No. _____

In The

Supreme Court of the United States

TONY NELSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID DUNCAN*
HARVEY A. SILVERGLATE, of counsel
EMMA QUINN-JUDGE
ZALKIND DUNCAN & BERNSTEIN LLP
65A Atlantic Avenue
Boston, MA 02110
(617) 742-6020
dduncan@zalkindlaw.com
Attorneys for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Skilling v. United States*, 130 S. Ct. 2896 (2010), this Court recognized that the broad sweep of the honest services mail fraud statute triggered substantial due process concerns. The Court therefore limited the statute's application to "offenders who, in violation of a fiduciary duty, participate[ ] in bribery or kickback schemes." 130 S. Ct. at 2930. Justice Scalia, concurring in part and in the judgment, cautioned that this narrowing failed to "solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery . . . restriction applies." 130 S. Ct. at 2938 (Scalia, J., concurring). In this criminal prosecution of an unpaid government appointee, the following important question is presented:

1. Whether the honest services mail fraud statute, 18 U.S.C. § 1346, and federal funds bribery statute, 18 U.S.C. § 666, are unconstitutionally vague where they fail to provide notice of the scope of the fiduciary duty, compromise of which for money is a breach of a government appointee's duty of honest services.

PARTIES TO THE PROCEEDING

Petitioner is Tony Nelson, defendant-appellant below. Frank Bernardino was an additional defendant in the district court; he was not a party in the court of appeals and is not a party here.

Respondent is the United States of America, appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Tony Nelson ("Nelson"), defendant-appellant below, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, filed on March 13, 2013.

OPINION BELOW

The opinion of the court of appeals (App. A.) is reported at 712 F.3d 498.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2013. A petition for rehearing and rehearing en banc was denied on June 13, 2013. (App. B.) The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted at App. 44-48.

STATEMENT OF THE CASE

A. Background Law

More than twenty-five years ago, the Supreme Court invalidated the honest services fraud doctrine because it raised serious vagueness issues with the mail fraud statute, 18 U.S.C. § 1341. *See McNally v. United States*, 483 U.S. 350 (1987). Congress immediately passed 18 U.S.C. § 1346, reinstating and codifying the honest services fraud doctrine without any limitation. In the ensuing decades, the courts of appeals "divided on how best to interpret the statute," but "[u]niformly . . . declined to throw out the statute as irremediably vague." *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (footnotes omitted). In *Skilling*, this Court once again intervened to make clear that, broadly interpreted, the statute "raise[d] the due process concerns underlying the vagueness doctrine." *Id.* at 2931 (footnote omitted). While the concept of "honest services" had been given a myriad of interpretations by the various courts that addressed it, *see Skilling*, 130 S. Ct. at 2936-38 (Scalia, J., concurring), until *Skilling*, no court drew the obvious conclusion that, interpreted broadly, the statute was unconstitutionally vague on its face.

Skilling purported to clarify the statute and to alleviate the vagueness problem by eliminating ambiguity. In doing so, the Court rejected the government's argument that the honest services statute reached "undisclosed self-dealing . . . *i.e.,* the taking of official action by [an] employee that furthers his

own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 2932. Instead, *Skilling* limited the statute's reach to its supposed pre-*McNally* core: "offenders who, in violation of a fiduciary duty, participate[ ] in bribery or kickback schemes." 130 S. Ct. at 2930.

Justice Scalia, joined by Justices Kennedy and Thomas, concurred in part and in the judgment, but observed that the Court's limiting construction does not cure all vagueness because it does "not solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies." *Skilling*, 130 S. Ct. at 2938 (Scalia, J., concurring). Justice Scalia noted that among the several courts of appeals decisions considering the issue "[t]here was not even universal agreement concerning the *source* of the fiduciary obligation – whether it must be positive state or federal law . . . or merely general principles." *Id*. at 2936 (emphasis in original; citations omitted). The *Skilling* majority responded by observing that debates about the "source and scope of fiduciary duties" were "rare in bribe and kickback cases," where, the majority asserted, "[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute." *Id.* at 2930 n.41.

The source and scope of Nelson's fiduciary duty in this case is not beyond the dispute; indeed, it is at the heart of the case. Nelson was a part-time unpaid board member of a public agency, and as such, was

expected to earn a living while serving his community. Nelson is hardly unique – state, local, and municipal governments throughout this country rely on countless volunteers and part-time employees to fulfill critical functions. Because they are unpaid (or, in some cases, receive a small stipend or salary), these individuals must typically earn their living by engaging in other, typically private sector, work. Thus, in order to protect citizen volunteers from arbitrary or politically-motivated prosecutions and to ensure the continuing participation of qualified individuals in public service, the law must provide clear notice of the distinction between permitted private sector activities and proscribed conduct. As this case demonstrates, *Skilling* left unfinished business: absent a clear definition of the fiduciary duty, breach of which constitutes a violation of the honest services statute, part-time and volunteer public servants lack constitutionally adequate notice of the line between lawful and unlawful conduct.

B. Background Facts

Petitioner Tony Nelson was a prominent African-American businessman in Jacksonville, Florida. He was appointed to the board of the Jacksonville Port Authority ("JaxPort") in 2001, reappointed in 2005, and served as chairman starting in March 2006. App. 3. Board members serve on a part-time basis without pay. *Id.*; App. 20. The board's function was to vote on some, but not all, contracts, to hire the executive

director of JaxPort, and to provide "vision" for the executive director. App. 24 n.16.

JaxPort maintains a 40-foot deep channel that permits cargo ships to enter the port and contracts with private companies for dredging. *See* App. 3; Tr. vol. 3, 28-29.[1] Subaqueous Services, Inc. ("SSI"), a dredging company owned by unindicted co-conspirator Lance Young, App. 3, obtained three contracts for dredging services from Jaxport, starting – before the charged acts in this case – in December 2005, Tr. vol. 3, 42-49. SSI was awarded these contracts as the low bidder, performed well on them, and neither Nelson nor any other board member was involved in the selection process by which SSI was awarded its contracts. Tr. vol. 3, 42-49, 79; Tr. vol. 9, 214.

In August 2006, Young entered into an agreement with Nelson to pay Nelson $8,500 a month for Nelson's "access" at JaxPort. App. 6; Tr. vol. 6, 234-36. Young paid Nelson's company, Ja-Ash, through SSI's statewide lobbyist, Wren: Wren entered into a written contract with Nelson's Ja-Ash, and SSI increased its payments to Wren to cover the cost of Nelson's contract. App. 6.

Before contracting with Nelson, Young had a contract with another JaxPort board member, Marty

[1] Citations to "Tr." refer to the trial transcript; "Def. Ex." refers to Nelson's exhibits below; "Dkt. No." refers to docket entries in the trial court.

Fiorentino. App. 4. Young hired Fiorentino in 2005, shortly after SSI began seeking dredging business in Jacksonville, and Young paid Fiorentino $5,000 a month for his services. *Id.*; Tr. vol. 3, 137-38, 146-50. Young testified that he hired Fiorentino in part for "access" at JaxPort. Tr. vol. 4, 134. Shortly before SSI won its first dredging contract with JaxPort, Fiorentino arranged a meeting between Young and the JaxPort Executive Director at which Young pitched SSI's services. Tr. vol. 3, 191-93. In arranging this meeting, Fiorentino did not disclose the full details of his relationship with Young; Fiorentino disclosed that he had been hired to help Young with a matter before the City of Jacksonville, but not that he had also been hired to provide access to JaxPort. Tr. vol. 9, 158-59, 218-19.

Fiorentino also introduced Young to JaxPort board member Nelson, and Nelson and Young became good friends. App. 4. During Young's contract with Fiorentino, Young complained to Nelson that he was dissatisfied with Fiorentino's performance. App. 6. When Fiorentino's contract ended in 2006, Young opted not to renew. *Id.* Fiorentino recommended that Young talk to Nelson. *Id.* Young testified that when he told Nelson of his disappointment with Fiorentino, Nelson responded that he (Nelson) was doing more at JaxPort for Young than Fiorentino had; Young further testified that Nelson told Young to put him on the payroll, a request that Young took to be a solicitation for a bribe. *Id.* Young had earlier stated, when

interviewed by the FBI, that he hired Nelson as the replacement lobbyist to Fiorentino. Tr. vol. 7, 52-53.

Nelson was aware that while Fiorentino was working for Young, Fiorentino had obtained an opinion from the Jacksonville General Counsel's office that he could lobby on behalf of Young at JaxPort, so long as he abstained from taking any votes on matters concerning Young or SSI. *See* App. 4; App. 37 (Hill, J., dissenting). Nelson discussed this opinion with Young and Young's corporate attorney and told them that his involvement with Young was cleared by General Counsel so long as he did not vote on matters concerning SSI. Tr. vol. 4, 215-21; Tr. vol. 6, 296-97. This was consistent with the JaxPort orientation manual that new board members received, which instructs appointed directors that they may not vote on matters that present a conflict of interest, but are otherwise permitted to participate in matters where they have a conflict of interest. Tr. vol. 6, 284-90; Tr. vol. 9, 208-09; Def. Ex. 4A. Neither Fiorentino nor Nelson ever voted on a matter that affected SSI while Young owned SSI, App. 7; Tr. vol. 4, 215-21; Tr. vol. 6, 296-97, and no JaxPort staff member testified to pressure from Nelson to do something illegal, *see* Tr. vol. 9, 213-14; Tr. vol. 10, 102-03.

Fiorentino was not prosecuted and the government has *consistently* taken the position that Fiorentino did not, in fact, commit a crime. *See, e.g.,* Dkt. No. 227, at 6, 14.

Much of the evidence at trial focused on Nelson's concealment of his financial relationship with Young and SSI. In February 2008, Nelson confronted City Counselor Lake Ray after Ray – who, in addition to serving as City Counselor was himself also an engineer employed by a major JaxPort contractor – alleged that Nelson had an improper financial relationship with a contractor at JaxPort. *See* App. 8; Tr. vol. 6, 242-59; Tr. vol. 9, 155-75. Nelson also discussed Ray's allegations with Jacksonville's General Counsel, Cindy Laquidara, and told her about a joint venture with Young to bid for Corps of Engineers work but did not disclose the monthly payments he received. App. 8. Based on that limited description of his financial relationship with Young, Laquidara advised Nelson that he was in compliance with Florida ethics requirements. *Id.* Nelson also emphatically denied, in an interview with a JaxPort Ethics Officer, having received any money from Young or SSI. App. 8-9. In an April 2008 FBI interview, Nelson denied having a business relationship with Young and stated that the $50,000 payment from Young was a loan. App. 10.

Nelson's efforts at JaxPort for SSI consisted of speaking to JaxPort staff in favor of Young and SSI on such issues as reimbursement to SSI for additional expenses, an increase in SSI's contract payment for fuel costs, and early release of a substantial sum of money that JaxPort was holding as retainage pending completion of a large contract on which SSI was a subcontractor and had completed its work. App. 7-8.

SSI was successful in getting reimbursed for expenses and getting the retainage released, but unsuccessful in increasing its fuel reimbursement. *Id.* Young and others testified without contradiction that these were all legitimate expenses for services SSI provided. Tr. vol. 5, 161, 166; Tr. vol. 8, 72-73; Tr. vol. 10, 94-95, 101-02. No JaxPort staff testified that Nelson influenced any of their decisions. *See* Tr. vol. 9, 213-14; Tr. vol. 10, 102-03. Indeed, as the sentencing court observed, there was "no evidence of monetary loss in this case to the Port, nor is there any evidence that SSI benefitted monetarily from Port business in any way that it wouldn't have anyway" because SSI "already had a contract and they were paid under their contract." Sentencing Tr. 62, Feb. 3, 2012. Thus, the sentencing court went on, the government "struggled" to identify a quid pro quo, *id.* at 63; indeed, the government conceded at oral argument before the court of appeals that it had *not* demonstrated a quid pro quo in this case (and was not required to do so under Eleventh Circuit precedent). *See* Pet. for Reh'g 12 n.30.

