her questionnaire were not all truthful. She told us in so many words.

Tr.24481 (JA.508) (emphasis added). The defense responded that if anyone was untruthful on their questionnaire "with respect to any question, they should be off the jury." Tr.24482 (JA.509). The district court accepted that and proposed as the standard for removing Ezell that "not everything in her questionnaire was truthful." Tr.24485 (JA.509). The defense accepted that, on the express reservation that "the same standard should apply to every juror." *Id.*

Other jurors — Rein, Casino, Masri and Svymbersky — it turned out, had similarly failed to disclose arrests or convictions on their questionnaires, and the district court realized that "under any version of the math, we don't have enough jurors." Tr.24378 (JA.483),

24371 (JA.481). When questioned, these jurors explained their failure to answer the questionnaire truthfully in terms that mirrored Ezell's explanation. Rein explained his failure to disclose charges related to a domestic dispute with his sisters because he thought it "was dropped" and "expunged." Tr.24627 (JA.546). Significantly, in response to the district court's question as to whether his answer on the questionnaire was "truthful," Rein responded "I would say no." Tr.24627 (JA.546). Casino explained his failure to disclose a 40-year-old criminal record — an apparent DUI conviction, three-day stay in jail, weapons charge, and assault charge, Tr.24648 (JA.551) — because he thought he was required to disclose only recent arrests, Tr.24645 (JA.550), he did not think he had any arrests, Tr.24646 (JA.550), and he did not recall his arrests when he completed the questionnaire, Tr.24649 (JA.551), although he remembers them "clearly now," Tr.24648 (JA.551). Svymbersky explained away his failure to disclose a conviction for receiving stolen property as something "that wasn't going to show up on any records" and that he thought, despite his guilty plea, that the "charges were dropped." Tr.24543-45 (JA.524-25). He just did not think it was anything "pertinent or pending." Tr.24545 (JA.525). Masri, in contrast, explained his failure to disclose a recent DUI to which he pleaded guilty and was serving 18 months probation at the time he completed his questionnaire because he did not believe he had to disclose anything that was pending. Tr.24663-64 (JA.555).

Like Ezell, each of these jurors explained that answers on their questionnaires were untruthful, but, unlike Ezell, the district court evaluated their removal under a different legal standard. Faced with the prospect of a numerical mistrial, the district court abandoned the truthfulness standard used to remove Ezell, and instead announced that it would remove jurors

only if a truthful response in *voir dire* would have served as a basis for a cause challenge.[6] Tr.24727 (JA.571).

A district court cannot employ a shifting standard and affirmatively mislead defense counsel about something as fundamental as removal of deliberating jurors. Indeed, in *Harbin*, 250 F.3d at 547, this Court characterized that as a fundamental error requiring automatic reversal. The district court in *Harbin* had announced a standard for exercising peremptory challenges in *voir dire*, explaining that once the jury was seated, individual jurors could not be challenged except for cause. *Id.* at 537. Six days into trial, however, it was revealed that a juror knew the mother of a witness. *Id.* at 538. After questioning the juror, the district court found no grounds to dismiss the juror for cause. *Id.* Instead, the district court discarded its previously announced standard and permitted the government to exercise a peremptory challenge that it had not used during jury selection. *Id.*

This Court reversed because, among other things, the district court had "affirmatively misled[]" defense counsel about the standard for striking jurors. *Id.* at 547. Indeed, the shifting standard in *Harbin* violated due process because "it failed to provide notice to the defendants of the . . . process that would actually be used (and in fact had the effect of affirmatively misleading them)." *Id.* Just as here, the shifting standard "skewed the jury selection process in favor of the prosecution." *Id.* at 541. Just as here, the prosecution was "permitted to use . . . a tool to alter the composition of the jury." *Id.* at 547. Just as here, that is the "type of error that affects the essential fairness of the trial and calls into question the impartiality of the jury." *Id.* As this Court held in *Harbin*, "defendants are entitled to a jury

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[6] The district court's determination to obtain a verdict at any cost also led it to credit the statements of the jury's foreperson, Tr.25236-37, who made demonstrable misrepresentations in denying *ex parte* communications about the jury's deliberations. Tr.25072; Tr.25127-29, 25142; Tr.25190-216; 5/4/06 Tr.45.

process that does not provide the prosecutor with a tool for eliminating jurors that is denied to the defendants." *Id.* Again, that is what occurred here: the prosecution motion to remove Ezell was granted under a standard that was *not* applied to defense motions to remove other jurors. That plainly violates due process and violates the right to a fair trial before an impartial jury.

B. The Prosecution Effectively Exercised An Impermissible Strike To Remove A Defense Holdout Juror During Deliberations

In removing Ezell, the prosecution was effectively permitted to strike a deliberating juror after it knew the juror's view of the evidence. Again, that is fundamental error requiring automatic reversal. *Harbin*, 250 F.3d at 547. This Court reversed in *Harbin* where the prosecution used its strike "presumably for the purpose of obtaining a jury more favorable to the prosecution, on the sixth day of an eight-day trial" because the prosecution "would have had significant opportunity to observe the demeanor of the juror, and to assess whether the alternate would be more favorable to its case." *Id.* Here the prosecution struck a juror after eight days of deliberation in a six-month trial at a time when the prosecution *knew* that the juror had doubts about the government's case. Tr.24484-85 (JA.509). That violates a defendant's right to a fair trial before an impartial jury.

While this Court has never addressed the issue, other courts have held that the removal of a holdout juror must be meticulously scrutinized because it impacts "the heart of the trial process." *United States v. Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988). Removal of a juror because of his doubts about the sufficiency of the prosecution's evidence violates a defendant's right to a unanimous verdict because it relieves the prosecution of its burden to persuade all the jurors beyond a reasonable doubt. *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). The district court's removal of Ezell enabled the prosecution to obtain convictions even though a member of the jury that began deliberations thought that the prosecution had failed to prove its

case. Tr.24074-76 (JA.405), Tr.24582 (JA.534), R.820:Exs.5, 12 (juror media interviews). That is constitutionally impermissible.

So fundamental is the right to a fair trial and a unanimous verdict from an impartial jury that "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Brown*, 823 F.2d at 596. *Brown* reversed a conviction because a juror's removal, while justified by the district court on neutral grounds, *could* have been related to the juror's doubts about the prosecution's evidence. *Id.* at 596-97.[7] Other courts have recognized the same principle. In *Thomas*, the Second Circuit reversed a conviction because the district court removed a holdout juror, again ostensibly for neutral reasons, because there was at least a possibility that the removal was related to the juror's view of the evidence. 116 F.3d at 622. *Thomas* emphasized the district court's limited ability to investigate and remove jurors during deliberations. *Id.* at 618. In *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999), the Ninth Circuit has adopted the same standard: "[I]f the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's view on the merits of the case, the court must not dismiss the juror."

Here there is more than a mere "possibility" that the prosecution sought Ezell's removal based on her unwillingness to convict. Ezell was virtually indistinguishable from the other jurors in the case. She, like they, sat attentively during a long six-month trial and took a leave from her position as an office manager. Tr.237, 253. A middle-aged woman from Chicago's South Side, Ezell — like many of the jurors — was active in her church and community. R.820:Ex. A (Ezell questionnaire); Tr.247-248. Like at least half of the other

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[7] This also has clear implications relating to the removal of McFadden in light of Rein's concern that she could be the "1" in an "11 to 1" deadlock. Tr.17285-86.

jurors, Ezell failed to disclose prior arrests and other matters on her questionnaire. Tr.24365-66 (JA.479-80), 24379 (JA.481). She explained those failings in a manner substantively identical to every one of those jurors. Tr.24451 (JA.501). The only thing that set Ezell apart from the other jurors was her view of the evidence. Tr.24074-76 (JA.405), Tr.24582 (JA.534). That fact was known to the prosecution at the time that it sought her removal — the only removal that the prosecution actively sought related to inaccurate questionnaire responses. *Cf.* Tr.24295 (JA.461) (offering no objection to Pavlick's removal). That raises the possibility that Ezell's removal was sought because of her view of the evidence, and that in itself warrants reversal. *Brown*, 823 F.2d at 596-97; *Thomas*, 116 F.3d at 622-23. Ezell was deserving of the same respect afforded every other member of this jury, and yet even after securing her removal, the prosecution denounced her in very public ways that proved unfounded, 4/28/06 Tr.8-9 (JA.618-19), for the simple reason that Ezell did not believe that the prosecution proved its case. Against that backdrop, it seems more than possible that the prosecution sought her removal — not based on her questionnaire responses — but based on her view of the evidence, and that plainly violates the Fifth and Sixth Amendments.

