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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

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BRADLEY STINN,

Petitioner,

- against -

UNITED STATES OF AMERICA

Respondent.

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BRADLEY STINN'S REPLY TO GOVERNMENT'S OPPOSITION TO HIS MOTION TO VACATE HIS CONVICTION AND FOR BAIL

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INTRODUCTION AND SUMMARY OF ARGUMENT

In his motion to vacate his conviction and sentence, Stinn described in detail the government's evidence and argument supporting its theory that Stinn deprived his employers or shareholders of his duties of honest and loyal services. He explained how the government's theory at Stinn's trial – that Stinn made accounting decisions to receive a salary and bonus – was exactly the same theory it offered in *Skilling* and that the Supreme Court rejected. After describing the pervasiveness of the government's invalid theory throughout Stinn's prosecution, he then explained why the government's contentions that salary, bonus, and shareholders' "right to control" the company's assets (as described in the *Wallach* decision) were defective after *Skilling*. Finally, he explained why harmless error analysis cannot apply: (a) there was no legitimate, constitutional alternative theory, (b) the government's strategy of mixing charges and arguments into "one big conspiracy" estopped it from asserting that a "legitimate" form of money or property could have been assigned to a particular transaction, and (c) the government opposed Stinn's request for a special verdict – which would have enabled the court to determine the "money or property" (if any) found by the jury.

In its opposition, the government chose not to respond to a number of significant arguments and instead raises new, but meritless, claims.

- It does not dispute Stinn's description of the trial, the government's evidence (including an attorney expert on corporate governance and fiduciary duties), and its arguments to the jury about Stinn's dishonesty. Instead, it claims its decision to leave a reference to section 1346 out of the indictment and the lack of a special "honest services" jury instruction effectively prohibited the jury from convicting on that theory. That is directly contrary to its own position and the holding in *Redzic*, and other cases, and must be rejected. Otherwise, the government would find a simple way to improperly skirt *Skilling*'s rule:

omit a reference to section 1346 but argue the case exactly the same way.

- The government then fails to respond at all to Stinn's point that salary, bonus, and the right to control corporate assets do not constitute money or property for purposes of the Title 18 fraud statutes. The government thus concedes that it (a) argued salary/bonus/right to control as the money and property and (b) told the jury to use that evidence to convict.
- As a replacement for its salary/bonus/right to control theory, the government now claims that the "money or property" element was satisfied with investors' decisions to buy, sell or hold shares of Friedman's stock (the "investment decisions" theory of money or property). Setting aside that such a theory was still mixed in with the honest services theory as well as the salary/bonus/right to control theories, the theory is meritless for several reasons: (a) no case supports it; (b) the Solicitor General of the United States has characterized that theory as an "honest services" theory; (c) there was no proof of it at trial; (d) adoption of an "investment decisions" money/property theory in the Title 18 fraud context would eliminate any money or property analysis in the public company setting; and (e) the only case to which the government cites, *Rowe*, does not support the proposition.

Recognizing the lack of any proof of the money/property element, the government next claims the error was harmless because there was "overwhelming evidence." Here too the government fails to address two of the reasons Stinn explained harmless error analysis is not available: (1) the government did not proffer at trial any distinct, constitutionally valid, theory of money or property; and (2) the government chose to incorporate all of its arguments and theories into each of the three counts, so that no transaction or theory could be separately considered by the jury. Having chosen to commingle facts and theories, the government may not now ask to justify the conviction on a subpart of its theory

and allegations. As to Stinn's third reason why harmless error analysis is not available – the government successfully opposed Stinn's request for a special verdict – the government makes the false claim that Stinn's request was "symmetrical" to the government's request for a special verdict in *Black v. United States*, 130 S. Ct. 2963 (2010), and Black's conviction was ultimately affirmed. (Gov't Br at 25 n. 9) But the special verdict issue in *Black* was exactly the opposite as that here. In *Black*, the *government* requested a special verdict form, and the defendant objected to it. *See* Brief for United States, *Black v. United States*, 130 S. Ct. 2963 (2010) (No. 08-0876), 2009 WL 3155001 at 45-46. The Supreme Court in *Black* rejected the government's contention that Black forfeited his right to challenge the honest services jury instruction by opposing the special verdict and Black's case was remanded. There is nothing remotely relevant in *Black* to Stinn's situation.

Here, Stinn asked for the special verdict; he was entitled to one; and the government may not now take advantage of its own strategic choice to oppose that request to deny him relief. The government cites to no case that supports its contention that it may present multiple invalid theories to a jury, successfully object to a defendant's request for a special verdict, and then reap the benefit by claiming the jury must have convicted on a valid theory.[1] The "overwhelming evidence" standard as paraphrased by the government is not the proper standard, and, in any event, there was clearly not overwhelming evidence of money or property (or of other elements) in the case.