C. Procedural Background

On January 21, 2010, Nelson was indicted in a forty-four count indictment charging honest services mail fraud in violation of 18 U.S.C. §§ 1341 and 1346, federal program bribery in violation of 18 U.S.C. § 666(a)(1)(B), money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(1&2) (predicated on the mail fraud and bribery charges), a single false statement

count in violation of 18 U.S.C. § 1001, and conspiracy to commit the first three substantive offenses in violation of 18 U.S.C. § 371. Nelson vigorously contested the charges. At trial, he argued that in entering into an agreement with Lance Young and SSI, he did not breach his official duties as a member of the JaxPort board, Tr. vol. 12, 66-68, and that, moreover, he, like Marty Fiorentino before him, was expressly authorized to act as a consultant and to advocate for SSI at JaxPort so long as he did not vote on matters concerning SSI, Tr. vol. 12, 68, 82-83.

The jury was instructed that Nelson's duty to provide honest services was "established by federal law." App. 52. The scope of that duty was defined no further, except for the explanation that the duty is violated "[i]f an official serves his personal interests by taking or agreeing to take *a bribe*." *Id.* (emphasis added). The jury instructions went on to explain – with complete circularity – that Nelson took a bribe if he acted corruptly or with an intent to defraud and that he had an intent to defraud or acted corruptly if he took a bribe. App. 51, 53, 55.

On May 20, 2011, Nelson was convicted of honest services mail fraud, federal funds bribery, conspiracy to commit mail fraud and bribery, money laundering, and a single false statement count.[2] Nelson's post-verdict motions for judgment of acquittal and for a

[2] Counts 37-43 were severed and then dismissed after trial; the jury found Nelson not guilty on one count of mail fraud.

new trial were denied.[3] Nelson was sentenced to concurrent terms of 40 months on all counts.

Nelson appealed, arguing, *inter alia*, that the honest services and bribery statutes were vague as applied because – absent any definition of the scope of Nelson's fiduciary duty, breach of which constituted a violation – the statutes failed to provide any criteria for determining guilt or innocence. The court of appeals affirmed Nelson's convictions in a split decision, issuing three separate opinions. Senior District Judge Paul C. Huck, sitting by designation, observed that because Nelson had been charged with bribery, he could not "tenably complain about . . . vagueness." App. 22 (quoting *Skilling*, 130 S. Ct. at 2934). Circuit Judge Charles R. Wilson concurred, writing separately to emphasize his view that the court's holding did not criminalize Nelson's concealment of his financial interest; rather, Judge Wilson characterized Nelson's concealment as a "symptom" of his criminal conduct. App. 34 (Wilson, J., concurring). Judge Wilson further observed that it was "unfortunate" that Nelson appeared to have been "swept up in what was the standard operating procedure for the board's unpaid, part-time members." App. 36. (Wilson, J., concurring). Despite the government's concession that it had *not* in fact established a quid pro quo, both the majority and concurrence noted that the government's quid pro quo showing – while not required in the Eleventh

[3] Co-defendant Frank Bernardino's Rule 29 motion was granted at the close of the evidence.

Circuit – helped to mitigate any potential vagueness concerns. App. 23, 35.

Senior Circuit Judge James C. Hill dissented, arguing that the majority conflated concealment with a violation of fiduciary duties: "Tony Nelson concealed his financial relationship with SSI from JaxPort. This was not a crime. . . . Nelson's concealment of a financial interest in SSI was not a violation of his fiduciary duty to JaxPort. It did not deprive JaxPort of his honest services." App. 36-37. The dissent flatly rejected the argument that concealment of a financial interest proved bribery by establishing the requisite intent. App. 39-40. First, evidence of concealment establishes only concealment, not the motive for such concealment, which, in this case, could as easily have been something else: "Perhaps tax evasion was his motive. That is a crime; just not the crime charged here." App. 40. Second, "[b]ribery requires a corrupt agreement to perform an *unlawful* official act," and here, Nelson agreed to perform a lawful act, because he was permitted to lobby JaxPort. *Id.* Thus, "[e]ven if the government had proved a *mens rea*, I don't believe that it proved an *actus reus* in this case." *Id.* Finally, the dissent observed that the jury instructions in the case were "fatally defective," because the "jury was instructed that Nelson had a duty to JaxPort, the existence of which is an essential element of the crime of honest services fraud. But they were never enlightened as to the *nature and limits* of this duty," a fatal flaw given that "Nelson was a part-time, unpaid member of the board [of JaxPort], fully

entitled to lobby JaxPort on behalf of SSI and to be paid for those efforts." *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the question left unanswered in *Skilling*, namely, what is the scope of an official's duties to the public, compromise of which for money taken is a breach of his duty of honest services. The courts of appeals do not agree on the source or scope of this duty, breach of which constitutes an honest services violation. Disagreement on this point existed before *McNally*, before *Skilling*, and now continues, despite this Court's attempt in *Skilling* to establish a uniform national standard for the honest services statute. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling*, 130 S. Ct. at 2927-28 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The lack of a clear and consistent definition of the scope of an individual's fiduciary duty, breach of which violates the honest services statute, makes it impossible for the many unpaid and part-time state, local, and municipal appointees, employees, and other officials to determine what conduct is permitted and proscribed. This problem is particularly acute because these individuals must necessarily

make a living, typically in the private sector, while serving their communities for little or no income, and a vague statute therefore leaves numerous public servants vulnerable to arbitrary, discriminatory, or politically-motivated enforcement.

A. The Honest Services Statute Remains Vague After *Skilling* Because It Fails to Define the Fiduciary Duty Whose Breach Is a Violation of the Law

The honest services mail fraud statute, 18 U.S.C. § 1346, prohibits engaging in a "scheme or artifice to deprive another of the intangible right of honest services." Because the broad and vague language of this statute triggers substantial due process concerns, this Court in *Skilling* limited its application to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." 130 S. Ct. at 2928. To read the statute "to proscribe a wider range of offensive conduct" would, the Court acknowledged, "raise the due process concerns underlying the vagueness doctrine." *Id.* at 2931.

In narrowing the statute, this Court sought to avoid leaving open questions about the scope of the honest services prohibition. Thus, the Court rejected the government's proposed formulation, that the statute be read to prohibit the "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in

the interests of those to whom he owes a fiduciary duty, so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior." 130 S. Ct. at 2933 n.44. That formulation, the Court noted, "leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest to amount to fraud?" *Id.* In other words, under the government's formulation, it would have been difficult to draw the line between permitted and proscribed conduct or to determine at what point a defendant had breached his fiduciary duty. This proposed broader reading of the statute was therefore rejected as impermissibly vague. *Id.*

The majority concluded that such vagueness concerns were alleviated by limiting the statute to bribery and kickbacks. Justice Scalia cautioned, however, that the Court's limiting construction would not cure the vagueness at the heart of the statute because it would "not solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies." *Skilling*, 130 S. Ct. at 2938 (Scalia, J., concurring in part and concurring in the judgment). In other words, "even with the bribery and kickback limitation the statute does not answer the question 'What is the criterion of guilt?'" *Id.* at 2939. The majority responded that such questions were unlikely to be triggered in the bribery and kickback context

because debates about the "source and scope of fiduciary duties" were "rare" in bribery and kickback cases, where "[t]he existence of a fiduciary relationship under *any* definition of that term, was usually beyond dispute." *Id.* at 2930 n.41 (emphasis added). Thus, it was – in the majority's view – unnecessary to define the fiduciary duty at issue in bribery or kickback cases.

And indeed, in many bribery or kickback cases the nuances of a government actor's fiduciary duties may not be relevant. However, where, as in Nelson's case, an unpaid or part-time public servant is permitted to have financial relationships within the private sector, is permitted to lobby the public board on which he serves, and has watched a colleague previously enter into a similar financial relationship (that the government characterizes as legitimate and legal), due process – constitutionally adequate notice – requires a clear understanding of the scope of the public official's duties, compromise of which for money is a violation of the honest services statute. The statutes of conviction – here the honest services and the federal program bribery statutes[4] – must

[4] The federal funds bribery statute criminalizes "corruptly" demanding, soliciting, or accepting a bribe and the jury was instructed that Nelson acted "corruptly" if he "act[ed] voluntarily, deliberately and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result." App. 53, 55. Because the unlawful conduct charged was Nelson's violation of the honest services statute, Nelson's bribery conviction is

(Continued on following page)

provide a clear distinction between one official who takes money for the purpose of providing access to his agency and in fact provides such access (*e.g.,* Nelson's colleague Fiorentino) and another public official who takes money for the purpose of providing access to his agency and in fact provides such access (Nelson). Indeed, two of the three court of appeals judges who reviewed Nelson's case were unable to spot a meaningful distinction between Fiorentino's conduct and Nelson's conduct. App. 36 ("I must agree that I am unable on this record to discern a difference between Fiorentino's conduct and Nelson's") (concurring);[5] App. 38 ("The only difference that I can see between what the government says is the innocent conduct of Fiorentino and the guilty conduct of Nelson is that Nelson concealed his relationship with SSI. This is not a crime."). The missing element is the nature and scope of the fiduciary duty that must be violated to establish an honest services conviction.

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inextricably intertwined with his honest services conviction. App. 13 n.7 ("In this case, the honest-services statute also potentially modifies the federal funds bribery statute.").

[5] Judge Wilson, who concurred in the decision affirming Nelson's conviction, discerned no distinction in the conduct of Fiorentino and Nelson, but deferred to what he understood to be the government's exercise of its prosecutorial discretion. App. 36. ("For whatever reason, the Government opted not to pursue Fiorentino, and the Court has no authority – absent very unusual circumstances – to interfere with the exercise of the prosecutor's charging discretion.") The government, however, never claimed that it exercised such discretion; rather, the government has steadfastly maintained that Fiorentino did not break the law. *See, e.g.*, Dkt. No. 227, at 6, 14.

B. The Courts of Appeals Are Split on the Nature, Scope, and Source of the Fiduciary Obligation Underlying the Honest Services Statute

Disagreement as to the nature, scope, and source of the fiduciary obligation, violation of which constitutes a breach of the duty of honest services, was pervasive before *Skilling* and remains so after *Skilling*, despite the limits set in that case. This conflict in the circuits existed before *McNally*, between *McNally* and *Skilling*, and continues to this day. That the courts of appeals continue to disagree on the underlying conduct required to violate the honest services statute – i.e., on the duty that must be breached to violate the statute – illustrates the fact that even as narrowed, the statute remains plagued by vagueness when applied in many different contexts.

Prior to *McNally*, "[n]one of the 'honest services' cases, neither those pertaining to public officials nor those pertaining to private employees, defined the nature and content of the fiduciary duty central to the 'fraud' offense." 130 S. Ct. at 2936 (Scalia, J., concurring). These pre-*Skilling* cases variously located the fiduciary duty in "positive state or federal law," *id.* (citing *United States v. Rabbitt,* 583 F.2d 1014, 1026 (8th Cir. 1978)), "general principles," *id.* (citing *United States v. Lemire*, 720 F.2d 1327, 1336 (D.C. Cir. 1983)), in "trust law," *id.* (citing *United States v. Gray*, 790 F.2d 1290, 1294 (6th Cir. 1986)), and even the "general law of agency," *id.* (citing *United States*

v. Ballard, 663 F.2d 534, 543, n.22 (5th Cir. 1981)). Where courts relied on a "federal, common-law fiduciary duty[,] the duty remained hopelessly undefined," with courts describing the duty "in astoundingly broad language." *Id*. at 2937. And "[m]any courts held that some *je-ne-sais-quoi* beyond a mere breach of fiduciary duty was needed to establish honest-services fraud," although "there was disagreement as to what the addition should be." *Id.*

After *McNally* and before *Skilling*, the circuits remained split as to the fiduciary duty requirements. The Second and Eighth Circuits concluded that breach of a fiduciary duty was not even an element of an honest services violation. *United States v. Ervasti*, 201 F.3d 1029, 1036 (8th Cir. 2000); *United States v. Sancho*, 157 F.3d 918, 920 (2d Cir. 1998), *overruled on other grounds by United States v. Rybicki*, 354 F.3d 124, 144 (2d Cir. 2003) (en banc); *see also Rybicki*, 354 F.3d at 155 (Raggi, J., concurring). The Fifth Circuit required a state law violation to sustain an honest services conviction, *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (en banc); *see also United States v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006) (honest services owed under state law include "fiduciary duties defined by the employer-employee relationship"), while the First, Third, and Seventh Circuits concluded that state law could be used to supply the fiduciary obligation but was not necessarily required, *see United States v. Sorich*, 523 F.3d 702, 712 (7th Cir. 2008); *United States v. Murphy*, 323 F.3d 102, 116-17 (3d Cir. 2003); *United States v. Sawyer*,

239 F.3d 31, 41-42 (1st Cir. 2001). By contrast, the Sixth, Ninth, and Eleventh Circuits explicitly held that "[f]ederal law governs the existence of fiduciary duty under the mail fraud statute." *United States v. Frost*, 125 F.3d 346, 366 (6th Cir. 1997); *see also United States v. Weyhrauch*, 548 F.3d 1237, 1248 (9th Cir. 2008) (honest services statute establishes a uniform federal standard); *United States v. deVegter*, 198 F.3d 1324, 1329 (11th Cir. 1999) ("The nature and interpretation of the duty owed is a question of federal law.").

