UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

- against -

BRADLEY STINN,

Defendant.

- - - - - - - - - - - - - - - - X

11-CV-2071 (NG)
Related to 07-CR-113 (NG))

THE GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANT'S MOTION TO VACATE HIS CONVICTIONS AND GRANT HIM BAIL

LORETTA E. LYNCH
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

James G. McGovern
Assistant U.S. Attorney
(Of Counsel)

PRELIMINARY STATEMENT

The government respectfully submits this memorandum of law in response to the petition filed by Bradley J. Stinn (the "defendant"), pursuant to 26 U.S.C. § 2255, in three iterations, on April 28, July 3 and July 13, 2011. During a six-week trial, the government proved that the defendant, while serving as the Chief Executive Officer at Friedman's Inc. ("Friedman's"), orchestrated a securities fraud scheme that made Friedman's reported financial data appear materially better than actual results. In furtherance of the scheme, the defendant lied on numerous occasions to Friedman's shareholders, its outside auditor, its Audit Committee, and analysts who covered Friedman's stock. The defendant also knowingly caused Friedman's to file materially false financial statements and other documents with the Securities and Exchange Commission ("SEC"). The jury convicted the defendant on all three counts of the Second Superseding Indictment: (1) conspiracy to commit mail, wire and securities fraud, in violation of 18 U.S.C. § 1349; (2) securities fraud, in violation of 18 U.S.C. § 1348; and (3) mail fraud, in violation of 18 U.S.C § 1341. The defendant was neither charged with nor convicted based upon an honest services theory of fraud, under 18 U.S.C. § 1346. On April 29, 2009, the Court sentenced the defendant to twelve years in prison and three

years supervised release; he is currently serving his sentence at Herlong FCI in California.

The Second Circuit affirmed the defendant's convictions on May 26, 2010, see United States v. Stinn, 379 F. App'x 19, 20, 22 (2d Cir. 2010), cert. denied, 131 S. Ct. 676 (2010), and the Supreme Court denied his writ of certiorari on November 29, 2010.[1] The defendant has filed this habeas petition seeking to vacate his convictions on two grounds: (1) that, in light of the Supreme Court's decision in Skilling v. United States, 130 S. Ct. 2896 (2010), his convictions were based on an invalid legal theory; and (2) that the Court's dismissal of a juror during deliberations denied him his Sixth Amendment right to a verdict by a unanimous jury.

For the reasons discussed below, the defendant's motion to vacate his convictions and sentence should be denied because: (1) the Supreme Court's holding in Skilling is irrelevant to the defendant's case, as he was not prosecuted under an honest services theory of fraud; (2) even if, by some chance, the defendant was convicted under honest services theory, any error was harmless; (3) because the defendant failed to raise his

---

[1] In his appeal to the Second Circuit Court of Appeals, the defendant raised two claims: (1) that the district court erred in giving a conscious avoidance instruction to the jury; and (2) that the individual or cumulative effect of the district court's rulings during jury deliberations coerced a guilty verdict. The defendant did not raise any honest services claims on appeal.

honest services claim on direct appeal, he has procedurally defaulted on such claim; (4) the Second Circuit has previously entertained and rejected the defendant's dismissed juror argument; and (5) nothing about the Ninth Circuit's decision in Williams v. Cavazos, ___ F. 3d ___, 2011 WL 1945744 (9th Cir. 2011), provides a legal basis to vacate the defendant's convictions.

STATEMENT OF FACTS

I. Overview

The defendant, while serving as the Chief Executive Officer of Friedman's Inc. (Friedman's), orchestrated a securities fraud scheme whose purpose and effect was to make Friedman's reported financial performance appear much better than the actual results. In furtherance of the scheme, the defendant lied on numerous occasions to Friedman's shareholders, its outside auditor, its Audit Committee, and analysts who covered Friedman's stock. The defendant also knowingly caused Friedman's to file materially false documents with the SEC, including filings whose primary purpose was to induce additional investors to purchase Friedman's stock. This Court accurately summarized the government's proof in denying the defendant's motion pursuant to Federal Rule of Criminal Procedure 29:

> The government introduced voluminous evidence establishing that [the defendant] knowingly and willfully, with a specific intent to defraud, engaged in a scheme to materially

> misrepresent Friedman's true financial condition to the company s shareholders and the investing public. Friedman's former Chief Financial Officer, Victor Suglia, and Friedman's former controller, John Mauro, cooperated with the government's investigation and provided compelling inside testimony about the company s day-to-day operations, the extensive nature and materiality of the financial manipulations that they and the defendant regularly engaged in, and communications with [the defendant] regarding these financial manipulations and misrepresentations. Evidence that established the existence of the scheme to defraud, the extent of the scheme, and the defendant's participation in the scheme came not only from cooperating witnesses Suglia and Mauro, but also from documents and other witnesses, including former Friedman's employees Bill Milligan, Virginia Greene, and Mary Stokum. Even certain portions of the testimony of the defendant's own witnesses supported the government's case. In addition, with regard to the material impact of the defendant's scheme to defraud, there was analyst and investor testimony that investing decisions would have been altered had the defendant's manipulations and misrepresentations been disclosed.

(Court's July 29, 2008 Order, Dkt #310).

II. Factual Background

Friedman's was the third-largest jewelry retailer in the United States. The business targeted low to middle income customers, and Friedman's financed a majority of its over $400 million in annual sales through an installment credit program that it underwrote. Friedman's public filings contained numerous materially false statements about its installment credit program. These documents misrepresented that Friedman's had a standardized

set of credit granting guidelines that were applied with few exceptions throughout Friedman's stores. (GX 2 at S-6 to S-7; GX 16 at 24-25, F-6).[2] In keeping with these disclosures, the defendant represented to shareholders and analysts that Friedman's had uniform, consistently applied credit-granting guidelines. (See, e.g., T 3144; GX 36 at 6). In fact, Friedman's routinely extended credit in violation of the guidelines, which had a "huge impact" on Friedman's bottom line. (See, e.g., T 724-25, 753-56, 983-86, 1190-1193, 2343-44, 2799-2804, 2842-43, 2849-51, 3693, 3837-44; GX 571A-571H, 727, 745, 835-871). These violations resulted from pressure the defendant and other senior executives applied on Friedman's sales personnel to hit sales targets that were directly tied to Wall Street s earnings targets. (See, e.g., T 622-35, 646-48, 955-59, 973-75).

While Friedman's failure to follow its own credit granting guidelines achieved the defendant's goal of increasing sales, it also resulted in a rising number of uncollectible credit accounts. Rather than disclosing this fact to the market, the defendant and his coconspirators falsified Friedman's accounting to cover up the deteriorating performance of Friedman's credit

---

[2] "T" refers to the trial transcript, "GX" refers to the government s trial exhibits and "Pet'r's Mem." refers to the July 13, 2011 iteration of the defendant's "Omnibus Memorandum of Law in Support of Bradley J. Stinn's Motion to Vacate and Set Aside Judgment of Conviction and Sentence Pursuant to 28 U.S.C. § 2255."

portfolio and to materially understate the impact of uncollectible credit accounts on reported earnings. Specifically, the defendant and his Chief Financial Officer, coconspirator Victor Suglia, had a meeting every quarter at which the defendant decided the final number that Friedman's would report for that period. At these meetings, the defendant usually selected a number that was as close to the average of the earnings estimates for all of the analysts that covered Friedman's, as he felt he could plausibly explain to Friedman's analysts. (T 1007-09). The defendant typically caused Friedman's to report a number that was higher than actual results, but in some cases, when Friedman's performance was better than expected, the defendant selected a number that was lower than actual results and used the difference to create a rainy day fund for future quarters. (T 1009-13). After the defendant selected the number, Suglia and coconspirator John Mauro, Friedman's Controller, "cook[ed] the books" to achieve the false earnings number. (T 1009, 2338).