C. Ezell Was Not Removed Under The *McDonough* Standard

Ezell was not (and could not be) removed under the *McDonough* standard, which the prosecution argued should control juror removal. Tr.24485 (JA.509). In *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548, 556 (1984), the Court held that an inaccurate answer on a *voir dire* questionnaire discovered post-verdict would constitute grounds for a new trial only when a "correct response would have provided a valid basis for a challenge for cause." The defense could find no case — and the prosecution and district court cited none — that has ever applied that standard to sitting jurors related to falsehoods discovered before verdict. Indeed,

McDonough's rationale is rooted entirely in the finality of jury verdicts and the absence of any viable post-verdict alternative to a new trial, *id.* at 555-56, which is entirely absent in this case, where falsehoods were discovered before verdict and jurors could be removed.

Contrary to the gloss offered in its posttrial opinion, R.867:66-67 (JA.66-67), the district court did not remove Ezell (or Pavlick) under *McDonough*. The record demonstrates that the district court removed these jurors for untruthful answers on their questionnaires, and the standard that the court proposed for Ezell's removal turned exclusively on truthfulness. Tr.24296-97 (JA.461-62), 24368-69 (JA.480), 24485 (JA.509). Indeed, the district court never made any findings with respect to any juror that would have constituted a valid challenge for cause. The district court expressed fundamental confusion over when it should even grant a cause challenge related to a juror's prior conviction:

> 1:40 PM
> THE COURT: I am not saying any conviction under any circumstances gives rise to a cause challenge . . . .
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> * * * *
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> 1:41 PM
> THE COURT: I just have this rough sense that ordinarily the government can make cause challenges with respect to anybody who has been convicted.
>
> THE PROSECUTION: We can make a cause challenge, but the Court shouldn't and ought not grant them if they are not appropriate.
>
> * * * *
>
> 1:51 PM
> THE COURT: I will tell you why I am -- why I think this is -- why I think -- what the basis for what I am doing, I think. I really do want there to be a standard of consistency, and charges don't rise necessarily to a level of convictions.

* * * *

1:52 PM
THE PROSECUTION: Your honor, this is crazy. . . .

Tr.24727 (JA.571), 24728 (JA.571), 24735 (JA.573), 24736 (JA.573).

But even if *McDonough* applied (it did not), and the district court actually employed it to remove Ezell (it did not), Ezell's undisclosed criminal history would not have served as a valid basis for a cause challenge. A juror can be challenged for cause only if she fails to meet the statutory criteria for jury service or is found to be biased. *See, e.g., Swain v. Alabama* 380 U.S. 202, 220 (1965) ("[C]hallenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality."), *overruled on other grounds by Batson v. Kentucky,* 476 U.S. 79 (1986). The district court *never* made any finding of bias. Indeed, prior arrests or even convictions are not an impediment to jury service. *See* 28 U.S.C. § 1865; 730 ILCS 5/5-5-5. That is particularly true here where the juror's criminal history (drug arrests and traffic matters) bears no semblance to the offenses at issue in the case. *See, e.g., United States v. Langford*, 990 F.2d 65, 69-70 (2d Cir. 1993). Likewise, the criminal history of a juror's relative does not furnish a basis for a cause challenge. *See, e.g., United States v. Stewart,* 433 F.3d 273, 304-06 (2d Cir. 2006).

Further, the prosecution did *not* raise cause challenges to jurors with criminal convictions or family members with extensive criminal histories. Jurors who disclosed arrests and convictions (Juror Nos. 101 and 113) were empanelled without challenge. Tr.24721 (JA.569), 24726-28 (JA.571), 2166, 2280-82, 2300-02. Indeed, three other jurors who were empanelled without challenge disclosed that siblings or close friends had been convicted of serious criminal offenses, including one juror who disclosed that two of her brothers had been in prison. Tr.884-85, R.820:Ex. A (Juror Nos. 20, 73 and 111 questionnaires); Tr.2298. When that

latter juror revealed midway through the trial that both brothers were recently rearrested on significant criminal charges, Tr.11181-82, the prosecution made no cause challenge related to her brothers' criminal issues. Indeed, the juror explained that the police forced one of her brothers to sign a false statement incriminating another, *id.*, and while the government raised a concern about how this juror might view its own cooperating witnesses, Tr.11200, it *still* made no cause challenge. The prosecution did *not* care about jurors' arrests or the criminal histories of their family members, and Ezell's mattered only after her view of the evidence became known.

D. Ezell's Removal Chilled Expression In Deliberations

Ezell's removal carried additional practical prejudice: it potentially chilled the expression of pro-defense jurors in deliberations. After Ezell's removal, the original jurors and substituted alternates were told that the Court "had to excuse a couple of jurors," that the removals "were not prompted by any of the lawyers" and were not related to the jury deliberations. *See, e.g.*, Tr.24760 (JA.579); Tr.24804 (JA.590). Despite those admonitions, however, Ezell's removal presented a real risk that the remaining jurors as well as alternates believed that the removal might have related to her view of the case, how she deliberated or the power of some jurors (Peterson, Rein and Losacco) to oust other jurors they deemed deliberating in bad faith. This is particularly true where the entire jury was instructed by Peterson (based on extrinsic research) that a juror could be removed for failing to justify her opinions with testimony and evidence, and where a group of jurors sought the ouster of Ezell on precisely this basis. *See* 5/5/06 Tr.11-12 (JA.625), 79 (JA.642); Tr.24074-76 (JA.405) (Losacco Note). At least one juror (the foreperson) speculated that Ezell's removal was related to her view of the evidence. Tr.25129-30. Further, the jurors with undisclosed arrests and convictions who remained on the jury (Rein, Casino and Svymbersky) might have concluded that Ezell's removal was related to

her view of the evidence, since they remained and she was dismissed. That was highly prejudicial to the defense.

E. Background Checks On Deliberating Jurors Prejudiced The Defense

The prejudice from investigations into the jurors' backgrounds during deliberations was the widespread suggestion in the media that jurors who lied on their questionnaires would be prosecuted by the United States Attorney for perjury. R.820:Exs.7, 8, 9 (media reports on perjury prosecutions). Jurors admitted to seeing media reports or hearing about the background investigations. Tr.24627-28 (JA.546); Tr.24661 (JA.554). Indeed, one juror who had not even made misstatements on her questionnaire expressed something approaching terror when interviewed prior to the jury being reconstituted: "I'm sorry. I'm really scared. . . . I'm really -- I'm sorry. I'm so afraid right now." Tr.24767-68 (JA.581). It is well established that there is a significant risk that jurors who are the subject of law enforcement scrutiny during deliberations in a criminal case will seek to please the prosecution and vote to convict. *See, e.g., Remmer I*, 347 U.S. at 229 ("The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder."). That risk was palpable when over half of the deliberating jurors made misstatements on their questionnaires, were questioned about those misstatements by the district court in the presence of federal prosecutors, and then saw local media outlets advocating perjury prosecutions based on those misrepresentations.

III. SUBSTITUTION AFTER EIGHT DAYS OF DELIBERATIONS DEPRIVED WARNER AND RYAN OF A FAIR TRIAL BEFORE AN IMPARTIAL JURY

Before the district court took the unprecedented step of substituting alternate jurors after eight days of deliberations spread over two weeks, it told jurors that they must start

"all over": "I will tell all the jurors in this case, you and everybody else, that you need to *pretend* you never had a discussion about the case at all." Tr.24650 (JA.551) (emphasis added). There lies the fundamental problem. In order to avoid the reasonable possibility of prejudice to the defense, jurors had to *pretend* that they had not spent eight tumultuous days in heated arguments about the evidence, Tr.24074-78 (JA.405-06), 24163 (JA.427). Jurors had to *pretend* that they had not repeatedly sought the court's guidance in confusion about the instructions, Tr.24022 (JA.390), 24022-23 (JA.390). Jurors had to *pretend* that they had not already deliberated to verdict on several counts, R.820:Ex. 3 (juror media interview). Jurors had to *pretend* that they had not sought to purge the jury of a defense holdout by resorting to extrinsic legal research and requesting her removal, Tr.24074-76 (JA.405). Jurors had to *pretend* that the two of their number who were removed had never participated in deliberations, Tr.24443 (JA.499), 24485 (JA.509). Jurors had to *pretend* that they were never questioned about falsity in their questionnaires, Tr.24498 (JA.513), and jurors had to *pretend* that they never saw or heard about the tremendous media scrutiny focused exclusively upon them, Tr.24700 (JA.564). That is an awful lot of *pretend.*

The district court recognized the enormous potential for prejudice in substituting jurors and termed the decision "difficult," "extraordinary," "tough," "an extremely close call," and one that can be "very, very, very legitimately criticized." Tr.24725 (JA.570), 24803 (JA.590). The district court made its decision because it wanted to reach a verdict and reasoned "If I am wrong, it will not be the first time I was reversed, and I am not afraid to be reversed." Tr.24343-44 (JA.473). While a district court has discretion to substitute jurors, that discretion has to be exercised in light of legal standards. *See, e.g., Nemmers*, 795 F.2d at 632-33. Here the district court's decision was not the product of reasoned judgment guided by legal principles, but

rather an expedient guess.[8] And given the acknowledged potential for prejudice, the decision to substitute jurors so late in deliberations was a plain abuse of discretion.