Since *Skilling* adopted its limiting construction of the statute – and in doing so also purported to establish a "uniform national standard," 130 S. Ct. at 2933 – the courts of appeals that have squarely addressed fiduciary duty have consistently acknowledged that breach of such a duty *is* required to establish an honest services violation. *See, e.g.*, *United States v. Milovanovic*, 678 F.3d 713, 722 (9th Cir. 2012) (en banc); *see also United States v. Urciuoli*, 613 F.3d 11, 17-18 (1st Cir. 2010). However, beyond that basic point, the courts of appeals continue – as before *McNally* and *Skilling* – to disagree about the nature, source, and scope of that duty. Consistent with its pre-*Skilling* jurisprudence, the Fifth Circuit still looks to – and indeed, may still even *require* – violation of a state law duty to sustain an honest services conviction. *See United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012) ("[W]e read *Skilling* as recognizing that § 1346 prosecutions may involve misconduct that

is also a violation of state law.); *United States v. Sanchez*, 502 F. App'x 375, 381 (5th Cir. 2012) (unpublished) (finding error in federal-law based instructions because *Skilling* "does not obviate the requirement that a state official, when prosecuted under § 1346, owe a state-law duty"). The Ninth Circuit has held that the fiduciary duty required to be breached "is not limited to a formal 'fiduciary' relationship well-known in the law," *Milovanovic,* 678 F.3d at 724, while the Eleventh Circuit has described the duty broadly, stating that public officials "inherently" owe a duty, the scope of which is left undefined, App. 22.

Other circuits, without explicitly framing the issue in terms of fiduciary duty, have limited post-*Skilling* bribery convictions of public officials to schemes involving "a specific intent to give or receive something of value in exchange for *an official act*," *United States v. Wright*, 665 F.3d 560, 567-68 (3d Cir. 2012) (emphasis added and removed) (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999)); *see also United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013)); *United States v. Ring*, 706 F.3d 460, 465 (D.C. Cir. 2013); *cf. United States v. Jefferson*, 674 F.3d 332, 351-55 (4th Cir. 2012) (relying on *United States v. Birdsall*, 233 U.S. 223, 230-31 (1914) to define the "official acts" involved in exchange constituting bribery as including acts

required by written rule or clearly established by settled practice of the defendant's agency).[6]

Thus, even after *Skilling*, the courts of appeals cannot agree on the nature or scope of the duty whose breach violates the honest services statute. This continued inconsistency – indeed incoherence – among the circuits underscores the due process concerns raised by Nelson, namely that the statute

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[6] This formulation, which requires that the bribe be "in exchange" for a particular act also embodies a quid pro quo requirement, which the D.C., First, Second, Third, and Ninth Circuits have held is required for a conviction of honest services bribery. *See United States v. McDonough*, Nos. 11-2130, 11-2163, 2013 WL 4459062, at *6 (1st Cir. Aug. 21, 2013); *United States v. Rosen*, 716 F.3d at 699-700 (2d Cir. 2013); *United States v. Garrido*, 713 F.3d 985, 997 (9th Cir. 2013); *Ring*, 706 F.3d at 465; *United States v. Andrews*, 681 F.3d 509, 527 (3d Cir. 2012). The Eleventh Circuit has "not held that a *quid pro quo* exchange is required in all honest-services cases," App. 23, although it has noted that *Skilling* does not alter its previous determination that section 666 – the bribery statute at issue in this case and one of the three statutes from which the honest services prohibition on bribery "draws content," *Skilling*, 130 S. Ct. at 2933 – does *not* require a quid pro quo, *United States v. White*, 663 F.3d 1207, 1214 n.6 (11th Cir. 2011). The circuits are clearly split on whether section 666 itself requires a quid pro quo: the Sixth, Seventh, Ninth, and Eleventh Circuits have explicitly rejected a quid pro quo requirement for section 666, *see Garrido*, 713 F.3d at 996; *McNair*, 605 F.3d at 1188; *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009); *United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005), while the Second, Fourth, and Eighth Circuits have explicitly required a quid pro quo, *United States v. Ganim*, 510 F.3d 134, 141-42 (2d Cir. 2007) (Sotomayor, J.); *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998); *United States v. Griffin*, 154 F.3d 762, 763 (8th Cir. 1998).

failed to provide him adequate notice of the distinction between permitted and proscribed conduct, and undercuts this Court's attempt to assuage vagueness concerns by imposing a limiting construction on the statute that creates a uniform national standard. Instead, the vagueness inherent in the honest services doctrine, recognized by this Court in *McNally* and *Skilling*, has now shifted to the fiduciary duty requirement, which – lacking a defined scope or content – is susceptible to wide-ranging and inconsistent interpretations. As Nelson's case illustrates, the vagueness of the fiduciary duty requirement directly undercuts this Court's limiting construction in *Skilling*: there, the Court rejected the government's concealed financial interest theory of prosecution, and here, evidence of a concealed financial interest, no longer a viable theory of prosecution, was transformed to a "symptom" of the crime, rather than the crime itself. Thus, the remaining vagueness in the statute – now shifted, after *Skilling*, into the vague fiduciary duty – amounts to nothing more than a continuing "invitation for federal courts to develop a common-law crime of unethical conduct," *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari); *see also McNally v. United States*, 483 U.S. 350, 360 (1987) (striking down honest services prohibition "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials").

C. The Eleventh Circuit Erred in Affirming Nelson's Conviction

The Eleventh Circuit affirmed Nelson's conviction, concluding that he "inherently owe[d] a fiduciary duty to the public to make governmental decisions in the public's best interest." App. 22 (citing *United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999)). The scope of this "inherent" duty was not, however, specified in the court of appeals' decision (any more than it was in the trial court's instruction to the jury), and thus the decision fails completely to delineate lawful and unlawful conduct. This failure is hardly surprising – the Eleventh Circuit's "inherent" duty standard derives from pre-*Skilling* case law that defined the duty in terms no longer applicable after *Skilling*. Specifically, under the prior standard, this "duty to the public to make governmental decisions in the public's best interest" meant that "[i]f the official instead secretly makes his decision based on his own personal interests – as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest – the official has defrauded the public of his honest services." *DeVegter*, 198 F.3d at 1328 (quoting *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997)). This pre-*Skilling* standard, relied, moreover, on the Eleventh Circuit's pre-*Skilling* view that the honest services statute should be read *broadly* to effectuate Congress's intent. *See Lopez-Lukis*, 102 F.3d at 1171 (relying on "congressional intent to construe the mail fraud statute broadly"). After *Skilling*, rather than reformulating

the fiduciary duty standard to reflect *Skilling*'s narrowing of the statute, the Eleventh Circuit simply relied on its pre-*Skilling* standard, now stripped of its original content and therefore rendered even broader by the absence of any attempt to define its contours.

In failing to give content to its own fiduciary duty standard, the court of appeals also failed to elaborate on the phrase "governmental decisions" or to explain what "governmental decisions" Nelson took in this case. Instead, relying on the Eleventh Circuit's decision in *Lopez-Lukis*, the court of appeals concluded that Nelson had "use[d] his position of authority to direct or influence someone else in his organization to do something that he could not do himself," App. 24, comparing Nelson's conduct to voting on a matter or securing the votes of other board members on a matter, *see id.* at App. 24 n.17. But Nelson did neither, and the court's analysis fails to distinguish between permitted and proscribed activities; if Nelson could legitimately lobby JaxPort had he disclosed his financial interest, there must be an identifiable line between legitimate lobbying (i.e., "us[ing] his position of authority to . . . influence someone else in his organization") and conduct that violated his "inherent" duty as a public official (i.e., "us[ing] his position of authority to . . . influence someone else in his organization"). Where Nelson and Fiorentino were both hired to provide "access" to JaxPort, the Eleventh Circuit's decision fails to explain where the line was between the access provided by Fiorentino

(which was lawful, according to the government) and the access provided by Nelson.

Having failed to define the duty Nelson breached or how, specifically, his conduct breached that duty, the court of appeals noted that any "potential vagueness" in the statutes of conviction was "mitigated by their *scienter* requirements," and thus, because the jury found that Nelson had corrupt intent, Nelson could raise no challenge to the statute as applied. App. 26. The trial judge instructed the jury that the underlying duty to provide honest services is "established by federal law." App. 52. The scope of that duty was defined no further, except for the explanation that it is violated "[i]f an official serves his personal interests by agreeing to take a *bribe*." App. 52 (emphasis added). The jury was further informed that Nelson took a bribe if he took money with the intent to be corruptly influenced or rewarded and with the intent to defraud. App. 51. Thus, the intent to be "corruptly" influenced or rewarded and the "intent to defraud" divided permitted conduct from proscribed conduct. However, because the definitions of both were entirely circular, they failed to provide a coherent standard or to remedy any vagueness problem: the jury was effectively instructed that Nelson took a bribe if he had the intent to do so and had the requisite intent if he in fact took a bribe. App. 51-55.

Absent a clear definition of Nelson's duty – absent clear criteria – the jury would have been propelled to look elsewhere for evidence of Nelson's guilt. And the chief difference between the conduct of

Fiorentino and that of Nelson was that Nelson concealed his financial relationship and later expressed remorse and guilt regarding the relationship, whereas Fiorentino neither concealed nor expressed guilt about the relationship.[7] Indeed, much of the evidence against Nelson at trial consisted of testimony concerning his concealment and admissions of wrongly concealing his relationship with Young and the payments from Young. While intent, or *mens rea*, may "blunt[ ] any notice concern," *see Skilling*, 130 S. Ct. at 2933, and concealment *may* be evidence of intent, *see, e.g.*, *United States v. Langford*, 648 F.3d 1309, 1322 (11th Cir. 2011), if concealment of a financial relationship is what separates a permitted act from a proscribed act, then concealment itself becomes the act being criminalized, running afoul of *Skilling*. Likewise, to the extent that concealment provides evidence of corrupt intent under the federal funds bribery statute, where such intent may serve to mitigate due process concerns by "avoid[ing] prosecution [under section 666] for acceptable business practices," *McNair*, 605 F.3d at 1152, 1188, the reliance on intent must fail if concealment is the *only* factor that renders the business practice corrupt,

[7] As noted above, Fiorentino made at least one incomplete disclosure of the relationship. *See* Tr. vol. 9, 158-59, 218-19. To the extent that Fiorentino concealed some portion of his financial relationship with Young, this renders his innocent conduct that much less distinguishable from Nelson's, highlighting the failure of the honest services and bribery statutes to provide a clear line between permitted and proscribed conduct.

because then enforcement of the bribery statute – and in this case, an honest services conviction based on bribery – relies on the vagaries of an individual defendant's conscience: those who take an action and feel guilty about it are guilty, those who take the same action and feel no guilt are not guilty. Due process cannot rely on a capacity to feel guilt as the sole factor that defines a statute's reach.