The defendant and his coconspirators used a variety of manipulations to falsify earnings including holding Friedman's books open for various amounts of time past the end of fiscal months, quarters and years, and booking post-period transactions to hit earnings targets through a reduction of bad debt expense (a practice known internally as "scooping"), (see, e.g., T 655-62, 1016-18, 1045-46); hiding from auditors and shareholders the

existence of millions of dollars in extremely delinquent credit accounts (known internally as the "x-files" and the "turd accounts") that remained on Friedman's books even though no payments had been made (in some cases for several years), (see, e.g., T 1238, 1247, 1251-59, 1264-66, 1302-06, 1333-38, 1358-83, 2371-72, 2383, 2397, GX 25, 165, 526, 572, 751, 1003); and deliberately understating Friedman's allowance for doubtful accounts expense, i.e., the reduction of earnings required by generally accepted accounting principles ("GAAP") in an amount equal to the company's good faith estimate of its uncollectible credit accounts, (see, e.g., T 1016, 1062-73, 1094-99, 1347-58, 2398-99; GX 875). Alone, each of these manipulations caused Friedman's reported income to be overstated by millions of dollars. (See, e.g., T 1503-07).

The defendant and his coconspirators also deliberately falsified three key metrics that shareholders and investors used to assess the performance of Friedman's credit portfolio: (1) the allowance for doubtful accounts percentage, (2) the "currency percentage," i.e., the percentage of accounts receivable that was less than 30 days past due, and (3) the "delinquency percentage," i.e., the percentage of accounts receivable that was greater than 90 days past due. (See, e.g., T 1039, 1067, 1280-82, 1294-96, 2330-31, 2337; GX 730, 824). These misstatements had the purpose and effect of making it appear that Friedman's credit portfolio was

much more collectible than it in fact was.

III. Jury Deliberations

The parties first became aware of a problem involving a juror at the end of the second day of deliberations. On that day, at approximately 4:00 p.m., the jury sent a note, indicating that one of the jurors refused to deliberate, and asked for guidance. (T 4568; Court Exhibit 10). After receiving this note, the Court sent the jurors home for the day, and instructed them to return the following morning. (T 4568-71). The Court also repeated its standard instruction not to discuss the case with anyone outside of the jury room.[3] (T 4571).

Prior to the start of deliberations the next day, the Court asked the jury to continue deliberations and re-read the portion of its charge relating to the duty of every juror to deliberate. (T 4582). At the end of that day, the Court indicating that one of the jurors was still refusing to deliberate, in violation of the Court's original and supplemental instructions. (T 4583; Court Exhibit 11).

At the end of the fourth day of deliberations, the jury sent out a note indicating that it had reached a partial verdict on two counts. (T 4595; Court Exhibit 13). After receiving this

---

[3] This instruction was given nearly daily over the course of the six week trial. (See T 232, 600, 840-41, 1051-52, 1266, 1489, 1701, 1920, 2131, 2350-51, 2579, 3232, 3439, 3667, 4005, 4293).

note, the Court gave a partial verdict instruction and requested that the jurors send another note out indicating whether they wanted to adjourn for the day or return a partial verdict. (T 4602-04). At 5:25 p.m., the Court reported to the parties that it had been advised by the Court Security Officer ("CSO") guarding the jury room that one of the jurors came out of the jury room and stated that she needed to go home because she needed to take certain medicine by 7:00 p.m. (T 4604). Thereafter, the Court dismissed the jurors for the day and again reminded them not to discuss the case. (T 4605-06).

On the morning of March 20, 2008, the Court learned that a juror again had come out of the jury room. (T 4611). Shortly thereafter, the jury sent out a note indicating that it was submitting a unanimous verdict on two counts. (T 4613; Court Exhibit 14). As reflected in the verdict sheet provided to the Court, the foreperson stated that the jury had reached unanimous guilty verdicts on Counts Two and Three. (T 4613; Court Exhibit 15). On polling, the first nine jurors responded that the verdict as announced was their verdict, but Juror 10 stated that the verdict was not her verdict. (T 4515-16). Thereafter, the Court then sent the jury back to the jury room indicating that further instructions would follow. (T 4616). Prior to receiving any additional instructions, however, the jury sent out the following note:

> We cannot continue deliberations since one juror agreed to the verdicts rendered and then recanted when in the courtroom. She refuses to engage in deliberations. Her integrity is questionable and we have acted in good faith. The foreperson must speak to the judge.

(T 4621; Court Exhibit 16). After lunch, the Court advised the parties it had been informed by the CSO that Juror 10 was the juror who came out of the jury room, three times, most recently prior to lunch that day. (T 4622). The Court then decided to give a supplemental instruction reminding the jurors that their oath required them to deliberate and exchange views, but that no juror should ever return a verdict that does not reflect his or her considered judgment of the case. (T 4634-35).

After the jury adjourned to the jury room, the Court advised the parties sua sponte that it was considering questioning Juror 10 about her health to determine whether she was suffering from a medical problem that was interfering with her ability to deliberate. (T 4636). These concerns were based on the fact that Juror 10 had become ill and fainted during the trial, had indicated during jury selection that she had recently suffered a broken kneecap, and "ha[d] on multiple occasions simply popped out of the jury room expressing her distress to the CSO" despite being told to put any communications to the Court in a written note. (T 4636-37).

Prior to a final decision concerning whether to question Juror 10 about her competence to deliberate, the jury sent out

another note. (T 4644). In this note, the jury advised that Juror 10 had confessed to speaking to an attorney the prior night after the jury had reached a partial verdict. (T 4644-45; Court Exhibit 17). This note stated:

> Last night, this jury had come to a unanimous verdict on counts 2 + 3. As you know, Juror #10 reversed her decision upon polling. Returning to the jury room as per your latest instructions, Juror #10 revealed that she had spoken to an attorney last night to determine which of the charges were the most serious. The rest of the jury feels any further deliberations are futile. We tried this in good faith, but this faith has been compromised. Please help us resolve this issue.

(T 4644-45; Court Exhibit 17).

Upon receiving this note, the Court decided to question Juror 10 about whether she had violated her oath by discussing the case outside the jury room. (T 4645-51). During questioning, Juror 10 admitted that she had asked her sister, a Brazilian professor of Portuguese literature, to explain the "difference between conspiracy and fraud" because Juror 10 had "a huge, you know, issue in my head, I don't know the meaning." (T 4652-53). Juror 10 stated that her sister provided her with an example to explain the difference "so I can be clear in my head." (T 4654-55). Juror 10 described this example as follows:

> If a neighbor came to you and said I'm going next door and I intend to kill the neighbor's pet and I'm pretty sure she was serious when she says she's going to kill the pet and you know how much the neighbor like your dog and

> you didn't stop your neighbor to do so, this could be a fraud. You have an intention - you have - she has the intention - if she don't have the intention to kill but just to mention she will, this could be a fraud, considered fraud. I don't know, it is a little confused. I'm still a little confused there.

(T 4655-56). Juror 10 then added, "[a]nd the conspiracy, she said it could be more than two or three people together, to put a few groups of people together to conspire, you know, against someone." (T 4656).