A. Substitution Violated The Sixth Amendment And The Spirit Of Rule 24

Rule 24(c)(3) permits substitution of deliberating jurors *only* if that can be accomplished without compromising a defendant's constitutional rights to a unanimous verdict from an impartial jury. *See* Fed. R. Crim. P. 24(c)(3); U.S. Const. amend. VI; *United States v. Kerley*, 753 F.2d 617, 619-20 (7th Cir. 1985) (Rules of Criminal Procedure "must be interpreted with the interests of justice as a paramount consideration"). Although that provision was added in 1999 and there is a dearth of case law since that amendment, there is a substantial body of earlier authority that recognizes the serious constitutional implications in substituting jurors after the start of deliberations. *See* Fed. R. Crim. P. 23(b) advisory committee's note; *see also Green v. Zant*, 715 F.2d 551, 555-56 (11th Cir. 1983); *United States v. Virginia Erection Corp.*, 335 F.2d 868, 871 (4th Cir. 1964); Lester Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1962). Thus, while the Rule provides that a district court "may" substitute deliberating jurors, it plainly does not and cannot authorize a violation of the Constitution.

The constitutional danger inherent in substituting a deliberating juror is that it can defeat an "essential feature" of the jury trial by compromising "group deliberation." *Williams v. Florida*, 399 U.S. 78, 100 (1970); *Henderson v. Lane*, 613 F.2d 175, 177 (7th Cir. 1980); *Claudio v. Snyder*, 68 F.3d 1573, 1575 (3d Cir. 1995). Earlier authorities recognize the inherent difficulty in asking jurors to start deliberations anew, and the significant risk of coercion to the new alternates who enter deliberations after other jurors have already formed strong conclusions about the evidence. *See, e.g., United States v. Quiroz-Cortez,* 960 F.2d 418, 420 (5th Cir. 1992).

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[8] The district court was so focused on bringing this case to verdict that it refused to consider the merits of a timely defense objection, Tr. 24367-68 (JA.480), 24372 (JA.481), that it had impaneled two alternates in excess of the six authorized under Rule 24. *See* Fed. R. Crim. P. 24(c)(1).

Further, there is a risk in high-profile cases that the alternate jurors, exposed to media and other outside influences, may inject extraneous information into deliberations. All these risks increase the longer the first jury deliberates. *See United States v. Virgen-Moreno,* 265 F.3d 276, 289 (5th Cir. 2001). That is why no case in American jurisprudence has ever permitted the substitution of multiple jurors over a defendant's objection after eight days of deliberations.

In its posttrial ruling, the district court stood by its decision to substitute jurors, holding that Rule 24 creates a presumption "that post-submission substitution . . . is *not* prejudicial" if jurors are told to "begin deliberations anew" and "the court has no basis to conclude that the presumption has been rebutted in this case." R.867:95 (JA.95) (emphasis in original). In so ruling, the district court applied an erroneous legal standard. There is *no* such presumption in the law. Nothing in the text, commentary or the history of Rule 24 suggests anything of the sort.[9] Quite the contrary, the commentary to Rule 23 recognizes the great potential for prejudice:

> The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations.

Fed. R. Crim. P. 23(b) advisory committee's note. The committee made clear that the practice is discretionary. Fed. R. Crim. P. 24 advisory committee's note. Rule 24(c)(3) can only be read as

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[9] Contrary to the district court's assertion, nothing in *United States v. Johnson,* 223 F.3d 665, 669-71 (7th Cir. 2000), suggests that the 1999 amendment created a "presumption of non-prejudice."

authorizing substitution of deliberating jurors under limited circumstances and certainly does not create the presumption relied upon by the district court.

While this Court has not expressly addressed the standard by which to assess the potential for prejudice related to the substitution of deliberating jurors, courts that have addressed the question have held that the potential for prejudice must be analyzed for a *reasonable possibility of prejudice* — not actual prejudice. *See, e.g., United States v. Register*, 182 F.3d 820, 843 (11th Cir. 1999) (the pertinent inquiry is "whether the record indicates a reasonable possibility of prejudice to defendants"). Consistent with that standard, this Court has analyzed substitution of deliberating jurors in light of objective criteria, such as the risk of external influence on alternates prior to substitution and the length and apparent extent of the original deliberations. *See United States v. Josefik*, 753 F.2d 585, 587 (7th Cir. 1985). Indeed, this Court has readily acknowledged in similar contexts that when an error relates to jury deliberations, the correct legal standard is an *objective* inquiry into whether there is a reasonable possibility of prejudice. *Bruscino*, 687 F.2d at 941. The same rationale would mandate a reasonable possibility of prejudice standard related to the substitution of deliberating jurors because the actual harm from such a substitution — which plainly implicates core constitutional values — would be difficult to prove. *Cf. Remmer*, 347 U.S. at 229; *Harbin,* 250 F.3d at 544.

Here the district court acknowledged that a reasonable possibility of prejudice existed. Tr.24803 (JA.590). It recognized that the circumstances surrounding substitution were "very, very unusual" because the original jury had already deliberated for eight days. Tr.24575 (JA.532). The court also acknowledged that it had concluded two jurors who participated in the original jury's deliberations were not fit for jury service. Tr.24576 (JA.532). Specifically regarding Pavlick, the district court has admitted that Pavlick's participation in the original

deliberations raised "the specter of bias." R.867:65 (JA.65). The district court's own statements confirm a reasonable possibility of prejudice. *Id.*, Tr.24576 (JA.532). Further demonstrating prejudice, the reconstituted jury purged of a defense juror convicted on counts that the district court later concluded were not supported by sufficient evidence. R.867:20-23 (JA.20-23).

B. Substitution Created A Reasonable Possibility Of Prejudice

The reasonable possibility of prejudice must be assessed in light of the circumstances surrounding the district court's decision to substitute deliberating jurors. Here by any measure, that possibility exists. The extraordinary length of the prior deliberations alone — eight days spread over more than two weeks — renders almost any decision to substitute prejudicial. The jury had grappled with serious questions about the court's instructions and repeatedly sought and received guidance from the court. Tr.23968-69, 24022-23 (JA.390). The jurors engaged in heated debate over evidence, and had such strong disagreements that some resorted to misconduct in an effort to force the removal of a holdout defense juror. Tr.24053 (JA.399); Tr.24074-76 (JA.405); 5/5/06 Tr.11-12 (JA.625). The jury had already deliberated to verdict on several counts. *See* R.820:Ex.3 (juror media interviews). These objective facts rendered a non-prejudicial substitution impossible.

The alternate jurors were completely absent from the proceedings for two-and-a-half weeks, when media coverage about deliberations was relentless. Tr.24526 (JA.596), 24546 (JA.525), 24700-01 (JA.564). The alternates — Svymbersky and DiMartino — admitted to being exposed to publicity or discussions about the breakdown in the jury's deliberations and the removal of jurors. Svymbersky had seen "headlines" about the case, Tr.24558 (JA.528), and heard from others that "the deliberation wasn't going well," Tr.24546 (JA.525).[10] "Four or five

[10] Svymbersky also admitted to taking his trial notes home following closing arguments, Tr.24548-49 (JA.525), in violation of the district court's instructions, Tr.2429, R.820:Ex.22.

times" his coworkers sought to engage him in conversation about the trial. Tr.24558-59 (JA.528). DiMartino admitted that a coworker, her daughter and at least one other person tried to discuss the case with her before she was recalled to service. Tr.24539-41 (JA.523-24). She too had heard that the jurors had been "arguing" and that a juror had a problem with a DUI. *Id.* That the district court impaneled these alternate jurors despite these critical admissions violated the letter of Rule 24 that the "court must ensure that a retained alternate does not discuss the case with anyone..." Fed. R. Crim. P. 24(c)(3). Given the highly publicized nature of the trial, the prejudicial media attention, and the alternate jurors' own admissions, there is at least a reasonable possibility that these jurors introduced prejudicial outside influences into the jury room. Tr.24700-01 (JA.564), 24539 (JA.523), 24546 (JA.525). That compromised the jury's impartiality.