The court of appeals observed that, having been charged with bribery, Nelson was hard-pressed to raise a vagueness challenge to his convictions. App. 22. Like the government's view that Nelson took a bribe because he was charged with taking a bribe, this fails to address the fundamental indeterminacy in this case: what is a bribe? Due process requires a standard that clearly differentiates a legitimate business relationship from a violation of the statute. Absent a definition of fiduciary duty, breach of which constitutes a violation of the honest services statute, the statute remains unconstitutionally vague.

D. This Case Raises an Important Constitutional Question That Impacts Numerous State, Local, and Municipal Actors Who Serve Their Communities in Unpaid and/or Part-Time Capacities

Across all levels of state and local government, there are public servants who work part-time or, as in Nelson's case, on an unpaid basis. From state legislators – who serve on a part-time basis in 40

states[8] – to the many individuals who serve unpaid on state, local, and municipal boards that oversee government functions, ranging from education to land use to, as here, a city's port operations, this society relies on the willingness of its citizens to perform civic functions at little or no pay.[9] Millions of government employees also work on a part-time basis: in 2012, well over two million state and local government employees worked part-time.[10] These public servants must be able to earn their living in the private sector, and in doing so, must know what conduct is permitted and what is proscribed.

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[8] *See* Nat'l Conf. of State Legislatures, *Full and Part-Time Legislatures* (2009), http://www.ncsl.org/legislatures-elections/legislatures/full-and-part-time-legislatures.aspx.

[9] In many states, including Florida, "[l]ocal politicians are allowed, if not encouraged, to maintain private careers and businesses to support themselves and their families. Salaries paid to such political figures typically are modest, necessitating that anyone other than those with inherited or earned wealth maintain an income-generating occupation while in public office. . . . [S]tate and local laws and political culture tolerate local officials' engaging in private business dealings that almost certainly benefit from their holding municipal office, so long as they do not engage in official acts, such as voting on municipal bodies on matters that directly affect their own financial interests." Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* 5 (2011).

[10] Bureau of Labor Statistics, U.S. Dep't of Labor, *Current Population Survey* tbl. 16 (2012).

A vague criminal statute creates a threat to due process by failing to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Id.* at 108-09. The risk of arbitrary or discriminatory enforcement is particularly acute in the public sector, where "[t]he lack of statutory specification can give rise to selective prosecution and political misuse." *United States v. Kincaid-Chauncey*, 556 F.3d 923, 949 (9th Cir. 2009), *overruled by Skilling*, 130 S. Ct. 2896; *see also* Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* 14 (2011) (noting that a vague federal statute makes "local politicians increasingly vulnerable to politically or professionally ambitious U.S. attorneys"). A vague statute in the political context also implicates First Amendment concerns, because permitted political speech may be chilled where, as here, the line between permitted lobbying and an improper bribe is hard to discern. *See Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968) ("trying to persuade Congressional action" involves "exercising the First Amendment right to petition").

Nelson's case is thus not the rarity that the *Skilling* majority predicted and it has broad implications for the numerous public servants and citizen volunteers who serve this society in unpaid or

part-time roles. This Court should clear the uncertainty left by *Skilling* so that qualified individuals may continue to participate in state, local, and municipal governments without the risk of arbitrary or discriminatory prosecution under the honest services statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID DUNCAN*
HARVEY A. SILVERGLATE, of counsel
EMMA QUINN-JUDGE
ZALKIND DUNCAN & BERNSTEIN LLP
65A Atlantic Avenue
Boston, MA 02110
(617) 742-6020
dduncan@zalkindlaw.com
Attorneys for Petitioner

**Counsel of Record*

Dated: September 11, 2013

APPENDIX A

712 F.3d 498

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Tony Devaughn NELSON,
Defendant-Appellant.

No. 12-11066.
March 13, 2013.

Susan Hollis Rothstein-Youakim, Robert E. O'Neill, U.S. Attys., Tampa, FL, Mark Devereaux, Bonnie Ames Glober, U.S. Attys., Mac D. Heavener, III, Asst. U.S. Atty., Jacksonville, FL, for Plaintiff-Appellee.

David Duncan, Emma Quinn-Judge, Zalkind, Duncan & Bernstein LLP, Boston, MA, Mark S. Barnett, Curtis Fallgatter, Fallgatter, Farmand & Catlin, PA, Jacksonville, FL, Harvey A. Silverglate, Harvey Silverglate, Cambridge, MA, for Defendant-Appellant.

John D. Cline, Law Office of John D. Cline, San Francisco, CA, for National Ass'n of Criminal Defense Lawyers, Amicus Curiae.

Appeal from the United States District Court for the Middle District of Florida.

Before WILSON and HILL, Circuit Judges, and HUCK,* District Judge.

HUCK, District Judge:

Tony Nelson, a former member of the Jacksonville Port Authority's (JaxPort['s]) board of directors, was convicted in the Middle District of Florida for honest-services mail fraud under 18 U.S.C. §§ 1341 and 1346, federal funds bribery under 18 U.S.C. § 666(a)(1)(B), conspiracy to commit mail fraud and bribery under 18 U.S.C. § 371, and several other crimes predicated on these offenses. On appeal, he challenges his convictions on three grounds. First, Nelson argues that the fraud and bribery statutes under which he was convicted are unconstitutionally vague as applied in this case because they fail to describe the nature and scope of the fiduciary obligations owed by public officials to the public – *i.e.* they lack an "ascertainable standard" by which Nelson and the jury could have determined whether his conduct was unlawful. Second, Nelson argues that he is entitled to a new trial because the district court improperly instructed the jury on what constitutes a "bribe" for purposes of his honest-services and federal funds bribery charges. Finally, Nelson argues that the district court committed reversible error by admitting the testimony of JaxPort's director of procurement,

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* Honorable Paul C. Huck, Senior United States District Judge for the Southern District of Florida, sitting by designation.

Louis Naranjo, which he asserts allowed the jury to convict him on the basis of uncharged conduct.

Upon review of the parties' briefs and the record, and with the benefit of oral argument, we affirm.

I.

JaxPort is an independent agency and political subdivision of the State of Florida and is responsible for the development and maintenance of Jacksonville's public seaport terminals. The agency is governed by a seven-member, all-volunteer board. The Mayor of Jacksonville appoints four members, and the Governor of Florida appoints three others. The board elects a chairman, who leads the board. Board members serve four-year terms and may serve a maximum of two terms. JaxPort has a staff of approximately 150 employees and several officers, including a chief executive officer, who reports to the board.

Nelson was appointed to the board in 2001 by Jacksonville Mayor John Delaney and served as chairman of the board from March 2006 until September 2007. He remained a member of the board until resigning in 2008 amid allegations that he solicited and accepted bribes from one of JaxPort's private dredging contractors, Subaqueous Services, Inc. ("SSI"), and its owner, Lance Young. These

allegations, which we summarize here, led to an FBI investigation and ultimately to this criminal action.[1]

Nelson was introduced to Young in the fall of 2005 by another JaxPort board member, Marty Fiorentino, at Young's Jacksonville Jaguars luxury suite. At the time, Fiorentino, a Jacksonville attorney and lobbyist, was under contract with Young to lobby on behalf of SSI in the Jacksonville area. For these services, Young paid Fiorentino $5,000 per month. According to Nelson, Fiorentino told him that the City of Jacksonville's Deputy General Counsel and Co-Ethics Officer, Steven Rohan, advised Fiorentino that he could lobby on behalf of SSI so long as he abstained from voting on matters involving SSI or Young.

Following their initial meeting, Young and Nelson became friendly, speaking by telephone on a weekly basis and socializing regularly. Nelson was a frequent guest in Young's Jaguars suite, and whenever Young was in Jacksonville they would have dinner at Young's expense. Although they did not yet have a formal understanding that Nelson would help SSI with its business at JaxPort, Nelson offered Young

[1] We recount the facts as the jury found them. We also describe here certain undisputed facts that, while unnecessary to the jury's verdict, are otherwise relevant to this appeal. Where helpful, such as where we recount a witness's characterization of events or a witness's testimony involving statements made to him or her by someone else, we indicate who testified to that fact.

advice on submitting bids for JaxPort projects. For example, Young testified that, in the fall of 2005, Nelson suggested that SSI include in its first bid proposal a provision for participation by "disadvantaged" contractors, which was supposed to improve the chances of SSI's bid being selected. Although JaxPort did not accept this initial bid, Nelson would credit the success of SSI's subsequent bids, at least in part, to this advice.

Around the same time, Nelson urged JaxPort staff to retain SSI for dredging work. Louis Naranjo, JaxPort's director of procurement, testified that in November 2005 JaxPort's chief financial officer, Ron Baker, asked Naranjo to attend a meeting with Nelson at Nelson's downtown Jacksonville office.[2] According to Naranjo, Nelson complained about the performance of JaxPort's dredging contractor, SeaTech, and told Naranjo that he should cancel JaxPort's contract with the company. Naranjo testified that he responded by telling Nelson that he saw no reason to cancel the SeaTech contract and that, in any event, he did not have such authority. In response, Nelson told Naranjo that if Naranjo could not cancel the contract, Nelson would find someone else who could. Naranjo further testified that Nelson told

[2] As discussed below, Nelson argues that Naranjo's testimony concerning the content of this meeting, which predates the alleged conspiracy, should not have been allowed into evidence. This argument forms the basis for Nelson's third ground for reversal.

him that SSI was "ready to go and could do this work."

Meanwhile, Young grew frustrated because Fiorentino was, in Young's view, not doing enough to help SSI at JaxPort. Young testified that Fiorentino was "really good at introducing [him] to people" but "wasn't doing anything for [him]" – "there was no movement on [his] problem." Young added that, in the summer of 2006, when he told Fiorentino he was not going to renew their agreement, Fiorentino suggested that he speak with Nelson, who by then was chairman of the JaxPort board.

According to Young, when he expressed to Nelson his disappointment with Fiorentino, Nelson responded that he was getting "twice as much" done for Young and SSI than Fiorentino ever did. Young further testified that Nelson told him that he "wanted to be on the payroll," which Young understood to be a solicitation for a bribe.

After considering Nelson's request and discussing the matter with his state-wide lobbyist, Frank Bernadino [sic], Young arranged to retain Nelson as a "consultant" through Bernadino's company, the Wren Group, at a rate of $8,500 per month. To avoid making payments directly to Nelson, Young paid Nelson's fees to Wren Group, which in turn paid Nelson through Nelson's company, Ja-Ash, Inc. Regular payments were made in this fashion from August 2006 through the summer of 2007, after which time, according to Young, he and Nelson agreed that Nelson

would be paid through a deferred, lump-sum payment. According to Young, this new arrangement was put in place because SSI had to discontinue all lobbying activities in anticipation of the sale of SSI to Orion Marine Group, which left Young without a method of paying Nelson through Wren Group. Young told Nelson that he would be paid in full following the sale of SSI. In accordance with their agreement, Young gave Nelson a check for $50,000 in March 2008.

The testimony presented at trial reflects that, although Nelson never voted on an SSI contract while receiving payments from the company, he was frequently called upon by Young to help SSI with various other matters before JaxPort. Young testified, for example, that he asked Nelson for his assistance in persuading JaxPort to approve a change order to one of SSI's dredging contracts. According to Young, Nelson later reported that he made several phone calls to unspecified JaxPort staff members and assured Young that the change order would be approved. The change order, which was indeed approved in September 2007, added almost $150,000 of work to SSI's contract.

Young also testified that Nelson agreed to help SSI obtain early release of approximately $585,000 in "retainage" (a portion of the earned contract price withheld until project completion) under a contract with JaxPort. JaxPort's manager of contracts and administration, Elaine Varnot, corroborated this testimony, stating that she was instructed by

JaxPort's director of finance and the project manager to release the retainage funds to SSI (through SSI's general contractor for the project), which she eventually did. Varnot added that, in her experience, the making of such an exception was unprecedented. Other examples of matters in which Nelson apparently intervened on SSI's behalf include instances where he requested that JaxPort increase the price of its contract with SSI to account for increased fuel costs (a request that was ultimately denied) and where he requested that SSI be paid on particular claims.