Thereafter, the Court dismissed Juror 10 based on her admissions of misconduct, finding that "[b]ased on my observations, including the demeanor of the juror and the content of her answers, I'm satisfied that that juror cannot be rehabilitated by simply telling her once again not to speak to anyone outside of the jury room." (T 4667-68). The Court, with the defendant's consent, then replaced Juror 10 with Alternate Juror 1, who had been sequestered and had not participated in any deliberations. (T 4669-70). The Court thereafter instructed the jury that it must begin its deliberations anew and put aside all prior deliberations. (T 4670). The jury returned to begin deliberations on Monday, March 24, 2008. That afternoon, the jury returned a verdict of guilty on all counts. (T 4684-86).

Argument

The Defendant's Section 2255 Motion Should Be Denied

Relief under 28 U.S.C. § 2255 is an extraordinary remedy. See Bousley v. United States, 523 U.S. 614, 622 (1998); United States v. Frady, 456 U.S. 152, 164-65 (1982); Zhang v. United States, 506 F.3d 162, 166 (2d Cir. 2007). Underscoring why 2255 petitioners face such a high bar, the Frady Court noted that "[o]nce the defendant's chance to appeal has been waived or exhausted . . . we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum." Frady, 456 U.S. at 164. Because of the extraordinary nature of federal habeas review, section 2255 claims are limited to situations exhibiting "a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice." Graziano v. United States, 83 F.3d 587, 590 (2d Cir. 1996) (internal quotation marks omitted). Neither of the defendant's claims reach this lofty standard.

I. Defendant's Skilling Claim Cannot Provide Him With Relief

The defendant's petition to vacate in light of Skilling fails to reach even a forgiving standard of relevance. The Skilling ruling merely limited the meaning of honest services fraud under 18 U.S.C. § 1346 to bribery and kickback schemes.

See Skilling v. United States, 130 S. Ct. 2896, 2931 (2010). A jury convicted the defendant of (1) mail fraud (18 U.S.C. § 1341); (2) securities fraud (18 U.S.C. § 1348); and (3) conspiracy (18 U.S.C. § 1349) to commit securities fraud, mail fraud, and wire fraud (18 U.S.C. § 1343). (T 4684-86). The defendant was neither indicted under, nor was the jury instructed on honest services fraud. Skilling, therefore, has no relevance Furthermore, even if Skilling were relevant, any error was harmless. The defendant's petition is nothing more than a superfluous assault on convictions that have already been fully litigated on direct appeal. Accordingly, the defendant's petition fails on substantive grounds.

Furthermore, even if the defendant's petition did in fact state a valid honest services claim under Skilling, the defendant's 2255 motion suffers from fatal procedural flaws. Although the defendant has filed within the statute of limitations, 28 U.S.C. § 2255(f)(1), and the honest services holding of Skilling applies retroactively to cases on collateral review, see Bousley, 523 U.S. at 620-21; Schriro v. Summerlin, 542 U.S. 348, 351-53 (2004), the defendant has procedurally defaulted his Skilling argument, such as it is.

A. Honest Services Fraud: Pre- and Post-Skilling

Beginning in the 1940s until 1987, courts had interpreted the phrase "scheme or artifice to defraud" in the

mail fraud statute (now 18 U.S.C. § 1341) "to include deprivations . . . of intangible rights." Skilling, 130 S. Ct. at 2926. One such intangible right that developed was the right to honest services. See id. "Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead a third party, who had not been deceived, provided the enrichment." Id. (internal citation omitted). The paradigmatic honest services case was the bribery of a public official but the doctrine extended beyond this situation into the private sector. See id.

In 1987, the Supreme Court pulled the rug out from under the honest services theory of fraud by limiting the scope of the fraud statutes "to the protection of property rights," thereby excluding intangible rights from the statutes' ambit. McNally v. United States, 483 U.S. 350, 360 (1987). In response to the McNally decision, Congress passed a statute declaring that "[f]or the purposes of [the fraud] chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

Over twenty years later in Skilling, the Supreme Court

addressed an appeal challenging the constitutionality of section 1346 on vagueness grounds. To avoid constitutional problems, the Court interpreted the statute and limited the scope of section 1346 solely to bribery and kickback schemes. Skilling, 130 S. Ct. at 2931. Skilling's fraud claim was limited to the constitutionality of section 1346; therefore, the Court confined its holding to the meaning of that statute. See id. at 2927 ("[Skilling] asserts that § 1346 is unconstitutionally vague."). Skilling's holding does not implicate any of the other fraud statutes.

Applying this statutory interpretation, the Court found that Skilling did not commit honest services fraud, and because the conspiracy count Skilling's was convicted of had alleged multiple objects (honest services wire fraud, wire fraud, and securities fraud) of the conspiracy, "Skilling's conviction [was] flawed." Id. at 2934 (citing Yates v. United States, 354 U.S. 298 (1957)). Nevertheless, because errors involving alternative theories of guilt are subject to harmless error analysis, see Hedgpeth v. Pulido, 555 U.S. 57, 129 S. Ct. 530, 532 (2008) (per curiam), the Court remanded the case to the Fifth Circuit for further proceedings. Skilling, 130 S. Ct. at 2934.

On remand, the Fifth Circuit, heeding the Supreme Court's instruction to conduct a harmless error analysis in conformity with Pulido, applied its interpretation of the

harmless error standard. See United States v. Skilling, 638 F.3d 480, 481-82 (5th Cir. 2011). In advocating that the error was harmless, the government argued that Skilling committed securities fraud (an object of the conspiracy), separate and apart from a deprivation of honest services, because "the evidence presented at trial proved that Skilling participated in a scheme to deceive the investing public about Enron's financial condition in order to maintain or increase Enron's stock price." Id. at 483. The court examined the record and concluded there was "overwhelming evidence" that Skilling committed securities fraud. Id. at 483-88. The "alternative theory" error was therefore "harmless beyond a reasonable doubt," and the Fifth Circuit affirmed all of Skilling's convictions. Id. at 488.

B. Skilling Is Inapposite To The Defendant's Conviction Because The Defendant Was Neither Indicted Under Nor Was The Jury Instructed On Honest Services Fraud

The defendant's petition seeking relief in light of the Supreme Court's decision in Skilling must fail because, put simply, the holding in Skilling has no relation to the defendant's conviction. To avoid striking down the entirety of 18 U.S.C. § 1346 as unconstitutionally vague, the Supreme Court limited honest services prosecutions under that statute to bribery and kickback schemes. Skilling, 130 S. Ct. at 2931. Section 1346 is merely a definitional statute that states: "For the purposes of [the fraud] chapter, the term 'scheme or artifice

to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services. 18 U.S.C. § 1346 (emphasis added). "[I]ncludes" underscores the fact that "scheme or artifice to defraud" is more expansive than the intangible right to honest services. By abrogating honest services except in bribery or kickback schemes, the Court redefined what type of honest services prosecutions fall within the ambit of the fraud statutes. Nonetheless, "Skilling expressly applies only to the honest services provision," and the limitation of honest services to bribery and kickback schemes does "not extend[] to any other 'scheme or artifice to defraud' criminalized by the fraud statutes." DeGuzman v. United States, No. SA-10-CA-951-XR, 2011 WL 777934, at *2 (W.D. Tex. Feb. 25, 2011)("The honest services provision is . . . not the only way to commit a scheme or artifice to defraud); see also Crowe v. Haynes, No. CV210-130, 2011 WL 1558419, at *2 (S.D. Ga. Jan. 12, 2011)(finding that Skilling is limited to "honest-services portion 1341, not the entirety of the statute").