The district court's response was that the first eight days of deliberations were not "long" days,[11] R.867:94 (JA.94), the alternate jurors' exposure to media and discussions about the case had been "innocuous," *id.*, reports that the jury simply allowed the alternate jurors to catch up was "a sensible procedure," R.867:96 (JA.96), and the court's admonition to start "new deliberations" and pretend that the prior eight days of deliberations never happened "obviated any prejudice" to the defense, R.867:95 (JA.95), Tr.24650 (JA.551). How do we know any of this? None of this speculation could ameliorate the possibility of prejudice evident from the objective circumstances. The court's analysis turned on requiring the defense to show actual prejudice in a circumstance where no defendant could ever demonstrate prejudice because of the

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[11] The district court's *post*-verdict satisfaction with the length of the reconstituted jury's deliberations is inconsistent with the court's *pre*-verdict concerns stemming from the fact that the reconstituted jury took "long breaks," Tr.25339, ended early on three days, Tr.25005, 25251, 25255, and had to pause deliberations on two separate occasions in order for the court to *voir dire* certain jurors, Tr.25067-76, 25190-25216. The district court was so troubled by the reconstituted jury's long breaks and short hours that it considered imposing a minimum number of hours or even sequestering the jury. Tr.25339.

secrecy surrounding deliberations. R.867:95 (JA.95). Indeed, the court simply dismissed the fact that the prior jury had deliberated to verdict on several counts as "not competent" under FRE 606(b). R.867:96 (JA.96). But if the district court instructed the jury to "pretend" those deliberations never happened and that instruction ensured that those earlier deliberations did not influence the verdict in the case (as the district court assumes), R.867:95 (JA.95), FRE 606(b) would have no application. Indeed, the earlier deliberations are shielded *only* if they relate to the verdict.

IV. THE ERRONEOUS EXCLUSION OF EXCULPATORY EVIDENCE HAD A SUBSTANTIAL AND INJURIOUS EFFECT ON THE TRIAL AND VERDICT

The district court erroneously excluded significant evidence that demonstrated Ryan's good faith, lack of fraudulent intent and the reasonableness of his belief about the bona fides of the transactions charged in this fraud prosecution, including those involving Warner. R.276:17-19 (JA.154-56), R.439:1 (JA.107). While this Court typically reviews evidentiary rulings for an abuse of discretion, it has "not hesitated to overturn blanket evidentiary rulings" where the district court categorically excludes critical defense evidence. *Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 994-95 (7th Cir. 2005) (court abused discretion by adopting temporal "bright-blue line" rule for admissibility of evidence of fraud).

When, as here, intent is a central issue, both the prosecution and the defense must have wide latitude to prove intent by circumstantial evidence. As this Court noted, "fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive . . . ." *Worthington v. United States*, 64 F.2d 936, 941 (7th Cir. 1933) (internal quotation marks omitted). Accordingly, a criminal defendant must be allowed to present evidence about those circumstances to explain or rebut inferences that arise from the prosecution's proof. *Id.* at 941-42. Indeed, a defendant should be

allowed to develop fully and fairly all evidence which would tend to exonerate him. *See United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982) (reversing mail fraud conviction where district court limited evidence proffered by defendant to show lack of intent); *United States v. Thomas*, 32 F.3d 418, 421 (9th Cir. 1994); *United States v. Rubin*, 591 F.2d 278, 283 (5th Cir. 1979) (reversing conviction where the district court excluded evidence of conversations that would have made the lack of criminal intent "much more believable").

Further evidence which shows the benefits or lack of harm caused by allegedly fraudulent conduct is admissible to negate fraudulent intent, even though the success of the alleged scheme to defraud is not an element of the crime. *See United States v. Ethridge*, 948 F.2d 1215, 1217-18 (11th Cir. 1991) (reversing mail fraud conviction where district court excluded evidence that insurance company suffered no loss; such evidence negated intent to defraud); *United States v. Foshee*, 569 F.2d 401, 403-04 (5th Cir. 1978) (reversing mail fraud conviction where district court excluded evidence that checks at issue were ultimately paid and that banks lost no money; such evidence negated intent to defraud), *amended on other grounds*, 578 F.2d 629 (5th Cir. 1978); *United States v. Bane*, 583 F.2d 832, 836 (6th Cir. 1978) (whether defendant's action actually benefited the alleged victim is relevant to claim of good faith).

Likewise, evidence of acts and events that occur after the relevant conduct — including acts of persons other than the defendant — can prove or negate a defendant's intent at the relevant time. *See United States v. Felton*, 908 F.2d 186, 189 (7th Cir. 1990) (evidence of drug sale by acquaintance to undercover agent the day after the alleged crime relevant to show defendant's intent one day earlier); *United States v. Brantley*, 786 F.2d 1322, 1329 (7th Cir. 1986) (evidence of subsequent acts admissible to show defendant's intent); *see also Scott v.*

C.I.R., 226 F.3d 871, 875 (7th Cir. 2000) (evidence of conduct of parties after taking title to property probative of intent at time of title transfer).

Here the prosecution was afforded excessive latitude to prove Ryan's intent, while Ryan was afforded no latitude at all. The prosecution argued that Ryan abused the public trust in the very broadest of terms and thus placed at issue all of his conduct during his last 12 years in public office. *See* Tr.2431, 22835-36, 23113, R.110:17-59 (JA.244-86). While almost no fact in support of the prosecution was considered too prejudicial or attenuated, the district court repeatedly excluded evidence probative of Ryan's good faith and lack of criminal intent, including evidence showing the fairness of leases and contracts, the regular practice of the SOS, and Ryan's honest good-faith public service. *See, e.g.*, Tr.14197, 19396, R.276:26 (JA.163), R.439:8 (JA.114). As a result, the jury saw a one-sided, distorted picture of Ryan's public service that had a substantial impact on the verdict.

A. The District Court Erroneously Excluded Defense Evidence That Was Probative Of Ryan's Good-Faith Approval Of Certain Contracts And Leases

The prosecution alleged that as SOS, Ryan approved a few contracts and leases as part of a fraud scheme. Tr.2431-32. The defense evidence showed that Ryan approved every contract and lease at issue on the recommendation of SOS professionals. Tr.4305-07. The jury was deprived of equally probative evidence showing that three of the leases and one contract were renewed several times by Jesse White, Ryan's successor as SOS. Tr.2419, R.439:7-8 (JA.113-14). The most powerful and objective demonstration of the reasonableness of Ryan's belief about the merits and fairness of the contracts and leases to the state is the fact that his successor, an elected official from the opposing political party with no connection to Ryan, *renewed* them. R.353. But the district court excluded this evidence because, in its view, "the contract renewals are irrelevant" on the issue of Ryan's "genuine belief in the honesty of his

actions" and because admission of the evidence could result in a series of mini-trials, causing delay. R.439:7 (JA.113).

The district court's blanket rejection of defense evidence of events that occurred after the charged conduct is a clear abuse of discretion. R.439:7 (JA.113). In *Cerabio*, this Court addressed a similar situation when the district court adopted an inflexible rule for the admission of evidence about fraud in connection with a contract. 410 F.3d at 993. There, the district court excluded all evidence about events before the contract was entered into but admitted all evidence about events after the contract was executed. *Id.* This Court held that the district court's "bright blue line" ruling ("Is it before contract was entered into? It's out. Is it afterwards?. . . [I]t goes in. . . .") was reversible error because the ruling created an "arbitrary barrier" to probative evidence that went to the heart of the defense. *Id.* at 994. That error affected the fairness of the trial and had a substantial influence on the jury's verdict.

This Court reached a similar conclusion in *Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987), where the district court arbitrarily excluded all evidence of events that occurred subsequent to the filing of plaintiff's discrimination claim. Ordering a new trial, this Court stated: "Proximity in time . . . is a proper consideration in assessing probative value; but given the importance of circumstantial evidence in proving (and, equally, disproving) employment discrimination, a blanket exclusion of evidence of events that occurred before or after the discrimination is arbitrary." *Id.* at 698-99; *see also Mihailovich v. Laatsch*, 359 F.3d 892, 913-14 (7th Cir. 2004). Here, the district court's illogical rule (also applied to the SOS currency exchange rate increases discussed below) created an arbitrary barrier to the admission of probative evidence on the central issue in the case: Ryan's intent. The district court's concern

about undue delay with respect to the renewal of three leases and one contract was completely unwarranted in light of the significant probative value of that evidence. *See* FRE 403.

Finally, the district court violated its own blanket rule by permitting the prosecution to introduce evidence of events that occurred after Ryan's decisions and that could not have formed the basis of those decisions. For example, the district court allowed testimony about concrete and snow removal problems that became apparent only after the leases were signed. Tr.10003, 10013-14; Tr.21412-13. Likewise, the district court allowed testimony about an after-the-fact assessment of the merits of the 17 N. State lease by an SOS official who was not involved with selecting or negotiating the lease and whose opinion could not have informed Ryan's decision. Tr.9956-57, 9971. The district court also permitted the prosecution to introduce expert testimony that rents on some leases exceeded market rates based on a retrospective analysis of comparable properties, information that could not have been available to Ryan at the time of his decisions. Tr.10446-47, 10977-80.