The government ends by claiming Stinn waived his right to raise the *Skilling* constitutional argument despite the fact that there was an en banc opinion in the Second Circuit (*Rybicki*) upholding the honest services theory and every

[1] It is beyond doubt that the jury relied on one or more of these theories in light of the government's law professor testimony, its individual witness testimony, and its arguments.

court of appeals had approved it. The government's argument is contrary to the law and common sense.

Finally, in response to Stinn's juror dismissal argument, the government claims that the Second Circuit already decided this issue. Yet, by citing to a case that affirmed a trial judge's decision to dismiss a juror as a proper exercise of discretion, the Second Circuit made clear that it was rejecting Stinn's appellate argument because there was "good cause" under Rule 23 to dismiss Juror 10. That is not a constitutional analysis. The Second Circuit's single sentence that there was "no evidence that Juror 10 was removed for her holdout status" and its citation to *Baker* was a Rule 23 ruling and not a rejection of the constitutional claim. This court may and should therefore address this important issue.

Stinn's motion should therefore be granted on both grounds. He should be released on bail immediately.

ARGUMENT

I. THE GOVERNMENT IGNORES THE CASELAW AND ITS OWN PRIOR POSITION REGARDING THE APPLICABILITY OF *SKILLING*

The government first argues that Stinn's *Skilling* argument fails because section 1346 was not listed in the indictment. (Gov't Br at 2 and 18.) It does not discuss *United States v. Redzic*, 569 F.3d 841 (8th Cir. 2009), *vacated*, --- U.S. ---, 130 S. Ct. 3543, *affirmed on remand*, 627 F.3d 683 (8th Cir. 2010) – which Stinn discussed in his motion and in which the government took the opposite position to its position here.[2] In that case, the government contended that it need *not* cite to

[2] In analogous situations, courts deem a party's failure to contest facts or legal arguments to concede the issue or abandon the claim. *Douglas v. Victor Capital Group*, 21 F. Supp. 2d 379, 393 (S.D.N.Y. 1998) (considering unaddressed remaining claims abandoned in a summary judgment motion); *Anti-Monopoly, Inc v. Hasbro, Inc.*, 958 F. Supp. 895, 907 & n. 11 (S.D.N.Y. 1997) ("the failure to provide argument on a point at issue constitutes abandonment of the issue"); *Ortho Pharm Corp. v. Cosprophar, Inc.*, 828 F. Supp. 1114, 1129 (S.D.N.Y. 1993) (considering the failure to argue claim in its post-trial memo or

section 1346 in its indictment or have a jury instruction that describes honest services to affirm a conviction based on an honest services theory argued to the jury. Moreover, *Redzic*'s jury instruction directed the jury to find "property," rather than the amorphous "property right" used in the jury instructions here – and the Eighth Circuit and the government had no problem holding that instructing the jury to find "property" properly authorized it to find a deprivation of honest services. The government also does not discuss or cite to the long line of cases that, at the government's behest, affirm convictions where the government contends that citations to definitional sections are unnecessary. *See United States v. Gilkerson*, 556 F.3d 854, 856 (8th Cir. 2009) (finding "any alleged failure to define 'migratory bird preservation facility' or to cite to where the definition could be found is immaterial); *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) (explaining the "indictment's failure to cite § 1346, a definitional provision, and to use its specific term, 'honest' services, does not mean no crime was charged); *United States v. Hassoun*, 477 F. Supp. 2d 1210 n. 9 (S.D. Fla 2007) (noting the "[f]ailure to specifically cite to, or include the text of a definitional provision in an Indictment's count does not render it insufficient."); *United States v. Shepardson*, 196 F.3d 306, 310 (2d Cir. 1999) (despite the fact Shepardson was convicted under § 922, "§921 defines terms for Section 922").

Indeed, in *United States v. Mahaffy*, 2006 WL 2224518 (E.D.N.Y. 2006), the court made the same point: section 1348 incorporates section 1346 by

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response papers abandoned after defendant had addressed the issue in its own brief). When the government fails to raise a claim of waiver, it gives up that contention. *United States v. Quiroz*, 22 F.3d 489 (2d Cir. 1994) (internal citation omitted). When the government fails to address arguments that it made in trial in opposing a motion on appeal, it has been deemed to have abandoned the argument. *See United States v. Teyer*, 322 F. Supp. 2d 359, 376 (S.D.N.Y. 2004) (noting that despite the government's initial argument at trial, "the Government has apparently abandoned this argument" on appeal); *United States v. Kumar*, 617 F.3d 612, 626 n. 12 (2d Cir. 2010) (defendant's reply brief pointed out the government's abandonment of the *ex post facto* argument it made to the district court).

reference, and there is no requirement that section 1346 be cited in an indictment. Honest services "is sufficiently pleaded where [the Indictment] alleges a perhaps unquantifiable harm inflicted on the defrauded entities which may, but does not necessarily result in, direct economic harm." *Id.* at *13. In short, by choosing not to address *Redzic* or any of the case law that authorizes government arguments about honest services, the government concedes that no citation to section 1346 or jury instruction was necessary to authorize the jury to convict on that theory.