Because Skilling's holding only addresses section 1346, the defendant's attempt to utilize Skilling to vacate his convictions is unavailing and meritless. Stripping away the substantial rhetoric (e.g., defendant's allegation that his conviction "founders on the forbidden 'vagueness shoal' identified . . . in Skilling, (Pet'r's Mem. 3)), the simple fact

is that he was neither indicted under section 1346 nor was the jury instructed on honest services fraud.[4] Thus, Skilling provides him no recourse.

The government indicted the defendant on three counts: (1) Conspiracy to Commit Securities Fraud, Mail Fraud, and Wire Fraud; (2) Securities Fraud; and (3) Mail Fraud. Superseding Indictment ¶¶ 47-52. Nowhere does the indictment mention the phrase "honest services" or reference section 1346. Furthermore, the jury instructions (running 56 pages in length) also fail to mention the term "honest services" or section 1346 even once. (T 4391- 4447). These facts stand in stark contrast to Skilling, where Jeffrey Skilling was both indicted under and convicted of an honest services fraud charge. See Skilling, 130 S. Ct. at 2900-01. Because the defendant was neither indicted on nor convicted of honest services fraud, Skilling offers him no sanctuary.

---

[4] The defendant goes to great lengths to cast this tangible fraud case as an honest services prosecution by repeatedly highlighting that the government established and argued to the jury that, among his many other violations, the defendant breached the fiduciary duty he, as the CEO of Friedman's, owed to the company's shareholders. Pet'r Mem. 2, 21, 23, 25, 29-30, 31, 33, 35, 44 and 47. To put it plainly, however, when the overwhelming proof is that the CEO consistently misled his shareholders, it should have come as little surprise to the defendant that the government would argue that such actions amounted to a breach of the CEO's duty of loyalty to the shareholders. But, by no means, did mention of the defendant's fiduciary duties to his shareholders serve to transmogrify the charges in the indictment into allegations of honest services fraud.

Not asking the grand jury to indict the defendant on and not asking the Court to instruct the jury about honest services fraud was not a mistake or an example of nefarious prosecutorial motives.[5] Instead, the government did not have to avail itself of an honest services fraud charge in this case because the defendant was so clearly guilty tangible property fraud, a conclusion with which the jury concurred.[6] The Supreme Court has contrasted tangible fraud and honest services fraud: "Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the

---

[5] Indeed, if honest services prosecutions were so unassailable to attack on vagueness grounds, which the defendant must establish to show cause necessary to avoid the procedural default of his claim, see infra pp. 28-35, the government would have had no reason not to charge him under or instruct the jury on honest services fraud. This is particularly true due to the fact that this trial occurred before the Supreme Court even granted Skilling's writ of certiorari.

Regrettably, the defendant seeks to have it both ways, contending that the government pursued an intangible honest services prosecution dressed in tangible fraud clothing to avoid a subsequent statutory vagueness challenge while, at the same time, arguing that challenging section 1346 on direct appeal would have been such a novel claim that he could not have been expected to have raised it.

[6] In instructing the jury on each of the two substantive fraud counts and the three separate frauds (mail, wire, and securities) alleged as objects of the conspiracy count, the Court indicated that to convict the jurors needed to find "that the scheme to defraud contemplated or intended some harm to the property rights of another." (T 4405; Pet'r's Mem. 36) (emphasis added). Despite the defendant's protestations to the contrary, this instruction requires a tangible fraud to convict and is a far cry from allowing the jury to convict under a theory involving the intangible right to honest services.

other, the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment." Skilling, 130 S. Ct. at 2926 (internal citation omitted). As there is no contention that the defendant received enrichment from a third party, the defendant's conviction falls outside the boundaries of an "intangible right to honest services" theory of fraud.

The defendant's crime was not a failure to disclose an interest that conflicted with his duty to his employer. Rather, the defendant lied to investors and potential investors about the financial health of Friedman's, and as a result defrauded them of their property through either the purchase or retention of Friedman's shares. Contrary to the defendant's claims concerning the government's inability to prove what the actual numbers were, less the fraud, the government maintains that such proof was not required to prove that the defendant defrauded investors. As Judge Learned Hand once observed, "[a] man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. . . . he has lost his chance to bargain with the facts before him." United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932). Indeed, the defendant's "victim[s] didn't lose an intangible right to

honest services, rather the[y] . . . lost thousands of very tangible dollars. Wallace v. United States, No. 09-806-GPM, 2010 WL 5162027, at *3 (S.D. Ill. Dec. 14, 2010). His victims' loss of tangible property supports the conclusion that the defendant was not convicted by virtue of an honest services theory of fraud. As such, the defendant can find no refuge in Skilling.

There is no Second Circuit precedent granting habeas relief in light of Skilling. Nonetheless, in the year since the Supreme Court handed down Skilling, federal courts have uniformly rejected federal habeas petitions claiming relief under Skilling when the defendant was not charged with nor the jury instructed on honest services fraud. See, e.g., Crowe, 2011 WL 1558419, at *2 (denying habeas petition when charged with 1341 and not 1346); United States v. Jones, No. 5:10-01862, 2011 WL 1398504, at *1 (W.D. La. Apr. 7, 2011)(same); DeGuzman, 2011 WL 777934, at *3 (same).[7] Because the defendant was also convicted of fraud absent honest services charges or jury instructions, this Court

---

[7] See also Aliucci v. United States, No. 10-1297, 2011 WL 635264, at *9-10 (W.D. Pa. Feb. 11, 2011) (distinguishing Skilling because the petitioner was not charged on nor was the jury instructed on honest services fraud; finding harmless error analysis unnecessary because, unlike Skilling, the government did not offer alternate theories of guilt); United States v. Conti, No. 10-176 Erie, 2010 WL 4613798, at *5 (W.D. Pa. Nov. 5, 2010)(Skilling . . . has no application where petitioner was charged and plead guilty to 1341 and 371 and was not charged with or convicted of 1346); Wallace, 2010 WL 5162027, at *3 (finding Skilling inapposite to a petitioner charged with 1341 & 1347 but not with 1346).

should similarly dismiss his petition because Skilling is not relevant to his convictions.

To advance his arguments, the defendant cites two cases where a court entertained habeas relief in light of Skilling. Pet'r's Mem. 38. Not surprisingly, in both instances, the defendants had been charged and convicted of honest services fraud under section 1346. See Stayton v. United States, Nos. 1:09-CV-157-WSD, 1:09-CV-209-WSD, 2011 WL 691238, at *1 (M.D. Ala. Feb. 28, 2011); Geddings v. United States, No. 5:08-CV-425, 2010 WL 2639920, at *1 (E.D.N.C. June 29, 2010). By contrast, in this case the jury was never instructed on any invalid theories of guilt. Therefore, it strains credulity to believe that the jury convicted the defendant on an honest services theory of fraud, particularly because this jury was required to find some harm to property rights before returning a guilty verdict. (T 4405). Skilling therefore does not apply to the defendant's case, and the Court should deny his petitition.

C. In The Alternative, Any Honest Services Error Was Harmless

Assuming, arguendo, that the jury somehow convicted the defendant under an honest services theory of fraud despite not receiving any instructions to that effect, the defendant's conviction should not be vacated because any "alternative theory" error was harmless. Harmless error analysis applies to

"alternative theory"[8] instructional errors.[9] See Pulido, 555 U.S. 57. In Pulido, after citing a string of instructional error cases, including Neder v. United States, 527 U.S. 1 (1999), the Supreme Court concluded that "[a]lthough these cases did not arise in the context of a jury instructed on multiple theories of guilt, one of which is improper, nothing in them suggests that a different harmless-error analysis should govern in that particular context." 129 S. Ct. at 532.