The defense evidence about Secretary White's renewal of the leases at the same or higher rents and his assessment of the 17 N. State lease before he renewed it through 2013 was independently admissible as objective evidence of the fairness of the contracts and leases. R.353. The probative value and admissibility of that evidence is also demonstrated beyond doubt, however, by the prosecution's use of *post hoc* evidence about the same issues. Tr.9944-47, 10977-80, 11062-67. The prosecution's evidence violated the district court's erroneous bright-line rule prohibiting *post hoc* evidence and opened the door to the defense evidence about White's evaluation and renewal of the leases. Even if the defense evidence was otherwise inadmissible, it should have been admitted under the doctrine of curative admissibility. *See generally Manuel v. City of Chicago*, 335 F.3d 592, 596-97 (7th Cir. 2003).

B. The District Court Erroneously Excluded Defense Evidence Probative Of Ryan's Good-Faith Decisions About The Currency Exchange Rate Increase

Over objection, the district court allowed evidence that Ryan approved a single currency exchange rate increase in his eight years as SOS. *See, e.g.*, Tr.2352-53, 2852-53. Even though Ryan's 1995 rate increase was not charged in the indictment, the prosecution nevertheless portrayed Ryan's approval of that increase as highly irregular, suspect and part of a fraudulent scheme. *See, e.g.*, Tr.23085. The district court recognized that the rate increase was an exercise of Ryan's official authority as SOS, and further that Ryan was entitled to present evidence to explain his conduct. R.439:3-4 (JA.109-10). The court nevertheless refused to admit defense evidence showing that such rate increases were a regular practice of the SOS and that Secretaries Edgar and White authorized much larger increases in 1982, 2002 and 2005. *See* R.353:2-5, R.386:8-9, R.404:2, R.439:4-8 (JA.110-14), Tr.23714. Again applying an erroneous bright-line rule based upon the time of Ryan's decision, the district court permitted Ryan to introduce evidence of one rate increase approved by Secretary Edgar before Ryan's 1995 decision but excluded as irrelevant evidence of the later SOS rate increases. *Cf.* R.439:6 (JA.112).

By finding the evidence irrelevant, the district court ruled that evidence of the SOS practice whereby Secretaries Edgar and White approved multiple rate increases did not have "any tendency" to show that Ryan acted in accordance with a regular SOS practice and without fraudulent intent. The district court's ruling cannot be squared with FRE 406, which deems evidence of the routine practices of organizations relevant or with logic and common sense. The jury was entitled to know that the supposedly suspect rate increase was just one of many increases approved by three Secretaries of State in accordance with their official duties. Finally, because the prosecution should not have been allowed to admit evidence of the 1995 rate

increase at all, R.386, R.404, the defense evidence should have been admitted under the doctrine of curative admissibility. *Manuel*, 335 F.3d at 596-97.

C. The District Court Erroneously Excluded Evidence Related To Ryan's Honest Service As A Public Official

In harsh and dramatic terms, the prosecution attacked Ryan at trial as a "greedy," "shameless" politician who treated his public offices as "personal kingdoms" in which he was "pillaging the state, stealing from the taxpayers" in breach of the public's trust. Tr.22852; Tr.22834; Tr.22920; Tr.23139. The prosecution's evidence at trial — drawn from select events and transactions over a 12-year period — purported to show corruption that was "rampant" and endemic during Ryan's tenure as SOS and governor, Tr.22837. In response to the staggering breadth of the prosecution's charges, Ryan sought to introduce evidence showing how he actually conducted himself in public office, what he sought to accomplish, and the manner in which he approached public service. R.666:1-2.

The district court prohibited Ryan from introducing any evidence about his accomplishments in public office on the ground that there was no "meaningful relationship" between the charges and his conduct as a public official. R.276:25 (JA.162); *see also* Tr.14197, 19395-98. To the contrary, as is apparent from every aspect of the record, that relationship was the core of the prosecution's case. Ryan should have been allowed to present evidence showing the broad scope of his honest service in public office, including capital justice reform, health care coverage, environmental protection, prevention of drunk driving and organ donor awareness. The district court excluded the very evidence of consistent honest public service that would have revealed that the prosecution's evidence "did not fairly indicate a scheme to defraud." *Worthington*, 64 F.2d at 942. This evidentiary void left the jury with a completely skewed view

of Ryan's work, based on a few selected incidents that were incorrectly represented to exemplify all of Ryan's service. *See, e.g.*, Tr.22834.

Equally significant, the district court excluded defense evidence about Ryan's meritorious public service, even when it was offered for another purpose. The most egregious example involved the cross-examination of a prosecution witness, a former state prosecutor in a wrongful conviction case and current appellate court judge, who testified outside the presence of the jury that he believed Ryan's work on capital punishment was "absolutely illegal and immoral." Tr.14192. The district court allowed the witness to testify on direct examination about a conversation with Ryan, but the court prevented defense counsel from exposing the witness's obvious and significant bias. Tr.14197.

Similarly, the district court restricted Ryan's presentation of character evidence to prevent the jury from hearing facts about Ryan's public service that the prosecution chose to conceal from them. Tr.19396. Eleven defense witnesses who worked with Ryan on the reform of the death penalty and other policy matters were not permitted to testify about the details of the solid and credible basis for their knowledge of Ryan's honesty and integrity as a public servant. *Id.* All of the district court's rulings excluding defense evidence, individually and cumulatively, had a substantial injurious effect on the trial and prevented Ryan from presenting a complete defense.

V. THE RICO CHARGE IS LEGALLY UNTENABLE

The centerpiece of this prosecution was a RICO conspiracy charge predicated on a novel theory: that the state of Illinois was the "enterprise." R.110:12 (JA.239). This pleading device permitted the prosecution to sweep into a single conspiracy charge a myriad of unconnected acts by Ryan, Warner, Fawell and others that occurred while Ryan served as SOS,

governor or campaigned for those offices. R.110:1-16 (JA.228-43). The district court subsequently instructed the jury that an "enterprise" is a "legal entity" and that "a state is a legal entity." Tr.23885. The effect of the enterprise allegation and instruction was to relieve the prosecution of its burden of proving the "enterprise" element of the RICO offense. Those are legal errors reviewed *de novo*. *Olson v. Risk Mgmt. Alternatives, Inc.*, 366 F.3d 509, 511 (7th Cir. 2004); *United States v. Jefferson*, 334 F.3d 670, 672 (7th Cir. 2003); *United States v. Brack*, 188 F.3d 748, 761 (7th Cir. 1999).

A. The State Of Illinois Is Not A RICO Enterprise

The state of Illinois is a sovereign entity with a landmass of 56,400 square miles, a population of nearly 12.5 million people, that has been in continuous existence since its admission to the Union in 1818. *See* www.illinois.gov/facts (JA.357-64). No opinion — until this case — has ever permitted any state to be characterized as an "enterprise," and the only other court to have considered the issue reached a contrary conclusion. Indeed, in *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), a district court dismissed a RICO charge in a prosecution of a Maryland governor that alleged the "state" as the enterprise. The *Mandel* court reasoned that a state did not fit within the "enterprise" concept defined in the statute, and that the history and purpose of the statute did not suggest that Congress intended such a result. *Id.* at 1020-22. For example, the RICO statute empowers federal courts to order "dissolution or reorganization of any enterprise . . . . " 18 U.S.C. § 1964(a), and that provision and others raise serious federalism concerns when a state is alleged to be an enterprise.

The district court here disagreed with *Mandel*, declined to dismiss the RICO charge and relied instead on cases that permitted public offices to be characterized as enterprises. R.182:23-28 (JA.193-98). That was error predicated on the district court's admitted failure to

discern "a principled distinction between states and other public bodies," R.182:23-24 (JA.193-94), 28 (JA.198). To be sure, the "enterprise" concept can include various governmental offices. *See, e.g., United States v. Conn*, 769 F.2d 420, 425 (7th Cir. 1985) (Circuit Court of Cook County). But contrary to the district court's reasoning, a state is different. A state is not an ordinary legal entity — rather it is an independent sovereign. *See, e.g., Alden v. Maine*, 527 U.S. 706, 748 (1999). Particularly mindful of states' constitutionally secured existence, federal courts have narrowly interpreted federal laws "unless Congress conveys its purpose clearly." *United States v. Bass*, 404 U.S. 336, 349 (1971). There is no clear statement in the RICO statute that Congress intended that a state could be a RICO enterprise.