Nelson's relationship with Young and SSI did not go unnoticed. In response to complaints from other JaxPort vendors about the alleged conflict of interest, in February 2007, Baker called a private meeting with JaxPort staff to discuss the Nelson-SSI relationship. At that meeting, Baker directed JaxPort's ethics officer, Linda Williams, to conduct an investigation. That same day, Nelson met with the City of Jacksonville's general counsel, Cindy Laquidara, to discuss the accusations. Laquidara testified that Nelson told her that he and SSI once submitted a joint bid for a project through the United States Army Corps of Engineers ("Corps"), but that the bid failed. Nelson did not disclose that he was also receiving payments from SSI for "consulting" services. Based on these representations, Laquidara sent an email to Nelson advising him that his relationship with SSI did not present any conflicts of interest; Nelson then forwarded the email to Baker. Nelson also denied having a business relationship with SSI or Young (beyond the

Corps bid) in his conversations with Williams and others. Recordings of Nelson's meeting with Williams reflect that he denied ever receiving "a dollar, a penny, or a nickel" from SSI.

By February 2008, the FBI had begun intercepting Nelson's calls with Young.[3] In these recordings, Nelson and Young are heard discussing, among other things, Young's negotiations to sell SSI to Orion and how the new ownership would affect the level of access that Nelson was willing to provide the company at JaxPort. Nelson suggested that, without Young, Orion would not enjoy the same level of access that SSI had enjoyed in the past, which prompted a discussion about possible arrangements whereby Nelson could continue to work on behalf of the company. Under one suggestion, Young, as a consultant to Orion, would have facilitated payments between Orion and Nelson, as Bernardino had done through the Wren Group. However, both Nelson and Young were concerned that, because Orion was such a large company, Nelson would not have the same "coverage" with Orion as he had with SSI. For this reason, Nelson and Young also discussed the possibility of presenting "opportunities" to a company named Manson Construction, an Orion competitor.

Before these opportunities materialized, however, Nelson and Young were approached by the FBI and

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[3] Recordings of these calls were introduced at trial through Young.

were specifically asked about their relationship. Angela Kapala-Hill, the FBI Special Agent who conducted the interviews, testified that Young initially claimed that the $50,000 payment was for a "consulting fee," while Nelson claimed that it was a loan. Nelson also denied having a business relationship with SSI. However, according to Kapala-Hill, Nelson would later acknowledge that the payment was for providing SSI with "access" at JaxPort, and that, without these payments, he would not have helped the company to the extent that he did.[4] Kapala-Hill further testified that Nelson admitted to knowing that the payments were illegal.[5]

In January 2010, a grand jury indicted Nelson on one count of conspiracy to commit honest-services mail fraud, bribery, and money laundering (18 U.S.C. § 371); twelve counts of mail fraud based on checks mailed to Nelson through the Wren Group (18 U.S.C. §§ 1341, 1346); eleven counts of money laundering based on the same checks (18 U.S.C. § 1956(a)(1)(B)(I)); twelve counts of federal-funds

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[4] Young, who would become a cooperating witness for the Government, also eventually admitted that the payments were for providing access to JaxPort.

[5] On cross-examination, Kapala-Hill acknowledged that the word "bribe" did not appear in any of the Government's notes of her interviews with Nelson. She also acknowledged that the notes from one of the interviews, prepared by another agent present at the meeting, reflected that Nelson said that he "now" knows that the payments were "wrong," with the word "now" underlined.

bribery (18 U.S.C. § 666(a)(1)(B)); and one count of making a false statement to an FBI agent (18 U.S.C. § 1001).[6] At the conclusion of a three-week trial, the jury found Nelson guilty on all but one count of mail fraud. This appeal followed.

II.

Nelson challenges his conviction on three grounds. First, echoing concerns expressed in Justice Scalia's concurring opinion in *Skilling v. United States,* ___ U.S. ___, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010), Nelson argues that the mail fraud and bribery statutes under which he was convicted, 18 U.S.C. §§ 1341, 1346, 666(a)(1)(B), are unconstitutionally vague as applied to his conduct. Second, Nelson argues that the district court's instructions to the jury on his honest-services mail fraud and federal program bribery counts were plainly erroneous because, according to Nelson, the instructions effectively provided, in a circular fashion, that "Nelson took a bribe if he had the intent to do so and had the requisite intent if he in fact took a bribe," leaving the jury to speculate as to an essential point of law – *i.e.* what constitutes a "bribe." Lastly, Nelson argues that the district court abused its discretion in admitting Naranjo's testimony about his November 2005 meeting with Nelson because the events described by

[6] Counts 37-43, which charged Nelson with a separate fraud scheme, were severed and dismissed after trial.

Naranjo relate to uncharged conduct that preceded the alleged conspiracy. We address these issues in turn.

A. Void for Vagueness

We review whether §§ 1341, 1346, and 666(a)(1)(B) are unconstitutionally vague as applied to Nelson's conduct *de novo*. *See United States v. Wayerski,* 624 F.3d 1342, 1347 (11th Cir.2010). As an outgrowth of the Fifth Amendment's Due Process Clause, we have held that "[a] statute is void for vagueness if it fails to define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Tobin,* 676 F.3d 1264, 1278 (11th Cir.2012) (internal quotation marks omitted). We have also recognized, however, that "[s]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. Duran,* 596 F.3d 1283, 1290 (11th Cir.2010) (quoting *United States v. Nat'l Dairy Prods. Corp.,* 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963)) (internal quotation marks omitted). Where the law is definite, the general rule is that knowledge of the law is presumed; ignorance of the law or a mistake of law is no defense to a criminal prosecution. *Id.*

According to Nelson, all three statutes share the same infirmity: as applied to the facts of his case, each lacks a "clear criterion of guilt" distinguishing between lawful and unlawful conduct. Specifically, Nelson argues that, because his convictions for mail fraud and bribery ultimately rested upon allegations of "honest-services" fraud under § 1346, the absence of language in the statute describing the character and scope of the fiduciary relationship from which the honest-services obligation arises precluded Nelson (and the jury) from determining whether his relationship with Young and SSI was prohibited.[7]

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[7] The federal mail fraud statute prohibits the use of the mails in furtherance of a "scheme or artifice to defraud." 18 U.S.C. § 1341. The "honest-services amendment," 18 U.S.C. § 1346, modifies the federal mail fraud statute to allow the United States to predicate a mail fraud charge on a "scheme or artifice to deprive another of the intangible right of honest services." Thus, as modified, § 1341 provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to [deprive another of the intangible right of honest services], for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . or takes or receives therefrom, any such matter or thing . . . shall be fined under this title or imprisoned not more than 20 years, or both.

In this case, the honest-services statute also potentially modifies the federal funds bribery statute, 18 U.S.C. § 666(a)(1)(B), which makes it a crime to "corruptly" demand, solicit, or accept a bribe. The jury in this case was instructed that, "[t]o act 'corruptly' means to act voluntarily, deliberately and dishonestly

(Continued on following page)

This indeterminacy, he adds, allowed the jury to determine his guilt "based on the 'personal predilections' of its members," and enabled the Government to prosecute him in a discriminatory fashion.[8]

As discussed below, because Nelson's argument hinges on the supposed vagueness of the honest-services statute, we do not write on a clean slate. To frame our discussion, we first summarize the history of the honest-services doctrine and the relevant parts of the Supreme Court's decision in *Skilling,* which upheld § 1346 against a facial challenge on due process grounds through a limiting construction of that statute. Second, in light of the majority's reasoning in that case, we consider whether there is merit to Nelson's contention that the facts surrounding his arrest and conviction are such that it would violate due process to uphold his convictions under §§ 1341, 1346, and 666(a)(1)(B).

1.

The honest-services doctrine arose from various decisions interpreting the phrase "scheme or artifice to defraud" in the original mail fraud statute as

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to either an unlawful end or result *or* to use an unlawful means to accomplish an otherwise lawful end or result." Nelson could thus be found to have acted "corruptly" under the bribery statute if he intended to deprive another of the right to his honest services.

[8] Nelson argued and lost a motion to dismiss for selective prosecution at trial. He does not appeal that ruling here.

encompassing not only deprivations of money or property but also certain "intangible rights." *See Skilling,* 130 S.Ct. at 2926. "Honest-services" fraud, these courts reasoned, differed from traditional fraud in that the victim of the fraud did not necessarily suffer a loss of money or property. *See, e.g., Shushan v. United States,* 117 F.2d 110, 119 (5th Cir.1941). For example, "if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss." *See Skilling,* 130 S.Ct. at 2926. In that example, the actionable harm derived from "the denial of that party's right to the offender's 'honest services.'" *Id.* (quoting *United States v. Dixon,* 536 F.2d 1388, 1400 (2d Cir.1976)).

In 1987, however, the development of the "intangible rights" line of cases, and thus the honest-services doctrine, came to a halt with the Supreme Court's decision in *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). The *McNally* Court held that the mail fraud statute must be read as limited in scope to the protection of property rights. *Id.* at 360, 107 S.Ct. 2875. "If Congress desires to go further," the Court added, "it must speak more clearly than it has." *Id.*

Congress responded the following year by adopting § 1346, which provides: "For the purposes of [Chapter 63 of Title 18 of the United States Code ("Mail Fraud and Other Fraud Offenses")], the term

'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." In effect, the statute restored the mail fraud statute to its pre-*McNally* position and incorporated those decisions of the courts of appeals recognizing an intangible right to honest services. *Skilling,* 130 S.Ct. at 2928; *United States v. Walker,* 490 F.3d 1282, 1297 n. 16 (11th Cir.2007).

Against this background, Jeffrey Skilling, the former Chief Executive Officer of Enron Corporation, appealed his conviction in the Southern District of Texas for conspiracy to commit honest-services wire fraud under § 1346, arguing that § 1346 was unconstitutionally vague in violation of the Fifth Amendment.[9] Styling his argument as a facial, rather than as an as-applied challenge to the statute, Skilling identified what he believed were fatal indeterminacies in § 1346 and the decisional law it incorporated. Of relevance here, Skilling claimed that the pre-*McNally* honest-services cases, and thus the statute itself, failed to address or were in conflict on various core issues, such as whether the obligation to provide honest services extends only to persons taking "official action" and whether the use of the fiduciary position to accomplish the alleged fraud is a necessary element of the offense. *See* Brief for Petitioner at 40-42, ___ U.S. ___, 130 S.Ct. 2896, 177 L.Ed.2d 619

[9] Skilling also argued that § 1346 did not reach his conduct (artificially inflating stock prices to profit from increased salary and bonuses).

(2010). "Without consensus on these basic questions," Skilling maintained, "any argument that the statute codified a single, coherent, preexisting conception of honest services – a conception obviously available to ordinary persons from prior caselaw – falls apart completely." *Id.* at 42.

While acknowledging that Skilling's argument "ha[d] force," as the pre-*McNally* cases "were not models of clarity or consistency," the Supreme Court held that any vagueness concerns regarding § 1346 could be obviated through a limiting construction of the statute. *Id.* at 2929-31. "The 'vast majority' of the honest-services cases," the Court observed, "involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Id.* at 2930 (citing *United States v. Runnels,* 833 F.2d 1183, 1187 (6th Cir.1987)).[10] By limiting the scope of § 1346 to these "core" pre-*McNally* applications, the Court found that § 1346 did not present any due process concerns, either in terms of fair notice or the risk of arbitrary and discriminatory enforcement. *Id.* at 2931-33. The Court concluded: "[a] criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about

[10] Surveying various pre-McNally decisions, the Court noted that the circuit courts uniformly described bribery and kickbacks as the "core," "most obvious," "typical," "clear-cut," and "uniform[ ]" forms of honest-services fraud. *Id.* at 2931.

prosecution under § 1346 on vagueness grounds." *Id.* at 2934.[11]

Writing separately, Justice Scalia responded that, even if the pre-*McNally* honest-services doctrine could be pared down to a bribery and kickback core (he believed it could not),[12] limiting the statute in this manner would still not solve its "most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies." *Id.* at 2938 (Scalia, J., concurring in part and concurring in judgment). "What," he asked rhetorically, "is the criterion of guilt?" *Id.* at 2939. Without a clear answer to this question (among others), Justice Scalia reasoned, § 1346 did not give sufficient notice of the conduct prohibited under the statute.[13]

The majority responded to this argument in a footnote, explaining that debates concerning the

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[11] Despite upholding the constitutionality of the honest-services statute, the Court vacated Skilling's conviction on the basis that, following the limiting construction of § 1346, his conduct did not lie within the reach of the statute.