"An error is harmless only if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." United States v. Bah, 574 F.3d 106, 114 (2d Cir. 2009)(internal quotation marks and citation omitted); see also Neder, 527 U.S. at 18. The Second Circuit has interpreted Neder harmless error analysis to require a two step process: the reviewing court must "'search [] the

---

[8] Errors "where a jury rendering a general verdict was instructed on alternative theories of guilt and may have relied on an invalid theory. Skilling, 638 F.3d at 481.

[9] The defendant's argument that the government somehow waived harmless error analysis, Pet'r's Mem. 48, is unavailing. Harmless error analysis is not something a party can waive; rather, it is a part of the necessary process for granting a new trial on non-structural errors, including "alternative theory" errors. See Skilling, S. Ct. at 2934; Black v. United States, 130 S. Ct. 2963, 2967, 2970 (2010)(finding, in circumstances symmetrical to the defendant's case, that the defendants had not waived harmless error analysis on a general verdict with alternative theories of guilt, even though they had objected to the special verdict instruction offered by the government at trial).

record in order to determine (a) whether there was sufficient evidence to permit a jury to find in favor of the defendant on the omitted element and, if there was, (b) whether the jury would nonetheless have returned the same verdict of guilty.'" United States v. Needham, 604 F.3d 673, 679 (2d Cir. 2010)(quoting United States v. Jackson, 196 F.3d 383, 386 (2d Cir. 1999)).[10] The defendant makes no argument here that the jury instruction omitted an element of the offense. Instead, he argues that the jury could have convicted him of fraud under an honest services theory, which is now invalid as applied to cases not involving bribes or kickbacks, on any and all of his counts of conviction. Applying a harmless error analysis in this case,[11] the Court must determine if the jurors would have convicted the defendant on any of the three counts had honest services theory of fraud been unavailable to them. The defendant cannot prevail under this standard.

There was ample evidence at trial to prove that the defendant committed tangible fraud even if he did not defraud

---

[10] Contrary to the defendant's assertion, Pet'r's Mem. 54, the Supreme Court has denied the petition for certiorari that challenged the standard for harmless error analysis. See Black v. United States, No. 10-1038, 2011 WL 578895, at *1 (U.S. May 31, 2011).

[11] Operating on the tenuous assumption that the jury could have convicted on an honest services theory of fraud when the jury was not instructed on that theory, and the defendant was not charged with committing honest services fraud.

others of the intangible right to his honest services. The defendant goes to great pains to establish the striking similarity between his prosecution and that of Skilling. See Pet'r's Mem. 2, 17-18, 20, 23, 39. Trying to show such a similarity may not be in the defendant's best interests, however, because all of Skilling's convictions have been affirmed. On remand, the government demonstrated that the "alternative theory" error was harmless because Skilling committed securities fraud (one of the alleged objects of the conspiracy count): "[T]he evidence presented at trial proved that Skilling participated in a scheme to deceive the investing public about Enron's financial condition in order to maintain or increase Enron's stock price." United States v. Skilling, 638 F.3d at 483. The Fifth Circuit applied its own interpretation of the Neder harmless error standard and evaluated whether the "alternative theory" error was harmless beyond a reasonable doubt. Id. at 488. After examining the record, the Fifth Circuit found that the "jury was presented with overwhelming evidence that Skilling conspired to commit securities fraud, and thus we conclude beyond a reasonable doubt that the verdict would have been the same absent the alternative-theory error," and the court affirmed all of Skilling's convictions. Id. at 483-84, 488. Similarly, in this case, there is overwhelming evidence that the defendant deceived investors about Friedman's financial condition, which inflated Friedman's

stock price. (See Court's July 29, 2008 Order, Dkt #310 at 2). Consequently, to the extent that any "alternative theory" error occurred, it was harmless to the defendant. Accordingly, there exists no reason to vacate any of the defendant's convictions because it is beyond reasonable doubt that the jury would have returned the same verdict on all three counts absent the error. See Jackson, 196 F.3d at 386; United States v. Black, 625 F.3d 386, 393-94 (7th Cir. 2010)(Posner, J.)(affirming conviction because no reasonable jury could have acquitted if it had not been instructed on the honest services theory), cert. denied, Black, 2011 WL 578895, at *1.

D. The Defendant Has Procedurally Defaulted His Skilling Claim

In the alternative, the defendant has defaulted his habeas claim. Federal habeas review is not a substitute for direct appeal. Bousley, 523 U.S. at 621; Frady, 456 U.S. at 165 ("[W]e have long and consistently affirmed that a collateral challenge may not do service for an appeal."). Therefore, defendants generally may not raise claims that they could have raised on direct appeal but chose not to pursue. See Zhang, 506 F.3d at 166; Abbamonte v. United States, 160 F.3d 922, 924 (2d Cir. 1998). In such circumstances, defendants are said to have procedurally defaulted claims not raised on direct review. To cure procedural default, a defendant must demonstrate either (1) "cause" for the failure to raise the claim on direct appeal and

"actual prejudice" arising from the alleged error or (2) "actual innocence."[12] See Bousley, 533 U.S. at 622; Zhang, 506 F.3d at 166.

1. The Defendant Has Not Demonstrated Cause For Failing To Raise An Honest Services Claim On Direct Review

The defendant cannot show cause for failing to raise a challenge to section 1346 because such a claim was reasonably available to counsel when the defendant filed his direct appeal. To establish the cause necessary to defeat procedural default, a defendant must show that some external factor prevented him from raising the issue on direct appeal. See Coleman v. Thompson, 501 U.S. 722, 753 (1991); Zhang, 506 F.3d at 166.

Here, the defendant seeks to justify his failure in raising an honest services challenge on direct appeal on the grounds that the Supreme Court created a new substantive rule in Skilling, which occurred after the defendant had already filed his appeal. However, to establish cause under such circumstances, a defendant must demonstrate that his claim was "'so novel that its legal basis [was] not reasonably available to

---

[12] To demonstrate actual innocence, "a petitioner must present 'new reliable evidence that was not presented at trial' and 'show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.'" Lucidore v. N.Y. State Div. of Parole, 209 F.3d 107, 114 (2d Cir. 2000) (quoting Schulp v. Delo, 513 U.S. 298, 299, 327-28 (1995)). No such evidence is presented in the petition before the Court, nor does the defendant make such a claim.

counsel'" at the time of direct appeal. Bousley, 523 U.S. at 622 (quoting Reed v. Ross, 468 U.S. 1, 16 (1984)). A challenge is not sufficiently novel when, at the time of appeal, "the Federal Reporters were replete with cases involving [like] challenges." Id.; see also Gotti v. United States, 622 F. Supp. 2d 87, (S.D.N.Y. 2009). "Where a number of others had raised the claim before the petitioner failed to do so, the claim is not sufficiently novel to meet the cause requirement. Howard v. United States, 374 F.3d 1068, 1072-73 (11th Cir. 2004)(citing Turner v. Crosby, 339 F.3d 1247, 1282 (11th Cir. 2003)(citing Bousley, 523 U.S. at 622-23)).