B. The District Court Erroneously Directed A Verdict For The Prosecution On The Enterprise Element

From the inception of this prosecution, the defense has challenged the legitimacy of the enterprise allegation as a legal fiction. R.161, R.175. By casting the allegation so broadly — the entire state as a single enterprise — the prosecution pleaded an illusory catchall rather than an actual single vehicle through which the defendants agreed to accomplish racketeering acts. R.110:12 (JA.239), *see also* R.161:13. The artificial nature of the enterprise as alleged is confirmed by the prior prosecutions based on the same conduct in related cases: in the Fawell, Bauer and original Warner indictments, the enterprise was alleged to be various iterations of an association-in-fact between various individuals, the SOS office, CFR and others. R.161:Exs. All were predicated on the same illicit activity, and all alleged different enterprises (none of which included the state of Illinois). *Id.* The prosecution conceded that these prior indictments "involved some components of the enterprise charged in this case," but argued that its prosecution of Ryan was part of an "ongoing racketeering enterprise." R.171:12. But if Ryan's advancement through various offices in state government was merely a continuation of an

"ongoing corrupt enterprise," then why were all of the prosecution's prior formulations of the enterprise different? If Fawell is convicted on one enterprise, Bauer another, Warner originally indicted on yet another and Ryan indicted on still another, those are *multiple* enterprises. Here the designation of the state of Illinois as the enterprise permitted the prosecution to transform various, unrelated acts involving different entities (different enterprises) — the governor's office, the SOS office, CFR — into a single enterprise conspiracy irrespective of reality. The only apparent limitation on the prosecution's ability to cast a single enterprise is now the prosecutor's imagination.

The district court's answer was that this was a fact question for the jury to resolve, and thus it denied Ryan's motion to dismiss. R.182:30 (JA.200). Yet when it came time to instruct the jury, the district court erroneously directed a verdict for the prosecution by essentially instructing that the state of Illinois was the RICO enterprise. Tr.23885. Further, the district court refused a defense theory instruction that the prosecution's case consisted of proof of several distinct enterprises rather than the single enterprise alleged. R.720:3-4. There was ample proof in the record to support the defense instruction suggesting that the conduct at issue related to separate and distinct offices of state government or CFR. *See* Tr.22403-04, 22415-16. The vast majority of evidence at trial related to acts Ryan undertook as SOS — a separate and distinct entity from the office of Governor or CFR. *See, e.g.*, Tr.5346-47, 5234-35, 3588-92, 3580. Indeed, if the evidence tended to show anything it was that Ryan acted through distinct offices, and that is precisely what the prosecution argued at trial. *See, e.g.*, Tr.2431, 2455, 23139. If proof at trial is, as the district court held, the check on overly-broad prosecutorial allegations, then the jury has to at least be given instructions that would permit it to pierce the prosecution's

case. *See United States v. Dennis*, 917 F.2d 1031, 1033 (7th Cir. 1990). That did not happen here, and that was error.

VI. THE MAIL FRAUD CHARGES ARE PREDICATED ON AN UNCONSTITUTIONALLY VAGUE CRIMINAL STATUTE

The deprivation of the "intangible right to honest services" — a term *undefined* in the mail fraud statute (18 U.S.C. §§ 1341 (JA.373), 1346 (JA.377)) or anywhere else in the United States Code — furnished the legal underpinning of this prosecution. *See* R.110:17-59 (JA.244-86). While this Court has upheld the constitutionality of the "honest services" provision, *see, e.g., United States v. Hausmann,* 345 F.3d 952, 958 (7th Cir. 2003), it has acknowledged "persistent concerns about the breadth and vagueness of the statute," *United States v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999). Similarly, other circuits have upheld the constitutionality of the statute, *see, e.g., United States v. Rybicki,* 354 F.3d 124, 132 (2d Cir. 2003) (*en banc*), but a substantial body of dissenting authority has found the statute too vague to give fair notice to defendants, *see, e.g., Rybicki,* 354 F.3d at 162-164 (Jacobs, J., Walker, CJ., Cabranes and Parker, JJ., dissenting); *United States v. Brumley*, 116 F.3d 728, 742-47 (5th Cir. 1997) (*en banc*) (Jolly, DeMoss and Smith, JJ., dissenting). The constitutionality of a criminal statute is a question of law reviewed *de novo*. *United States v. Vallejo*, 373 F.3d 855, 859 (7th Cir. 2004).

Without any definition in the statute's text, courts have struggled to fill the gap. Indeed, "[n]o one can be sure how far the intangible rights theory of criminal responsibility really extends, because it is a judicial gloss. . . ." *United States v. Bloom*, 149 F.3d 649, 656 (7th Cir. 1998). This has yielded a patchwork of conflicting decisions over, among other things, whether a state law violation is a prerequisite to the federal offense. *Compare United States v. Panarella,* 277 F.3d 678, 694 (3d Cir. 2002), *with United States v. Sawyer,* 85 F.3d 713, 732 (1st

Cir. 1996), *with Brumley*, 116 F.3d at 733-34. This Court settled the issue for this Circuit in *Bloom* where it held that a misuse of position for private gain is the line that separates "run of the mill violations of state-law fiduciary duty . . . from federal crime." 149 F.3d at 655. Without such a limitation, this Court reasoned, the honest services provision would become "a federal common-law crime." *Id.* at 654.

Despite *Bloom*, the indictment in this case began with a laundry list of "Laws, Duties, Policies and Procedures Applicable" to each defendant, including provisions of the Illinois Constitution, state laws (criminal and civil) and other regulations. R.110:6-9 (JA.233-36). And the district court instructed the jury on the Illinois Constitution and a number of state laws (many of which were not criminal). Tr.23908-11. But when Congress has intended to incorporate state law into federal criminal statutes, it has done so expressly, *see, e.g., United States v. Turley,* 352 U.S. 407, 411 (1967), and that clear expression is notably absent from the mail fraud statute.

Similarly in tension with *Bloom*, the district court instructed that a failure to disclose a "conflict of interest" in a matter over which a public official has decision-making power constitutes a deprivation of honest services irrespective of a misuse of office. Tr.23905. *Bloom* plainly cabins an honest services violation to a misuse of position for private gain, 149 F.3d at 655, and in giving this instruction the district court strayed from this Court's holding and relied upon cases from other circuits, including *Panerella*, which is in conflict with *Bloom*. 277 F.3d at 692.

The confusion in the case law — mirrored in the district court's instructions — results directly from a vague and ambiguous statute. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be

informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, (1939). Here, the statute is void for vagueness because it fails to provide enforcement standards for prosecutors and adequate notice of criminality to the public. *See City of Chicago v. Morales,* 527 U.S. 41, 56 (1999). *Ad hoc* judicial definitions of "honest services" cannot satisfy due process.

VII. WARNER'S RIGHT TO A FAIR TRIAL WAS VIOLATED AS A RESULT OF JOINDER

A. Standard of Review

A Fed.R.Crim.P 8(b) challenge to joinder is reviewed *de novo*. *United States v. Rollins*, 301 F.3d 511, 517 n.1 (7th Cir. 2002). A Rule 14 severance ruling is reviewed for abuse of discretion. *Id.* "A district court . . . abuses its discretion when it makes an error of law." *Koon v. United States,* 518 U.S. 81, 100 (1996). A district court's jury instruction decisions are reviewed *de novo*. *United States v. LaGrou Distribution Systems, Inc.*, 466 F.3d 585, 590 (7th Cir. 2006).

B. Background

The original indictment did not contemplate a joint trial with Warner and Ryan defendants; Ryan was not added as a defendant until 19 months later. Significant portions of the second superseding indictment do not allege Warner's connection to offenses charged against Ryan. R.110 (JA.228).

The joint indictment prompted pretrial severance requests from Warner. R.129, 138-39, 250, 260. While expressing sympathy for Warner, the district court denied all such requests. R.131 (JA.650), 182 (JA.171), 276 (JA.138), 340 (JA.115). The court thought jury instructions could alleviate any prejudice, and suggested bifurcating the Ryan tax and false statement counts. R.182 (JA.171).