[12] Justice Scalia remarked: "Perhaps it is true that 'Congress intended § 1346 to reach *at least* bribes and kickbacks.' That simply does not mean, as the Court now holds, that § 1346 criminalizes *only* bribery and kickbacks." *Id.* at 2939 (Scalia, J., concurring in part and concurring in judgment) (emphasis in original) (internal citations omitted).

[13] Justice Scalia concurred with the majority in that he agreed that Skilling received a fair trial and that Skilling's honest-services conviction should be reversed. Unlike the majority, however, Justice Scalia would have vacated Skilling's conviction on constitutional grounds.

source and scope of fiduciary duties were "rare" in pre-*McNally* bribery and kickback cases, and that "[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute." *Id.* at 2931 n. 41. As examples, the Court cited the relationships between public officials and the public, employers and employees, and union officials and union members. *Id.* Later in the opinion, the Court added that, "[a]s to fair notice . . . it has always been 'as plain as a pikestaff that' bribes and kickbacks constitute honest-services fraud, and the statute's *mens rea* requirement further blunts any notice concern." *Id.* at 2933 (internal citations omitted).

2.

Against this narrow framework, Nelson challenges his convictions below on an as-applied basis, arguing that the scope of his fiduciary obligations to JaxPort were indeterminate under §§ 1341, 1346, and 666(a)(1)(B). As a result, Nelson argues, he and the jury were left without any criterion by which to judge whether the payments he received from Young and SSI were proper, such as legitimate payments to a lobbyist, or improper, such as bribes. Further, he argues, the jury was left without any guidance in determining whether he acted with "corrupt intent" or the "intent to defraud," as is required under these statutes.

Nelson emphasizes that his is not a "prototypical" bribery case where "neither the financial relationship

between the public official and his payor nor the acts performed by the official on behalf of the payor are legitimate. . . .” Rather, he argues, this is a case where “neither the existence of a contractual financial relationship with a public official nor the conduct engaged in by the public official is – without more – illegitimate.” To this point, Nelson notes that, as an unpaid and part-time board member, he was allowed to do business with companies that contract with JaxPort, provided only that he abstain from voting on any matters in which he might have a conflict of interest. He adds that, as a board member, he never voted on a contract under which Young or SSI stood to benefit, and that, for much of his tenure, all of JaxPort's contracts with private companies were approved by JaxPort's staff, rather than by its board.

Of course, that this case is not “prototypical,” or that Nelson claims that he did not personally know that his conduct was unlawful, does not necessarily mean that the statutes under which he was convicted are unconstitutional as applied. “Void for vagueness simply means that criminal responsibility should not attach where one *could not* reasonably understand that his conduct is proscribed.” *United States v. Nat'l Dairy Prods. Corp.,* 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963) (emphasis added). It does not mean that the statute must define every factual situation that may arise. *United States v. Biro,* 143 F.3d 1421 (11th Cir.1998). The existence of “marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no

sufficient reason to hold the language too ambiguous to define a criminal offense." *Id.* at 1430 (quoting *United States v. Petrillo,* 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947) (internal quotation marks omitted)). Moreover, ignorance of the fact that one's conduct is a violation of the law is no defense to criminal prosecution. *United States v. Duran,* 596 F.3d 1283, 1291 (11th Cir.2010) (citing *Cheek v. United States,* 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991)).

In light of these principles, as well as the majority's reasoning in *Skilling,* we conclude that the statutes at issue gave Nelson adequate notice of the conduct they prohibit. At the outset, we note that the supposed "indeterminacies" that Nelson highlights in these provisions – namely, the absence of statutory language or pre-*McNally* caselaw explicitly defining the scope of the honest-services obligation – were acknowledged by the *Skilling* majority and found insufficient to warrant striking down § 1346 on vagueness grounds. We thus reject Nelson's contention that "the issues raised by Justice Scalia were simply not addressed by the majority, and thus remained as problems for the lower courts to address in the future."

While it is true that *Skilling* does not foreclose an as-applied challenge to the § 1346 (or to other statutes under which criminality may depend on whether the defendant intended to violate his or her duty of honest services), we are mindful of the Supreme Court's observation that defendants charged with bribery or kickbacks face an uphill climb in

arguing they did not and could not reasonably understand that their conduct was illegal under the statute. We are similarly reluctant to find § 666(a)(1)(B) unlawful as applied, as Nelson's challenge to the federal funds bribery statute is essentially the same as his challenge to the mail fraud and honest-services provisions.[14]

Simply put, we find that there is nothing in the nature of Nelson's conduct or his role on the JaxPort board, in particular, that separates him from those similarly charged with bribery who, according to the Supreme Court, "cannot tenably complain about . . . vagueness." Nelson's case is not exceptional. In the first place, though he was not paid for his work as a JaxPort board member and worked only part time, Nelson does not dispute that he was a public official. As we have previously held, "[p]ublic officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest." *United States v. de Vegter,* 198 F.3d 1324, 1328 (11th Cir.1999) (citing *United States v. Lopez-Lukis,* 102

[14] Nelson seems to argue that, because § 666(a)(1)(B) required that the jury find that he acted "corruptly," the indeterminacy of his fiduciary obligations under the honest-services statute spill over into his federal funds bribery charges. We note that we recently held that the phrase "corrupt[ ] . . . intent to influence or reward" in the bribery context is unambiguous, particularly in light of statute's *scienter* requirement. *See United States v. Benner,* 442 Fed.Appx. 417, 419-20 (11th Cir.2011) (affirming the defendant's conviction under 18 U.S.C. § 215(a)(1)). *Accord United States v. McElroy,* 910 F.2d 1016, 1021 (2d Cir.1990).

F.3d 1164, 1169 (11th Cir.1997)). Indeed, we have described bribery of a public official as the "paradigm case" of honest-services fraud. *United States v. Langford,* 647 F.3d 1309, 1321 (11th Cir.2011).

Further, the evidence presented at trial reflects that Nelson agreed to represent SSI's interests before JaxPort in exchange for monthly payments routed through a middleman. While we have not held that a *quid pro quo* exchange is required in all honest-services cases, the existence of such an arrangement undoubtedly blunts any argument that the defendant lacked notice that his conduct was unlawful. This "classic" bribery and kickback scenario, like the scheme at issue in *McNally,* is squarely within the range of conduct that Congress aimed to prohibit through the passage of § 1346. *See Skilling,* 130 S.Ct. at 2922.[15]

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[15] In finding that Congress intended to "reverse *McNally* on its facts," the *Skilling* majority rejected the Government's argument that § 1346 proscribes all "undisclosed self-dealing by a public official or private employee – *i.e.* the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." 130 S.Ct. at 2932 (internal quotation marks omitted). Nelson argues that several of our earlier decisions, upon which we rely today, similarly recognize an unrestrained "undisclosed conflict of interest" theory of honest-services fraud. *See, e.g., Lopez-Lukis,* 102 F.3d at 1169 ("If the official secretly makes his decision based on his own personal interests . . . the official has defrauded the public of his honest services."). *See also Langford,* 647 F.3d 1309 at 1321-22. We do not read these decisions so broadly. These cases

(Continued on following page)

We also find unpersuasive Nelson's argument that §§ 1341, 1346, and 666(a)(1)(B) are vague as applied because these statutes and the cases interpreting them do not explicitly limit their application to bribes and kickbacks taken in connection with the performance of one's "official" or "customary" powers or duties. Even if, for argument's sake, we were to find the statutes vague in this regard, Nelson's argument assumes that his actions did not involve the exercise of his official or customary powers.[16] We disagree. For purposes of the honest-services and federal funds bribery statutes, a board member who uses his position of authority to direct or influence someone else in his organization to do something that he could not do himself is nonetheless acting in his official capacity. *See generally, Lopez-Lukis,* 102 F.3d 1164 (11th Cir.1997).[17] It is the authority inherent in

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did not involve a "mere failure to disclose a conflict of interest." *See Skilling,* 130 S.Ct. at 2932. Rather, all of these cases, like the instant case, involved public officials who solicited or accepted bribes or kickbacks – "classic honest services fraud that existed before, and after, *Skilling*." *See Langford,* 647 F.3d at 1322 n. 9.

[16] Nelson stresses that the evidence presented at trial established only that, as a member and chair of the JaxPort board, his official duties were to vote on certain contracts, none of which were involved in this case, and to appoint and provide long-term "vision and guidance" to the JaxPort's chief executive officer. "[T]here was no evidence that [his] duties included any hands-on, day to day involvement in the running of [JaxPort]."

[17] *Lopez-Lukis* involved a public official who accepted bribes in exchange for her vote and the use of her influence to secure a majority vote from other board members on those matters. *See*

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his position as a board member that has enabled him to exercise his influence in the first place, and he has a duty to exercise those powers honestly and in the organization's interests, rather than his own.

Finally, to the extent there is any doubt as to the meaning of §§ 1341, 1346, and 666(a)(1)(B) as applied to this case, we find that any potential vagueness in these provisions is mitigated by their *scienter* requirements. *See Skilling,* 130 S.Ct. at 2933; *Benner,* 442 Fed.Appx. at 420. As noted above, due process does not require that criminal statutes speak with absolute clarity as to all possible applications. "The constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *United States v. Waymer,* 55 F.3d 564, 568 (11th Cir.1995) (citing *Colautti v.*

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102 F.3d at 1168. Considering these acts independently of one another, we observed:

> The appellees concede that a county commissioner commits honest-services fraud when she sells her vote. It is no less a violation of sections 1341 and 1346, however, for that commissioner, in addition to selling her vote, to take steps to ensure that a majority of commissioners vote with her. In both scenarios, the commissioner deprives her constituents of their right to her honest services by deciding how to vote based on her own interests. The second scenario simply makes this deprivation more concrete. In addition to depriving her constituents of their right to her honest services, she seeks to ensure that the actions the Board takes are in her own bests interests instead of the best interest of the public.

102 F.3d at 1168 (internal citations omitted).

Franklin, 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)). In this case, to convict Nelson for honest-services fraud, the Government had to prove that he "devised or intend[ed] to devise any scheme or artifice to [deprive another of the intangible right of honest services]." *See* 18 U.S.C. § 1341, 1346. Likewise, to convict Nelson of federal funds bribery, the Government had to prove that he "corruptly" solicited or demanded something of value, "intending to be influenced or rewarded. . . ." 18 U.S.C. § 666(a)(1)(B). We are satisfied that, if in fact Nelson reasonably believed that his conduct was lawful, due to the nature of his role on the JaxPort board or for any other reason, the jury could have found that he did not have the intent required to commit these crimes.[18] The jury did not.

B. The Court's Instructions to the Jury

Next, Nelson argues that we should vacate his mail fraud and federal funds bribery convictions because the manner in which the district court

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[18] Jury Instruction No. 21 provided that:

> "Good faith" is a complete defense to a charge that requires intent to defraud. A defendant isn't required to prove good faith. The Government most [sic] prove intent to defraud beyond a reasonable doubt. An honestly held opinion or an honestly held belief cannot be fraudulent intent – even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness can't establish fraudulent intent.

instructed the jury on these charges "failed to provide the jury with a means of discerning whether [he] took a bribe." Nelson concedes that, because he did not raise this objection at trial, plain error review applies. *See United States v. House,* 684 F.3d 1173, 1196 (11th Cir.2012) (citing *United States v. Felts,* 579 F.3d 1341, 1343 (11th Cir.2009)). Thus, we will reverse his convictions only if the jury instructions, considered as a whole, "[were] so clearly erroneous as to result in a likelihood of a grave miscarriage of justice, or the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Starke,* 62 F.3d 1374, 1381 (11th Cir.1995).