Challenging the scope of honest services fraud did not meet this standard of novelty at the time of the defendant's direct appeal. The defendant appealed his conviction on May 11, 2009. Pet'r's Mem. 14. At that time at least two[13] petitions for certiori challenging honest services convictions were under consideration by the Supreme Court, and a third[14] was filed that same day. All three cases were subsequently granted review by the Supreme Court, and the honest services fraud convictions were

---

[13] Black v. United States, No. 08-876, 2009 WL 75563 (U.S. Jan. 9, 2009) (challenging the requirements/application of honest services fraud under section 1346); Weyhrauch v. United States, No. 08-1196, 2009 WL 797581 (U.S. Mar. 25, 2009) (same).

[14] Skilling v. United States, No. 08-1394, 2009 WL 1339243, at *i (U.S. May 11, 2009) (challenging the requirements/application of honest services fraud and asserting that section 1346 is unconstitutionally vague).

vacated and remanded.[15] Furthermore, in Skilling the Supreme Court identified a host of cases challenging various aspects of honest services fraud under section 1346, some as recent as 2008. See Skilling, 130 S. Ct. at 2928 n.35, n.36. In a case highlighted by the defendant, a petitioner challenged his honest services conviction on direct appeal on the ground that section 1346 was unconstitutionally vague. See Geddings v. United States, No. 5:08-CV-425-D, 2010 WL 2639920, at *1 (E.D.N.C. June 29, 2010). This was precisely the challenge in Skilling that the defendant contends was too novel for his counsel to raise on direct appeal, yet the challenge in Geddings occurred in 2008, over a year before the defendant's appeal.[16]

Although the Second Circuit had endorsed the validity of section 1346 at the time of the defendant's appeal, see United States v. Rybicki, 354 F.3d 124, 141-42 (2d Cir. 2003)(en banc),

---

[15] See Skilling, 130 S. Ct. at 2896; Black, 130 S. Ct. 2963; Weyrauch v. United States, 130 S. Ct. 2971 (2010).

[16] It bears highlighting that in the above cases where the defendants brought challenges against the honest services fraud statute, the defendants were actually charged with and convicted of honest services fraud. This defendant has not identified a single case where a defendant challenged the honest services theory of fraud when the defendant was not charged with or convicted of such fraud.

This result is not surprising. Certainly, why would a defendant appeal a legal issue that was unrelated to his conviction? Nevertheless, the absence of such precedent underscores the likelihood that the defendant chose not raise an honest services claim on direct appeal because he understood that the statute did not apply to his fraud convictions.

the defendant cannot establish the necessary cause for not raising an honest services claim because such a claim would not have been legally futile on direct appeal. The Supreme Court has said that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." Bousley, 523 U.S. at 623 (internal quotation marks omitted). While no circuit courts had invalidated section 1346 because it was unconstitutionally vague, circuits had split as to the interpretation of requirements of the statute at the time of the defendant's direct appeal. See Skilling, 130 S. Ct. at 2928 n.36 ("Courts have disagreed about whether § 1346 prosecutions must be based on a violation of state law, whether a defendant must contemplate that the victim suffer economic harm, and whether the defendant must act in the pursuit of private gain.")(internal citations omitted).

In fact, a defendant in the Second Circuit moved for a judgment of acquittal and a new trial after he was convicted of honest services fraud on the grounds that section 1346 was unconstitutionally vague in its face. United States v. Botti, 722 F. Supp. 2d 207, 208 (D. Conn. 2010)(decided after Skilling but motions were filed before Skilling). Again, this is the same argument that the defendant claims was reasonably unavailable to him in light of Second Circuit precedent at the time of his appeal, yet Botti did not believe such a claim to be futile

before Skilling. Given the wealth of precedent for challenging section 1346 and the split among the circuits in its interpretation, such a challenge as applied to the defendant's conviction was more than reasonably available to the defendant when he filed his direct appeal.

Furthermore, even if it were legally futile to challenge Rybicki's definition of honest services fraud in the Second Circuit, the facts of this case do not fit the paradigm of self-dealing honest services fraud laid out in Rybicki. The Rybicki court recognized two types of honest services fraud: (1) bribery and kickback schemes and (2) self-dealing schemes. See 354 F.3d at 139-41. In discussing the self-dealing branch of honest services cases, the Second Circuit noted that "the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer." Id. at 139-40. Here, there was no allegation that the defendant held an undisclosed interest an enterprise with which Friedman's did business, so the defendant's conduct does not square with the Second Circuit's precedent on self-dealing honest services fraud. Therefore, a challenge to the defendant's conviction on a self-dealing honest services theory would not have been foreclosed in the Second Circuit. Such a challenge was "reasonably available" to the defendant at the time of his direct appeal. The facts of

the defendant's case do not comport with the Second Circuit's definition of honest services fraud, and federal circuits courts had differed in their interpretations of section 1346. In this context, the defendant likely failed to raise an honest services claim on appeal, not because it was reasonably unavailable, but because the defendant believed that he had not been convicted of honest services fraud.

The defendant's pre-Skilling belief that he was neither prosecuted for nor convicted of honest services fraud is further evidenced in his pre- and post-trial filings. In his petition, the defendant concedes that he filed a pretrial motion to dismiss the indictment, in which he acknowledged that he was not being prosecuted for honest services fraud, under 18 U.S.C. § 1346.[17] Pet'r's Mem. 7. He also notes that the government responded to his motion, asserting that it was required to prove only that the "defendant was responsible for financial reports that intentionally and materially misled investors." Pet'r's Mem. 8 n. 7 (internal citations omitted). After he was found guilty, the defendant filed motion for a new trial, pursuant to Fed. R. Crim. P. 33(a), contending that the government had constructively

---

[17] In his October 2, 2007 motion to dismiss the indictment, the defendant observed that, based on his reading of the indictment, it looked like the government was "also" suggesting that he was guilty of fraud "because he deprived [Friedman's] of honest services, even though [the indictment] does not cite to 18 U.S.C. §1346. . . . [and] [t]here is no such allegation here." Defendant's Motion to Dismiss, Dkt #134 at 53.

amended the indictment to add a new theory of liability. Defendant's Memorandum of Law in Support of Rule 33 Motion, Dkt #288 at 2, 9-14. That new theory concerned "scooping," not honest services fraud. Id. Given the defendant's pre-trial understanding that he was not being charged with honest services fraud, and his current representation that he was prosecuted and convicted under that theory, it would have been reasonably expected that the defendant's Rule 33 motion would have included an argument that the government also constructively amended the indictment to add honest services fraud theory. It did not, presumably for the same reason his appeal neglected to raise such a claim.

In short, the defendant has failed to establish sufficient cause to justify his failure to raise an honest services claim on direct appeal. Accordingly, his Skilling argument has been procedurally defaulted, and the Court should deny the his petition summarily.

2. The Defendant Cannot Show Prejudice As A Result Of Skilling

Even if the defendant could show cause for not raising an honest services claim on appeal, he cannot demonstrate prejudice. In addition to showing cause, a defendant must show prejudice to defeat procedural default. A defendant's burden in showing prejudice is heavy. To demonstrate prejudice, a defendant challenging a jury instruction, which the defendant's

petition is styled as, must show not only "that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 456 U.S. at 170. This standard is a "significantly higher hurdle" than plain error review. Id. at 166. The defendant simply cannot meet this demanding burden. Skilling does not apply to his conviction, and his claim therefore has no merit. Furthermore, even if Skilling did somehow apply, any error was harmless, which falls well short of an error of constitutional dimensions. See supra p. 14. Therefore, the defendant cannot demonstrate that he was prejudiced by the alleged error, and this Court should find that he has procedurally defaulted on the claim in the present petition.