At trial, the prosecution admitted a plethora of evidence having no connection to Warner. R.584 (JA.659) (renewed severance motion describing evidence). Warner objected, sought severance and/or limiting instructions. Tr.2931 (JA.790), 2958 (JA.792), 3062 (JA.798), 3336 (JA.810), 4596 (JA.817), 5907-08 (JA.822), 11199 (JA.841), 13884-85 (JA.849), 14482 (JA.859), 16210-11 (JA.902), 16275-76 (JA.905), 17875 (JA.907), 20967-69 (JA.925), 21308-09 (JA.929), 21310 (JA.931). In some instances, the district court limited or excluded evidence. Tr.3628-47 (JA.815), 14497-98 (JA.860), 15369-70 (JA.887), 15831-43 (JA.907), 16209 (JA.902), 16839-54 (JA.917), 17881-98 (JA.910). Although the court gave interlocutory limiting instructions, it denied all trial severance requests, and ultimately ruled against bifurcating the tax and false statement charges. Tr.2931-32 (JA.790), 2975-76 (JA.797), 3155-56 (JA.801), 3507 (JA.814), 3748 (JA.815), 6894 (JA.827), 7024 (JA.830), 7193 (JA.831), 8737 (JA.833), 8964 (JA.835), 12894 (JA.847), 14045 (JA.854), 14239 (JA.855), 14453 (JA.858), 14564 (JA.863), 14711 (JA.865), 14821 (JA.866), 14978 (JA.868), 15122 (JA.873), 15325 (JA.874), 16277 (JA.905), 18099 (JA.919), 18415 (JA.921), 20972 (JA.925), 21456 (JA.951), 21825 (JA.952). At the close of the case, the court refused Warner's proposed instruction recapping off-limits witness testimony and subjects. R.660 (JA.674), Tr.21912-14 (JA.938).

C. Indictment

Count 2 described the alleged scheme and included the following non-Warner-related allegations that were also the subject of trial proof:

- Diversion of SOS resources and labor for the personal and political benefit of Ryan, Fawell and CFR, including "consulting" payments made to Ryan family members in relation to Phil Gramm's presidential campaign. ¶¶ 136-44; Tr.2727-28, 3167-69, 3180-81, 3191-93, 3556-57, 3741-43, 6914-15, 16663, 16666, 16668-70, 17071-72, 13577.

- Termination of IG investigators and reorganization of the IG Department, which was investigating fund-raising issues. ¶ 130; Tr.14730-33, 14548-49, 14570-71.

- Quashing an investigation into a highly-publicized accident in which the driver may have illegally obtained his Commercial Drivers License. ¶ 130; Tr.14571.

- SOS shredding after a federal grand jury investigation became public. ¶ 145-47; Tr.4693.

- Award of an SOS lease to Klein, who provided vacation benefits to Ryan and Fawell. ¶¶ 89-97; Count 6; Tr.11034-36.

- "[R]epeatedly engag[ing] in sham transactions" in which Ryan wrote a check for lodging benefits and Klein returned cash. ¶ 95; Tr.9414-15.

- Ryan's receipt and concealment of personal and financial benefits from Swanson. ¶¶ 98-99; Tr.11723.

- Award of an SOS lease to Swanson's clients. ¶ 101; Tr.2911-12.

- Swanson became a "lobbyist" for Grayville in exchange for $50,000 collected from Grayville citizens after learning Grayville had been selected as a prison site. ¶ 102; Count 10; Tr.14025-26, 13604-05, 15344-45.

- Swanson provided Udstuen $4,000 for a lobbying referral, and declared he was "taking care" of Ryan. ¶ 112; Tr.11721-23.

- Ryan recommended Swanson be hired as a lobbyist for an annual $60,000 retainer; Swanson did little or no work. ¶¶ 113-15; Tr.2937-40.

- DeSantis received low-digit plates and provided financial benefits to Ryan's family; Ryan did not disclose the benefits until after being questioned by federal investigators. ¶¶ 120-24; Tr.6917-18, 11455-58.

Counts 11-13 were false statement charges against Ryan only. Warner was actually the subject of some of Ryan's alleged false declarations to the FBI. Ryan's statements were admitted over Warner's objections, and absent redacting Warner's name. R.139, Tr.11135-46 (JA.837), 11472-76 (JA.844), 14982-87 (JA.860), 17874-914 (JA.907). Warner did not cross-examine Ryan since Ryan did not testify.

The indictment also contained a series of tax allegations against Ryan only:

- Use of CFR funds for the benefit of Ryan family members and third parties absent disclosure on D2 and IRS forms; misrepresentations of campaign fund use; ghost payroll campaign fund payments to family members; obtaining and failing to report cash; and diversion of money from political supporters. Count 18; Tr.13577, 16663, 16666, 16668-70, 17071-72, 17239-42, 17251-59, 17392-98 ,17405-11.

- Filing false personal income tax returns between 1995-1999. Counts 18-22; Tr.17419-32.

D. Misjoinder

The indictment did not set forth any evidence making the South Holland lease and the Grayville prison incident part of Warner's agreement. The district court nevertheless upheld joinder of Counts Six and Ten, stating:

> Although Warner had no alleged involvement in either of these contract awards, the court concludes that they are similar enough to matters in which he was allegedly involved that joinder is proper here, and that any prejudice to Warner can be addressed by way of an appropriate instruction to the jury.

R.182:40 (JA.210).

The court's reasoning is flawed. From the initial premise – that Warner had no connection to South Holland or Grayville – the conclusion that Counts 6 and 10 were misjoined should have followed. Under Rule 8(b), two defendants "may be charged in the same indictment . . . if they are alleged to have participated in . . . [the] same series of acts or transactions constituting an offense." *See United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir. 1985) (Rule 8(b) ususally requires "the acts or transactions . . . [to be] parts of a single conspiracy"); *see also United States v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003); *United States v. Marzano*, 160 F.3d 399, 401 (7th Cir. 1998). The indictment's failure to make South Holland and Grayville part of Warner's agreement signals that such allegations were not part of a single conspiracy involving Warner; thus, those allegations were subject to severance. *See United*

States v. Nicely, 922 F.2d 850, 853 (D.C. Cir. 1991); *United States v. Castro*, 829 F.2d 1038, 1045 (11th Cir. 1987), *withdrawn in part on other grounds*, 837 F.2d 441 (1988).

In addition, "similar enough" is not the standard for Rule 8(b) joinder in a multi-defendant case. *United States v. Southwest Bus Sales, Inc.*, 20 F.3d 1449, 1453-54 (8th Cir. 1994). In upholding the joinder of Counts 6 and 10, the district court essentially collapsed Rules 8(a) and (b). Such a formula is not permitted. *United States v. Stillo*, 57 F.3d 553, 557 (7th Cir. 1995); *United States v. Schweihs,* 971 F.2d 1302, 1322 (7th Cir. 1992); *Velasquez*, 772 F.2d at 1353.

"Rule 8(b) ... requires the granting of a motion for severance unless its standards are met, even in the absence of prejudice." *United States v. Lane*, 474 U.S. 438, 449 n.12 (1986). Rather than applying this framework, the district court erroneously converted the Rule 8(b) issue into one of prejudice by predicting jury instructions could remedy the prejudice.

Similar reasons establish the misjoinder of the tax and false statement counts. As opposed to being offenses in furtherance of a joint agreement between Warner and Ryan, both groups of offenses were unilateral in nature, and involved victims (the federal government) different from the mail fraud charges (the state of Illinois). Furthermore, the tax and false statement charges did not flow from the RICO conspiracy as neither tax nor false statement charges qualified as predicate acts under 18 U.S.C. § 1961(1), *United States v. Genova*, 333 F.3d 750, 758 (7th Cir. 2003). *Cf. Stillo*, 57 F.3d at 557.

While the district court recognized the possibility of misjoinder, it again sought to cure the problem through a remedy other than severance, *i.e.*, suggesting (but ultimately not holding) a bifurcated trial, and giving interlocutory jury instructions. The Ryan tax and false statement counts, however, were misjoined at the outset and should have been severed.

E. Prejudice

A mistaken Rule 8(b) ruling requires a new trial if the error affected substantial rights. *Lane*, 474 U.S. at 449 n.12; Fed.R.Crim.P. 52(a). A new trial is necessary for Warner since the erroneous misjoinder rulings affected his substantial rights. In addition, the district court also erred in refusing to order severance under Rule 14. *See Zafiro v. United States*, 506 U.S. 534 (1993) (discussing conditions for Rule 14 severance).

If ever there were a case where "evidence of a codefendant's wrongdoing . . . erroneously . . . [led] a jury to conclude that a defendant was guilty," *Zafiro,* 506 U.S. at 539, this is it. Warner's right to a fair trial was doomed the day Ryan was added as a defendant. Ryan was much maligned in the press. R.49, Tr.21319 (JA.933). Responsibility for a tragic auto accident where six children perished (and the driver had allegedly obtained his license through bribery) had been laid at Ryan's doorstep. *Father of 6 Dead Seeks Accountability*, CHI. TRIB. October 25, 2005, at 1; *see also* Tr.4844. Because of adverse public sentiment, picking unaffected jurors proved difficult and protracted. It is doubtful jurors would have harbored hidden agendas or sought celebrity if they were selected to try an unknown businessman.