Nelson cites to two points of error in the court's instructions, both concerning what he argues are "hopelessly circular" propositions on an "essential point of law" – *i.e.* what constitutes a "bribe." First, Nelson argues that the court's honest-services instruction was circular because the phrase "intent to defraud," defined in the instruction as "act[ing] knowingly and with the specific intent to solicit, demand, or accept bribe payments," conflated the statute's *mens rea* requirement with the underlying criminal conduct: bribery. Thus, Nelson argues, the jury was effectively instructed that "Nelson took a bribe if he had the intent to do so and he had the requisite intent if he in fact took a bribe." As Nelson concedes, however, he specifically requested that the language "specific intent to solicit, demand, or accept

bribe payments" be included in the court's instruction.[19] Further, when the court asked Nelson's attorney whether the instruction as finally written conformed to what he requested, Nelson's attorney replied, "Yes, sir." Nelson cannot now complain about the circularity of an instruction that he, through counsel, requested and approved.[20] *See United States v. Silvestri,* 409 F.3d 1311, 1337 (11th Cir.2005) ("When a party responds to a court's proposed jury instructions with the words 'the instruction is acceptable to us,' such action constitutes invited error.").

Nelson's second argument is similarly unavailing. According to Nelson, because the court's instructions provided that corrupt intent is an element of both honest-services fraud and federal funds bribery, and because the term "corruptly" was defined therein

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[19] Our pattern instruction for §§ 1341 and 1346 defines the phrase "intent to defraud" as meaning "to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else." *See* Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction 50.2 (2010). Maintaining that this "garden variety" definition is not suitable for cases that do not involve traditional deception, such as the instant case, Nelson's attorney asks the court to strike all of the language following "specific intent to" and replace it with "solicit, demand, or accept bribe payments." The court obliged.

[20] Nelson now claims that the only reason he requested this definition was "to insure that simple concealment would not be grounds for conviction." Be that as it may, whether Nelson had good reason to request the instruction does not change the fact that any resulting confusion was a product of his own doing.

as requiring the jury to find that Nelson intended to act "unlawfully,"[21] the jury was effectively instructed that Nelson "act[ed] 'corruptly' [if] his conduct [was] unlawful and his conduct [was] unlawful if he act[ed] corruptly." The net effect of this error, Nelson maintains, was to "propel[] the jury to look elsewhere to determine whether [he] engaged in culpable conduct and to engage in subjective individual judgments unmoored from any coherent legal standard."

We disagree. The court's definition of "corruptly," adopted verbatim from our pattern instruction for federal funds bribery, did not merely instruct the jury that Nelson "act[ed] 'corruptly' [if] his conduct [was] unlawful," but rather, it required – correctly – that the jury find that Nelson voluntarily and deliberately engaged in unlawful conduct. *See* Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction 24.2 (2010). In other words, Nelson had to know that accepting payments from SSI in exchange for representing the company's interests at JaxPort was something that the law forbids. The jury was thus propelled to look to Nelson's state of mind in joining the conspiracy – a task that, as noted above, the jury was equipped to take on.

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[21] The term "corruptly" was defined in the federal funds bribery instruction as acting "voluntarily, deliberately and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means or result." The term was not defined in the honest-services instruction.

In any event, even to the extent that the court's instructions may be considered to contain a degree of circularity, we are not left with "substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *See United States v. Beasley,* 72 F.3d 1518, 1525 (11th Cir.1996). On the whole, the instructions "accurately express the law applicable to the case." *See id.* And, as other circuits have observed, the term "corruptly" has a commonly understood meaning. *See United States v. McElroy,* 910 F.2d 1016, 1021 ("The term 'corruptly' is ordinarily understood as referring to acts done voluntarily and intentionally and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.") (internal quotation marks omitted); *United States v. Pommerening,* 500 F.2d 92, 97 (10th Cir.1974) (The "words 'corruptly', 'value', and 'influence' are applied in their ordinary, everyday sense. It is obvious from reading [18 U.S.C. §] 201(b) that Congress intended to prohibit individuals from giving government employees, while they are acting in their official capacity, compensation in return for special favors."). We therefore decline to reverse Nelson's convictions merely because isolated clauses of the jury instruction may be "confusing, technically imperfect, or otherwise subject to criticism." *Beasley,* 72 F.3d at 1525.

C. The Testimony of Louis Naranjo

Finally, Nelson argues that the district court erred under Rule 403 of the Federal Rules of Evidence in admitting the testimony of JaxPort's director of procurement, Louis Naranjo, who testified regarding a meeting he had with Nelson before the alleged conspiracy. Rule 403 permits a trial judge to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. The court's authority should be used sparingly, however, as "the balance under Rule 403 should be struck in favor of admissibility." *United States v. Elkins,* 885 F.2d 775, 784 (11th Cir.1989). Similarly, on appeal, we "look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact." *Id.* Only upon a clear showing of abuse of discretion will we reverse a trial court's evidentiary ruling. *See United States v. Brannan,* 562 F.3d 1300, 1306 (11th Cir.2009). "[W]e must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *United States v. Frazier,* 387 F.3d 1244, 1259 (11th Cir.2004) (en banc).

As explained above, the testimony at issue pertained to a November 2005 meeting wherein Nelson, in the presence of JaxPort's CFO, Ron Baker, complained to Naranjo about JaxPort's dredging contractor, SeaTech, and asked Naranjo to cancel JaxPort's contract with the company. According to Young, Nelson also suggested that SSI was "ready to go."

Nelson objected to the admission of this testimony at trial, but the district court, following a proffer examination of the witness, concluded that Naranjo's testimony would not be unfairly prejudicial. The district court later reaffirmed this ruling when denying Nelson's motion for a new trial.

On appeal, Nelson argues that, by admitting Naranjo's testimony, the district court "invited the jury to convict [him] on the basis of uncharged conduct." Specifically, Nelson highlights the fact that the events described in Naranjo's testimony took place almost a full year before Nelson and Young's alleged conspiracy. Nelson also stresses that, in the broader context of the Government's case, Naranjo's testimony "stood alone as a dramatic instance of Nelson pressuring a [JaxPort] staff member in apparent support of SSI." Nelson argues that "[t]here was *no* evidence of similar conduct during the course of the conspiracy."

On balance, and in light of the principles described above, we do not find that the district court abused its discretion in allowing Naranjo's testimony. Although Naranjo's testimony related to conduct that preceded the conspiracy alleged in the indictment, it was unquestionably probative as to a number of issues bearing upon Nelson's guilt. For example, Naranjo's testimony corroborated and gave context to Young's testimony that, in asking to be "put on the payroll," Nelson told Young that he was *already* doing "twice as much" for SSI as Fiorentino was doing. Likewise, Naranjo's testimony illustrated how and to

what degree Nelson was capable of exercising influence over JaxPort staff – particularly its CFO, Ron Baker, who arranged the meeting between Nelson and Naranjo. Thus, the jury might have reasonably inferred from Naranjo's testimony that, at the time of the conspiracy, Nelson believed that his meeting with Baker and Naranjo was illustrative of the type of favors that he was willing and able to offer SSI in exchange for bribe payments.

At the same time, however, Naranjo's testimony was not necessarily prejudicial to Nelson's case, as other inferences could be drawn from the November 2005 meeting. As recognized by the district court, Naranjo's cross-examination of Naranjo highlighted various issues related to SeaTech's performance from which the jury might have reasonably inferred that "Nelson was doing everybody a favor by suggesting that SeaTech be terminated." This conclusion lends support to Nelson's theory of the case – namely, that, in representing SSI's interests at JaxPort, he was never in violation of his fiduciary obligations to the board or to the public.

Accordingly, we find that the district court did not make a clear error of judgment or apply the wrong legal standard in admitting Naranjo's testimony.

III.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

WILSON, Circuit Judge, concurring:

The dissent may well be correct that the investigation of Nelson began with a pre-*Skilling* theory of criminal concealment. And if the Government's case rested only on Nelson's nondisclosure of the SSI payments, then I would be inclined to agree with the dissent that no crime within the meaning of § 1346 occurred. *Skilling* definitively foreclosed the possibility that honest services fraud could criminalize undisclosed conflicts of interest. But the record shows that Nelson did not merely hide a business relationship – he hid payments that were intended to influence his actions as the chairman of JaxPort. It should come as no surprise that bribes are often concealed. Nelson's concealment was not the crime; it was merely a symptom.

I am also unpersuaded that Young's payments to Nelson were not bribes because they were "permitted." Permitted by whom? Nelson points to two grounds: the rubber stamp of Jacksonville's General Counsel Cindy Laquidara, and the fact that Nelson refrained from voting on SSI matters. For starters, a municipality's legal opinion hardly binds the Justice Department or this court. More importantly, Laquidara based her opinion on a mere fraction of the truth, because Nelson only revealed to her that he had submitted a joint bid with SSI to the United States Army Corps of Engineers. He did not reveal the most important information: he was on SSI's payroll as a lobbyist.

Nelson's only remaining justification is that he recused himself from voting on matters involving SSI. This presumably stems from section 112.3143(3)(a) of the Florida Statutes, which provides that no "public officer shall vote in an official capacity upon any measure . . . which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained." Although this argument must undoubtedly fail, it reveals that Nelson is likely as much a victim of circumstance as his own cupidity. Nelson seems to have been under the impression that as long as he recused himself, he could accept any payment that came his way.

Yet it cannot be the case that public officials are immune from the federal corruption laws simply because they refrain from voting "yea" or "nay," for the simple fact that it cannot be seriously contended that Nelson's influence on the board was limited to voting. The record contained numerous instances of Nelson exerting influence on SSI's behalf. Although we have not decided if bribery in the honest services context requires a showing of quid pro quo, even assuming that it does, this case obviously meets that standard. *See United States v. Siegelman,* 640 F.3d 1159, 1173-74 (11th Cir.2011), *cert. denied,* ___ U.S. ___, 132 S.Ct. 2711, 183 L.Ed.2d 84 (2012). For example, Young testified that he asked for, and received, Nelson's help in obtaining a change order's approval that added almost $150,000 of work to SSI's contract. Young also testified that he understood his payments to Nelson to be bribes. There was more than enough

evidence for a jury to find that Nelson knowingly accepted payments that were intended to influence his acts as a public official.

It is unfortunate that it appears to have been routine for JaxPort board members to lobby for companies that routinely brought business before it. It is entirely conceivable that Nelson became swept up in what was the standard operating procedure for the board's unpaid, part-time members. The dissent points out that Fiorentino, a fellow board member and lobbyist, was "innocent" simply because he did not conceal his financial relationship with Young. I must agree that I am unable on this record to discern a difference between Fiorentino's conduct and Nelson's. But Fiorentino's lack of a conviction does not automatically gut Nelson's. For whatever reason, the Government opted not to pursue Fiorentino, and the Court has no authority – absent very unusual circumstances – to interfere with the exercise of the prosecutor's charging discretion.

HILL, Circuit Judge, dissenting:

Tony Nelson concealed his financial relationship with SSI from JaxPort. This was not a crime. The investigation of him and the indictment against him, however, were instigated at a time when such concealment was thought by all to be a crime. After *Skilling,* we know that it never was. Nelson's concealment of a financial interest in SSI was not a

violation of his fiduciary duty to JaxPort. It did not deprive JaxPort of his honest services.[1]

Nevertheless, Nelson was convicted of honest services fraud. The evidence was that he was told that, as a part-time, unpaid member of JaxPort Board, he could lawfully advocate on behalf of SSI – as a *paid lobbyist,* just as was Fiorentino – and he did so. The evidence was that he was told he could not vote on any matter involving SSI and that he did not do so.[2] The evidence was that no economic harm befell JaxPort as the result of Nelson's lobbying for SSI.[3]

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[1] During the time of misapprehension by many that concealment would be criminal, FBI agents made an early-morning, unannounced call on Nelson at his home. One agent questioned him and another made notes. During the meeting, Nelson admitted that he had not told JaxPort of his relationship with SSI. This concealment would have been seen as enough for a prosecution at the time. Thereafter, *Skilling* was decided; the prosecution became one for bribery.