II. The Defendant's Sixth Amendment Claim Was Addressed On Direct Appeal; Therefore, The Court Cannot Properly Grant Relief On Collateral Review

Although the defendant was permitted to amend his section 2255 motion because adjudication of his first section 2255 motion was incomplete at the time of the amended filing, see Ching v. United States, 298 F.3d 174, 177 (2d Cir. 2002), his Sixth Amendment claim does not raise any new constitutional issues that were not raised and addressed on direct appeal. Essentially, rather than raising new constitutional claims that would be properly brought under section 2255, the defendant

simply wishes to re-litigate a claim he raised, and the Second Circuit addressed, on direct appeal.[18] See Williams v. Cavazos, No. 07-56127, 2011 WL 1945744 (9th Cir. May 23, 2011). In doing so, the defendant hopes to execute an end run around a Second Circuit ruling by confusing this Court with an inapposite, out-of-circuit ruling. Because the defendant's Sixth Amendment Claim raises no constitutional issues that have not already been addressed by the Second Circuit, his petition for relief on this ground must fail.

A. On Direct Appeal, The Second Circuit Addressed The Defendant's Sixth Amendment Claim Concerning The Dismissal Of Juror 10 During Deliberations

The Second Circuit has already ruled that the dismissal of Jury 10 after deliberations commenced did not violate the defendant's Sixth Amendment rights. After jury deliberations have begun, the Federal Rules of Criminal Procedure allow a judge to dismiss a juror and "permit a jury of 11 persons to return a verdict, even without the stipulation of the parties, if the court finds good cause the excuse a juror." Fed. R. Crim. P. 23(b)(3). A judge's power to dismiss a juror during deliberation is not limitless, however. She is constrained by the "good

[18] As has been thoroughly discussed, Skilling's holding does not apply to the facts of the petition before the Court. Nevertheless, at least the defendant relies on a Supreme Court ruling that, subsequent to his direct appeal, created a retroactively applicable right in support of his Skilling claim, something that cannot be said of his Sixth Amendment claim.

cause" requirement in Rule 23(b) and by the Sixth Amendment, which guarantees federal criminal defendants a right to a unanimous jury verdict. See United States v. Thomas, 116 F.3d 606, 621 (2d Cir. 1997) (citing United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987)). The Brown court interpreted the Sixth Amendment to limit a judge's discretion to discharge a juror mid-deliberation under rule 23(b). See Brown, 823 F.2d at 597 ("[T]o the extent that we limit the ability of courts to use Rule 23(b), we do so by command of the Constitution."). According to Brown, "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny this request." Id. at 596.

In Thomas, the Second Circuit recognized Brown's constitutional limitation on Rule 23(b) and "adopt[ed] the Brown rule as an appropriate limitation on a juror's dismissal in any case where the juror allegedly refuses to follow the law." Thomas, 116 F.3d at 622. Thomas concerned the dismissal of a juror on the grounds that the juror refused to follow the judge's instructions on applying the applicable substantive law to the facts of the case; it raised the issue of juror nullification. See id. at 613-14. Subsequently, in United States v. Baker, 262 F.3d 124, 131 (2d Cir. 2001), the Second Circuit recognized that the "stringent rule announced in Thomas applies to removal of a

juror by reason of the juror's determination of the evidence." Baker further refined the contours of the Sixth Amendment's limitation of the on juror dismissal under Rule 23(b).

In finding that the dismissal of Juror 10 during the defendant's trial was permissible, the Second Circuit evaluated the dismissal under both Rule 23(b) and the Sixth Amendment, which, of course, circumscribes Rule 23(b). First, if a court issues an opinion that merely says "claim denied," there is a presumption that the court denied the claim on its merits. See Harrington v. Richter, 131 S. Ct. 770, 784-85 (2011); cf. Harris v. Reed, 489 U.S. 255, 265 (1989) (presumption of decision on the merits of a federal issue when ambiguity is present). Applied here, if the Second Circuit had summarily denied the defendant's direct appeal, this Court should presume that such a denial was a denial on the merits of the claims the defendant brought on direct appeal, including his constitutional claim regarding the dismissal of Juror 10.[19]

Nevertheless, the Second Circuit went further and wrote an opinion, which devoted a paragraph to the defendant's juror

---

[19] To the extent that the Sixth Amendment challenge the defendant raises in the present petition is not coterminous to the Sixth Amendment challenge brought on direct appeal, the defendant has defaulted his claim. The defendant has not demonstrated any precedent, let alone binding or Supreme Court precedent, that has created a new retroactive constitutional right with respect to his juror dismissal claim. Furthermore, the defendant has not demonstrated cause for failing to raise the claim on direct appeal. See supra, pp. 28-35.

dismissal claim. See Stinn, 379 F. App'x at 22. In finding no error in the Court's dismissal of Juror 10, the Second Circuit declared: "there is no evidence that Juror 10 was removed for her holdout status." Id. (citing Baker, 262 F.3d at 131). This conclusion is instructive for two reasons. First, this "no evidence" ruling conforms to the constitutional test for evaluating juror dismissal, which, as discussed above, was laid down in Brown and adopted by the Second Circuit in Thomas. In applying the Thomas rule, courts must rely on the evidentiary record to conclude that there was no possibility that a juror was dismissed in violation of the Sixth Amendment because of the juror's view of the evidence. See Brown, 823 F.2d at 596 ("if the record evidence discloses any possibility. . . ."). The Stinn court found no evidence in the record that Juror 10 was dismissed on the basis of her views on the sufficiency of the evidence. In reaching this conclusion, the Stinn court necessarily determined that the record did not reveal the existence of any possibility that Juror 10 was dismissed because of her views on the merits of the case. Therefore, the Second Circuit found that dismissal of Juror 10 passed Thomas's "any possibility" test, and, in so doing, addressed on direct appeal the constitutional issue that the defendant raises in this petition.

Second, by citing Baker for the proposition that no

evidence suggested that Juror 10 was dismissed because of her views on the merits of the defendant's case, the Stinn court indicated that it addressed the dismissal of Juror 10 in the context of the Sixth Amendment. Baker, as has been noted, evaluated the constitutional limits of Rule 23(b) by limiting the application of the Thomas standard, and ruled that the facts in Baker were outside Thomas's scope. In Baker, a juror was dismissed because of her refusal to deliberate, which violated her duty as a juror. See Baker, 262 F.3d at 131. The Baker court then limited the scope of Thomas: "The stringent rule announced in Thomas applies to removal of a juror by reason of the juror's determination to vote without regard to the evidence. . . . Here, the juror was not removed for her nonconforming view of the evidence. She was removed for her admitted refusal to perform her duty as a juror. Id. Here, Juror 10 was dismissed not because she refused the follow the judge's instructions on a applying the relevant substantive law but rather because she violated her duty as a juror by discussing the case with her sister, who was not on the jury. (T 4652-56, 4667-68). Therefore, even though the Second Circuit applied the "no possibility" rule to the facts of the defendant's case, the Court was not obligated to do so under Baker. This fact underscores that the Second Circuit properly appreciated and addressed the defendant's Sixth Amendment argument on direct appeal. Thus, the

defendant raises no new constitutional issues here but rather seeks to re-litigate an issue that was fully litigated on appeal. Therefore, the Court should deny the defendant's petition for relief on this ground.