Judicial economy concerns undergird broad construction of joinder rules. Notably, severance of the Ryan-only counts would not have resulted in unduly duplicative testimony. In large part, witnesses who testified on the Ryan-only counts had nothing to say about Warner. *See* R.829 (JA.668). A separate trial on the Ryan false statement and tax charges would have been just that – a separate trial requiring little repetition of evidence admissible at a Ryan/Warner trial.[12] *See United States v. Bronco*, 597 F.2d 1300, 1303 (9th Cir. 1979); *United States v. Stone*, 826 F. Supp. 173 (W.D.Va. 1993).

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[12] Ryan, too, requested severance of the tax and false statement charges. R.150.

A parade of witness testified at trial about events having no connection to Warner. Evidence inadmissible against Warner was highly prejudicial. Some of it paralleled the crimes for which Warner was on trial (*i.e.*, state leases and contracts), thereby permitting the jury to find guilt based on impermissible propensity considerations. *Cf. United States v. Paladino*, 401 F.3d 471, 475 (7th Cir. 2005); *United States v. Coleman*, 22 F.3d 126, 134 (7th Cir. 1994). Furthermore, although Warner was neither a public official nor charged with tax evasion, much of the trial scrutinized over a decade of state business, as well Ryan's lifestyle and personal and political campaign finances. The "thoroughly discredited doctrine" of guilt by association, *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959), infiltrated the jury's consideration of Warner's case. *Cf. Kotteakas v. United States*, 328 U.S. 750, 774 (1946).

Another item of evidence that could never have been admitted against Warner at a separate trial was the Willis accident, *i.e.*, the traffic accident in which six children died. *See Zafiro*, 506 U.S. at 539 (risk of prejudice "might occur when evidence ... the jury should not consider against a defendant and ... would not be admissible if a defendant were tried alone is admitted against a codefendant"). Although the evidence was "sanitized," it was not altogether excluded. Tr.4901 (JA.820), 19388 (JA.923). The mere mention of the IG's failure to investigate this tragedy inflamed the jury's emotions and made it impossible for Warner to obtain a dispassionate adjudication based solely on evidence admissible against him.

The unique circumstances of this case also led to the compromise of Warner's constitutional right to confrontation. *Cf. Zafiro*, 506 U.S. at 539. Ryan's out-of-court statements to the FBI were "testimonial" in nature, *Davis v. Washington*, 126 S.Ct. 2266 (2006), *Crawford v. Washington*, 541 U.S. 36, 51 (2004), *United States v. Rashid*, 383 F.3d 769, 776 (8th Cir. 2004), irrespective of whether the evidence was "technically admissible only against" Ryan,

Zafiro, 506 U.S. at 539, or labeled as not offered for its truth. Warner simply was not afforded an opportunity to cross-examine the declarant and thus was denied the Constitution's reliability-testing tool. *Crawford*, 541 U.S. at 60. At a separate Warner trial, Ryan's hearsay statements could not have been admitted. Consequently, this is a case in which the defendant was prejudiced by "[e]vidence that is probative of a defendant's guilt but technically admissible only against a codefendant." *Zafiro*, 506 U.S. at 539. Indeed, Ryan's statements were offered as admissions against him. Because the prosecution strenuously asserted that Ryan's statements were false, the jury could not help but take this evidence as evincing consciousness of guilt on charges involving Warner.

To attain appellate relief, the defendant must rebut presumptions that a jury capably sorts through evidence and follows limiting instructions. *Stillo*, 57 F.3d at 557. Warner has done so here. As part of his proposed final jury instructions, Warner unsuccessfully offered a neutral instruction identifying witnesses who did not testify against him, and, in instances in which witness testimony was partially admitted, the general inadmissible topics. R.660 (JA.674); Tr.21912-14 (JA.938). Given the length of the trial, it was wholly unrealistic to have expected jurors to recall witnesses and evidence not admitted against Warner. This is not a case where compartmentalization of the evidence was facile. *Cf. Lanas*, 324 F.3d at 900; *United States v. Thompson*, 286 F.3d 950, 968 (7th Cir. 2000); *United States v. Hedman*, 630 F.2d 1184, 1200 (7th Cir. 1980).

What's more, two alternate jurors were introduced into the jury deliberations 18 days after the court initially read the final jury instructions. Regardless of good intentions, it simply was asking too much to think alternate jurors could have recalled the many items of evidence not admitted against Warner. At a minimum, a jury instruction identifying the evidence

was necessary to ensure Warner was not convicted on the basis of evidence admitted only against Ryan. The limiting instructions given at trial were for naught without a final summary instruction. *Cf. United States v. Vega Molina,* 407 F.3d 511, 522 (1st Cir. 2005); *United States v. Cortinas,* 142 F.3d 242, 248 (5th Cir. 1998); *United States v. Cavale*, 688 F.2d 1098, 1108 (7th Cir. 1982); *United States v. Rich*, 343 F. Supp. 2d 411 (E.D.Pa. 2004).

Furthermore, the jurors repeatedly demonstrated an inability to follow instructions on a variety of topics. As catalogued in Warner's posttrial motion, jurors did not follow instructions requiring disclosure of prior arrests or court-contacts on the jury questionnaire; failed to bring exposure to publicity to the court's attention; failed to follow directions about their notebooks; violated instructions not to talk about the case with third parties or among themselves before deliberations; and violated the bans on Internet research or reliance on outside law. R.818 (JA.715). If jurors could not follow simple instructions on these topics, they could not have followed more-difficult instructions regarding evidence compartmentalization, separate consideration, the burden of proof and the elements of complex federal offenses. *Cf. Calderon*, 151 F.3d at 983; *United States v. Colombo*, 869 F.2d 149, 151-52 (2d Cir. 1989). Indeed, this is not a case where mixed verdicts manifest the jury's adherence to evidence compartmentalization and separate consideration instructions. *See Thompson*, 286 F.3d at 968; *United States v. Phillips*, 239 F.3d 829, 839 (7th Cir. 2001); *Stillo*, 57 F.3d at 557-58; Wright & Miller, 1A *Federal Practice and Procedure Crim.*3d, § 223, pp. 83-86 (2005). Moreover, while the district court termed Warner's argument regarding the jurors' inability to follow instructions "excellent" (5/5/06 Tr.101 (JA.623)), it denied Warner's motion for a new trial.

VIII. RYAN'S COUNSEL WAS COMPELLED TO GIVE GRAND JURY TESTIMONY IN VIOLATION OF THE ATTORNEY-CLIENT PRIVILEGE

Ryan's chief legal counsel in the SOS office was compelled to provide grand jury testimony related to communications he had with Ryan for the purpose of providing legal advice. Testimony in the case covered a broad range of topics underpinning the indictment, including the reorganization of the IG office, fundraising by SOS employees, various contracts and leases, and the tax treatment of CFR funds and expenditures. *See In re Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002). Ryan asserted the attorney-client privilege and sought to quash the grand jury subpoena, but this Court held that conversations between Ryan and his SOS counsel were not privileged because the privilege ran to the office, not the officeholder, and the duty of public lawyers to uphold the law outweighed any need for a privilege. *Id.* at 293-94.

The Second Circuit has since decided the same issue in a grand jury investigation of the former governor of Connecticut, and has held that communications between the governor and his counsel in the governor's office are privileged because it is "in the public interest for high state officials to receive and act upon the best possible legal advice." *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005). The Second Circuit acknowledged that its holding was in direct conflict with this Court's opinion and that it was creating a circuit split. *Id.* at 536 n.4 ("Our decision is in conflict with the Seventh Circuit's decision in *Ryan*"). We re-raise the issue here to preserve it for further review and to present this Court with the opportunity to revisit its prior decision.

CONCLUSION

For these reasons, Warner and Ryan respectfully request that the Court reverse their RICO and mail fraud convictions and order a new trial as to the remaining counts, or alternatively, reverse and remand for a new trial on all counts.

Respectfully submitted,

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certify that the foregoing consolidated brief complies with this Court's order permitting a consolidated brief of no more than 22,000 words because it contains 21,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft Office Word 2003, the software application used to create this brief.

One of Warner's Attorneys

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Dated: December 14, 2006

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

The undersigned counsel certify that pursuant to Circuit Rule 31(e), they have filed electronically on a virus-free disk, versions of the brief and all of the Circuit Rule 30(a) and 30(b) appendix items that are available in non-scanned PDF format.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

The undersigned counsel certify that all materials required by Circuit Rule 30(a) and (b) are included in the appendices.

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CERTIFICATE OF SERVICE

The undersigned counsel certify that on December 14, 2006, they caused three true and correct copies of the foregoing Brief And Required Short Appendix Of Defendants-Appellants Lawrence E. Warner And George H. Ryan, Sr., one digital copy of the brief and available appendix materials on CD, and two copies of the Separate Joint Appendix (Volumes I-IV) to be served by messenger on the following:

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