[2] I am troubled by the concurrence's reference to Jacksonville General Counsel's advice to Nelson that he was permitted to be a paid lobbyist for SSI so long as he did not vote as a "rubber stamp" opinion. The reference implies that there was something wrong or lacking in the opinion and there is no evidence in the record to support such an inference. Furthermore, if Nelson was not entitled to rely on Jacksonville's rules – as interpreted by its own lawyer and regarding its own entity – to guard that his behavior was not in violation of those rules, then how is any local official safe from federal prosecution based on its own interpretation of those rules.

[3] The concurrence notes that Nelson helped SSI get a change order. This is no evidence of wrongdoing – the testimony was that SSI was due the change order and the additional

(Continued on following page)

So the question becomes, where is the crime here? The only difference that I can see between what the government says is the innocent conduct of Fiorentino and the guilty conduct of Nelson is that Nelson concealed his relationship with SSI. This is not a crime. *Skilling* flatly rejects such a theory of honest services fraud.

The majority opinion correctly states that in order to be guilty of honest services fraud, the jury had to find that "Nelson voluntarily and deliberately engaged in unlawful conduct." But then it goes on to say that "Nelson had to know that accepting payments from SSI in exchange for representing the company's interest at JaxPort was something that the law forbids." But this is not so. The law did not forbid Nelson from representing SSI's interests – only from voting on any matter affecting them, which he did not do.

So, once again – where is the crime here?

As a result of *Skilling,* I believe that a financial concealment case morphed into a bribery prosecution. The only remaining problem – but a pretty significant one – was that Nelson had been told that he could accept payment from SSI to advocate on its behalf in connection with the JaxPort. His agreement with SSI

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payment. Nelson's conduct in assisting SSI to get the change order, therefore, could not be a violation of his duty to JaxPort.

to do so – and to receive payment for doing so[4] – cannot be a bribe if it is permitted. Therefore, the government's theory became that the concealment of his financial relationship – although not a crime in itself – was evidence that Nelson's intent in accepting payment was corrupt, making otherwise legal payments illegal – a bribe.

There are two problems with this theory. The first is a legal objection and the second a failure of proof.

First, the government failed to prove Nelson had a corrupt intent to be bribed. The government proved only that Nelson sought to conceal his relationship with SSI – not why. Contrary to the majority opinion, the government did not prove that Nelson thought what he was doing was illegal. The word "bribery" does not appear anywhere in the FBI agent's notes of her interviews with Nelson. She admitted at trial that those notes contain Nelson's statement that he "now" knows that the payments were "wrong."[5] The word "now" was underlined three times by the agent. Clearly Nelson sought to hide the SSI payments. I do not know why. But neither does anyone else – least of

[4] It should be noted, I think, that Nelson received payment monthly whether he accomplished anything or not.

[5] The concurrence notes that Young testified that he thought the payments were bribes, but Young's *mens rea* cannot be used to convict Nelson.

all the jury. Perhaps tax evasion was his motive. That is a crime; just not the crime charged here.

Second, and more importantly, concealment alone is legally insufficient to prove Nelson had corrupt intent to be bribed. If Nelson had no duty to disclose his financial relationship with SSI, as *Skilling* says, and the payments were permitted, as he was told, then the jury was not permitted to infer a corrupt intent to be bribed by his concealment. The government's theory was that – although concealment is not a crime – it was evidence of corrupt intent and this *mens rea* turned lawful lobbying into unlawful bribery. I disagree. Bribery requires a corrupt agreement to perform an *unlawful* official act – an *actus reus*. In this case, Nelson agreed to perform a lawful act. The lobbying was permitted. An agreement to perform a lawful act is called a contract, not bribery. Even if the government had proved a *mens rea,* I don't believe that it proved an *actus reus* in this case.

In my view, the jury instructions in this case were fatally defective. The jury was instructed that Nelson had a duty to JaxPort, the existence of which is an essential element of the crime of honest services fraud. But they were never enlightened as to the *nature and limits* of this duty. The unique circumstance of this case – that Nelson was a part-time, unpaid member of the board, fully entitled to lobby JaxPort on behalf of SSI and to be paid for those efforts – required that the jury be carefully instructed as to the limits of his duty to JaxPort. That was not done. If it had, maybe he would have been acquitted.

Nor did the instructions require the jury to find any corrupt intent apart from Nelson's concealment of his relationship with SSI. If his acceptance of payment was not unlawful, then the only evidence upon which the jury could have concluded that he had a corrupt intent in accepting them was that he concealed them. But we know that concealment cannot be the crime here.

The majority says that if these instructions were error, the error was not plain. I disagree. Failure to adequately instruct the jury on the scope of Nelson's duty to JaxPort – an essential element of the crime of honest services fraud – and the necessity to find a violation of that duty is fatal to the verdict. Failure of the instructions to require the jury to find that he had a corrupt intent – apart from his concealment of a financial interest in SSI – was also fatal to the verdict.

For these reasons, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-11066-BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY DEVAUGHN NELSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Jun. 13, 2013)

BEFORE: WILSON and HILL, Circuit Judges, and HUCK,* District Judge.

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* Honorable Paul C. Huck, Senior United States District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX C

CONSTITUTIONAL PROVISION

U.S. Const. amend. V
Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

18 U.S.C. § 666
Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that –

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in

connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section –

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

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18 U.S.C. § 1341.
Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits

or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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18 U.S.C. § 1346
Definition of "scheme or artifice to defraud"

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

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,	Jacksonville, Florida
Plaintiff,	Case No. 3:10-cr-23-J-32TEM
vs.	May 18, 2011
TONY DEVAUGHN NELSON, FRANK S. BERNARDINO,	12:07 p.m.
Defendants.	Courtroom No. 10D

TRIAL PROCEEDINGS
(VOLUME XII OF XIV)
BEFORE THE HONORABLE TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE

COURT REPORTER:

Shannon M. Bishop, RMR, CRR
221 North Hogan Street, #150
Jacksonville, Florida 32202
Telephone: (904) 549-1307 Fax: (904) 301-6844
dsmabishop@yahoo.com

(Proceedings reported by microprocessor stenography; transcript produced by computer.)

* * *

[151] This is true because, as stated earlier, a conspiracy is a kind of partnership so that, under the law, each member is an agent or partner of every other member, and each member is bound by or

responsible for the acts and statements of every other member made in pursuit of their unlawful scheme.

In this case, regarding the alleged conspiracy, the indictment charges that the defendant conspired to commit honest services mail fraud, bribery, and money laundering.

In other words, the defendant is charged with conspiring to commit three separate substantive crimes. The government does not have to prove that the defendant willfully conspired to commit all three crimes.

It is sufficient if the government proves beyond a reasonable doubt that the defendant willfully conspired to commit one of those crimes. But to return a verdict of guilty, you must all agree on which of the three crimes the defendant conspired to commit.

The mail fraud statute is relevant to Count One of the indictment, the conspiracy charge, and Counts Two through Thirteen of the indictment.

It's a federal crime to use the United States Mail or to transmit something by private or commercial interstate carrier to carry out a scheme to fraudulently deprive the [152] public of a right to honest services.

The defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

Number one, the defendant knowingly devised or participated in a scheme to fraudulently deprive the public of the right of honest services; number two, the scheme or plan consisted of a bribe, such that the defendant, Tony Nelson, solicited, demanded, accepted, or agreed to accept payment from someone other than the Jacksonville Port Authority, and that, in return for the payment, Nelson intended to be corruptly influenced or rewarded for a transaction or series of transactions of the Jacksonville Port Authority; number three, the defendant did so with an intent to defraud; and, number four, the defendant used the United States Postal Service by mailing or causing to be mailed, or a private or commercial interstate carrier by depositing or causing to be deposited with the carrier some matter or thing to carry out the scheme to defraud.

A private or commercial interstate carrier includes any business that transmits, carries, or delivers items from one state to another. It doesn't matter whether the message or item actually moves from one state to another as long as the message or item is delivered to the carrier.

To act with intent to defraud means to act [153] knowingly and with the specific intent to solicit, demand, or accept bribe payments.

An individual who owes the public a duty to provide honest services does not violate the law by merely concealing or failing to disclose a financial interest.

Having an undisclosed financial interest is not a crime. And, even if you should find that Tony Nelson failed to disclose or concealed a financial interest, he cannot be convicted of honest services mail fraud simply for concealing or failing to disclose such a financial interest.

Rather, the government must prove beyond a reasonable doubt that the scheme or plan engaged in by Mr. Nelson consisted of bribery, as previously defined in this instruction.

If an official serves his personal interests by taking or agreeing to take a bribe, the official or employee defrauds the public of honest services, even if the public agency suffers no monetary loss.

The duty of a public official or employee to provide honest services to the public is established by federal law.

The government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It doesn't have to prove the material mailed or deposited with an interstate carrier was [154] itself false or fraudulent; or that the use of the mail or the interstate carrier was intended to as to the specific or exclusive way to carry out the alleged fraught [sic]; or that the defendant actually mailed or deposited the material. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To cause the mail or an interstate carrier to be used is to do an act knowing that the use of the mail or interstate carrier will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of the mail or an interstate carrier as a part of scheme to defraud is a separate crime.

The fact of a mailing is a necessary element of the offense of mail fraud which must be proven by the government. Direct proof of mailing is not required.

Use of the mails may be established by circumstantial evidence. Evidence of customary office practice and procedures regarding mailing is evidence of mailing.

The bribery statute is relevant to both Count One of the indictment, the conspiracy charge, and Counts Twenty-Five through Thirty-Six.

It's a federal crime for anyone who is an agent of a local government or a local governmental agency receiving [155] significant benefits under a federal assistance program to corruptly solicit or demand, accept, or agree to accept anything of value from any person when the agent intends to be influenced or rewarded in connection with certain transactions of the government or agency.

The defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

Number one, the defendant, Tony Devaughn Nelson, was an agent of the Jacksonville Port Authority during the period mid-2006 to April 2008;

Number two, the Jacksonville Port Authority was, during the years 2006 through 2008, an agency and political subdivision of the State of Florida and was subject to control by the State of Florida and the City of Jacksonville;

Number three, during each of the years 2006, 2007, and '8, the Jacksonville Port Authority received benefits greater than $10,000 under a federal program involving some form of a federal grant, contract, subsidy, loan, guarantee, insurance, or other form of assistance;

Number four, during the period between mid-2006 to April 23rd, 2008, the defendant, Tony Devaughn Nelson, solicited or demanded, accepted or agreed to accept anything of value from someone other than the Jacksonville Port [156] Authority; that is, (a) as to Count Twenty-Five, $8500; (b) as to Count Twenty-Six, $8500; (c) as to Count Twenty-Seven, $8500; (d) as to Count Twenty-Eight, $8500; (e) as to Count Twenty-Nine, $8500; (f) as to Count Thirty, $8500; (g) as to Count Thirty-One, $8500; (h) as to Count Thirty-Two, $8500; (i) as to Count Thirty-Three, $8500; (j) as to Count Thirty-Four, $8500; (k) as to Count Thirty-Five, $8500, and (l) as to Count Thirty-Six, $50,000;

Number five, in return for such acceptance or agreements the defendant, Tony Devaughn Nelson,

intended as to the count under consideration to be influenced or rewarded for a transaction or series of transactions of the Jacksonville Port Authority involving something worth $5,000 or more;

And, number six, the defendant, Tony Devaughn Nelson, acted corruptly.

To act corruptly means to act voluntarily, deliberately and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result.

The term agent means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.

* * *