B. The Analysis in Williams Is Inapplicable To The Facts Presented In The Present Petition

In July 2011, the defendant expanded his habeas petition to call the Court's attention to the Ninth Circuit's recent decision in Williams v. Cavazos, No. 07-56127, 2011 WL 1945744 (9th Cir. May 23, 2011).[20] The defendant claims that Williams entitles him to habeas relief on his Sixth Amendment claim that was fully litigated and addressed by the Second Circuit on direct appeal. However, Williams recognizes no new substantive constitutional rights that would have retroactive effect.[21] At best, Williams makes the relatively obvious observation that a state statutory analysis is not always coterminous with a constitutional analysis. See Williams, 2011 WL 1945744, at *9. After applying Ninth Circuit precedent to its facts, the Williams court concluded that the state courts had not addressed the federal claim raised on appeal, and then concluded, using Brown's "any possibility" test, that the juror's dismissal violated the Sixth Amendment. See id. at *7, *13-14.

---

[20] It goes without saying that this case is not binding in the Second Circuit.

[21] Much less any ruling that would be binding on the Second Circuit.

Beyond the fact that Williams recognizes no new constitutional rights of which the defendant can avail himself, Williams is inapposite to this case for several reasons. First, in Williams a federal appellate court evaluated whether a state court addressed both the state statutory restrictions on juror dismissal and the restrictions imposed by the Sixth Amendment. Here, a federal district court is being asked to conclude that a federal appellate court addressed the dismissal only in terms of Rule 23(b) and inexplicably neglected to consider the defendant's constitutional claim on direct appeal. In the present circumstance, it is unlikely that a federal court evaluated the dismissal only in terms of federal statutory restriction of Rule 23(b) but not the limits of the Sixth Amendment. Both restrictions are federal issues, rather than one state and on federal issue, and the trial court was a federal, rather than state, court. This presumption that the Court addressed both the Rule 23(b) and constitutional issues is particularly appropriate given that the federal courts have limited Rule 23(b) by the Sixth Amendment. See Baker, 262 F.3d at 131; Thomas, 116 F.3d at 622; Brown, 823 F.2d at 597.

Additionally, the Williams court concluded that the state appellate court had only addressed the state statutory claim because the state court's opinion spent many pages on the state statutory issue, while never mentioning the constitutional

issue. See Williams, 2011 WL 1945744, at *8. This stark discrepancy of page length treatment between a state statutory issue and a constitutional issue is not present in this case. The Stinn court devoted one paragraph to the defendant's juror dismissal claim on direct review. See Stinn, 379 F. App'x at 22. In this paragraph, the court both addressed Rule 23(b) and its constitutional limitations under the Sixth Amendment.

Lastly, the trial court in Williams dismissed the juror in question because of the juror's refusal to follow the judge's instructions on the relevant substantive law. See Williams, 2011 WL 1945744, at *8. Here, by contrast, Juror 10 repeatedly refused to follow the Court's instructions unrelated to the substantive law, in particular the instructions relating to leaving the deliberation room and discussing the case with anyone outside the jury. (T 4604, 4611, 4622, 4636-37, 4652-56). In light of these violations, the Court concluded that "[b]ased on my observations, including the demeanor of the juror and the content of her answers, I'm satisfied that that juror cannot be rehabilitated by simply telling her once again not to speak to anyone outside of the jury room." (T 4667-68). "Here, the juror was not removed for her nonconforming view of the evidence. She was removed for her admitted refusal to perform her duty as a juror." Baker, 262 F.3d at 131. Therefore, the stringent rule from Williams has no bearing on the defendant's petition. See

id. Because Williams does not apply to this case and the Second Circuit addressed the defendant's Sixth Amendment claim on direct appeal, the Court should deny the defendant's claim for relief.

The Defendant's Motion For Bail Should Be Denied

I. The Defendant Has Failed To Raise Substantial Claims And Extraordinary Circumstances That Would Permit Bail

Because the defendant's section 2255 petition fails to raise a viable Skilling claim, which in any event has been procedurally defaulted, and because the Second Circuit has already addressed his Sixth Amendment claim, the Court should not grant bail pending the resolution of the defendant's 2255 petition. To grant bail pending appeal, a situation analogous to granting bail pending the outcome of a habeas petition, a district court "must find: (1) that the [petitioner] is not likely to flee or pose a danger to the safety of any other person or the community if released; (2) that the appeal is not for the purposes of delay; (3) that the appeal raises a substantial question of law or fact; and (4) that if a substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial on all counts on which the imprisonment has been imposed." United States v. Randell, 761 F.2d 122, 125 (2d Cir. 1985). "[A] substantial question is one of more substance than would be necessary to a finding that is was not frivolous. It is a 'close' question or one that very well could be decided the other

way." Id. (internal quotation marks omitted). The defendant's petition raises does not raise a single substantial question.

A. The Defendant's Skilling Claim Raises No Substantial Questions

For the reasons discussed above, the defendant's Skilling claim is not a close question; therefore, it is not a substantial question that would permit bail. First, there is no "alternative theory" error resulting from the abrogation of section 1346 in Skilling. The defendant was not charged with, his jury was not instructed on, and he was not convicted of honest services fraud. He was convicted of defrauding his victims of tangible property rights. Second, even if there was an "alternative theory" error, such an error was harmless because the defendant committed tangible securities and mail fraud, of which he was convicted. Lastly, even if the error was harmful, the defendant has forfeited his honest services claims because he failed to raise it on direct appeal, and he cannot show cause for such a failure because an honest services claim was reasonably available to the defendant at the time of appeal. Because the defendant fails to raise a substantial question of law or fact, this Court should not grant him bail pending resolution of this petition.

The government submissions in Geddings, to which the defendant points in making his bail argument, have no bearing on this case. There, the petitioner had been charged and convicted

of undisclosed self-dealing honest services fraud. See Geddings, 2010 WL 2639920, at *1. Furthermore, there were no additional convictions other than for honest services fraud. See Gov't Mem. Geddings v. United States, Civil No. 5:08-CV-425-1D, at *4 (Dkt #146 June 29, 2010). Therefore, the court did not need to conduct a harmless error review because there was no "alternative theory" error alleged. The government supported bail in that case because Geddings in fact raised a substantial question of law. See id. at *2. These circumstances set Geddings apart from this petition and underscore that the defendant's Skilling claim does not raise the substantial question present in Geddings.

B. Petitioner's Sixth Amendment Claim Raises No Substantial Questions

Similarly, the defendant's Sixth Amendment claim is not a close question, and therefore he should be denied bail. On direct appeal, the Second Circuit addressed his Sixth Amendment claim and found it unavailing. See supra, pp. 37-41. The holding in Williams, to which the defendant draws the Court's attention, creates no new constitutional rights, let alone a constitutional right that would be binding on the Second Circuit. Furthermore, Williams is distinguishable on its facts from the present case. As such, the defendant cannot obtain relief from his conviction on his Sixth Amendment claim. See supra, pp. 36-44. Therefore, this claim does not raise a substantial question that would permit bail. The defendant does not raise any

substantial questions, and his motion for bail should therefore be denied.

Conclusion

For the foregoing reasons, the Court should deny the defendant's 28 U.S.C. § 2255 petition and his motion for bail.[22]

Dated: Brooklyn, New York
August 2, 2011

Respectfully submitted,

LORETTA E. LYNCH
United States Attorney

By: _____
James G. McGovern
Assistant United States Attorney
(718)254-6293

cc: David Shapiro, Esq.
(via ECF)

[22] The government acknowledges the assistance of Peter Henry Fielding, a second-year student at Harvard Law School.