The government also does not dispute any of the evidence and arguments in this case as Stinn described them in his motion, thus conceding that it did use the contentions to prove its "honest services" theory. In footnote 4 of its brief, the government attempts to dismiss its own reliance on "dishonesty" and fiduciary duties during trial by claiming that such references did not "transmogrify the charges in the indictment." But in *Redzic* the government "consistently referred to Parr's practice of administering short tests" and the court found that these references to a dishonest way of doing business were sufficient to support the government's contention that he was "withholding the honest services he owed the State of Missouri." *Redzic*, 569 F.3d at 847. Furthermore, the references to Stinn's dishonesty did not have to "transmogrify" the charges in the indictment for Stinn to prevail here; they only had to authorize the jury to convict because Stinn performed his job in an allegedly dishonest manner. The government contends that "it should have come as little surprise…that the government would argue such actions amounted to a breach of the CEO's duty of loyalty to the shareholders." (Gov't Br at 20 n. 4) Accepting that contention, it should come as little surprise to the government that the jury accepted such statements as proof of guilt. Since the government does not dispute that it made these references about Stinn's fiduciary duties and honest services to the jury, it also cannot dispute that the jury must have considered that evidence and argument in reaching its decision.

Moreover, the government's assertion that this was a "tangible fraud" case is false. (Gov't Br at 20 n. 4, 21). The government notes that in a tangible fraud

case "the victim's loss of money or property supplied the defendant's gain…." (Gov't Br at 21). Yet, in Stinn's case, the government failed to prove either. There was no "gain" to Stinn within the meaning of the statutes charged. There was no "loss" to the company, the board of directors, to investors, or to potential investors (all "victims" identified by the government at some point or other). The government never proved particular stock price drops were affected by any announcement related to any of the alleged improper disclosures or corrections of those disclosures. Stinn demonstrated the opposite was true regarding the increase in the bad debt reserve in late 2003 in connection with his sentencing. See Dkt 326 at 4-9.

The government did not call any expert witness (or even the outside auditor) to quantify the impact of the allegations about the financial statements, why the numbers were wrong, how they were material to the disclosures, what the "true" numbers were, the extent to which SEC reports influenced investors, or anything else about the challenged transactions – and then corrective disclosures leading to price decreases. The government did not argue any traditional notion of gain to Stinn (*e.g.*, selling shares of inflated stock, receiving a kickback for providing confidential information, or giving a contract to a company with whom a director has an undisclosed interest).

Instead, the government repeated over and over that Stinn stole his salary and bonus from Friedman's. It contended he should be convicted because he made decisions in order to obtain *that* money and property. Salary and bonuses are not money or property that satisfies a claim of tangible fraud; they are part of the invalidated outskirts of the honest services cases that *Skilling* excluded from the federal fraud statues.

Rather than call an expert to support its claim of "tangible fraud" (that is, a real money/property loss), the government called a lawyer to testify about corporate governance, and he devoted much of his testimony to Stinn's fiduciary obligations: his "duty of loyalty" (532:5); his duty of care with company funds

(532:8-10); his responsibility for "the information that we require to be sent out to the public to potential investors" (532:9-11; 533:9-11); that violating GAAP is essentially a crime (577:2-11; 572:18-573:9); managing earnings is a crime (524:11-12); that "backing in" to earnings goals is a crime (441:8, 11); and Stinn was "ultimately in charge of everybody in the company" (584:17-20 or 585:15-20). Thus, the government's assertion that Stinn's "victims' loss of tangible property supports the conclusion that the defendant was not convicted by virtue of an honest services theory of fraud" (Gov't Br at 23) is wholly inaccurate: the government never proved (by expert testimony or otherwise) that anyone lost money because of any particular "dishonest" transaction the government complained about. The government's opposition contradicts its arguments at trial that Stinn could be convicted because he made dishonest business decisions to obtain his salary and bonus.

Second, the government contends that, because the jury was charged that it had to find "some harm to the property rights of another" (Gov't Br at 21 n. 6), there was no possibility that the jury convicted based on the government's dishonest services theory. It again ignores its own position in *Redzic* and Stinn's explanation that, in *Redzic*, the jury instruction was even more concrete than it was here ("property" in *Redzic* as opposed to "property right" here). Neither the government nor the Eighth Circuit found any impediment to affirming Redzic's conviction on an honest services theory.

Given that the government argued that Stinn should be convicted because his dishonesty hurt the company and investors, and he allegedly stole his salary or bonus, there is no doubt the jury concluded that the money or property in the case was the "property right" of honest services, or the salary he was paid, or the bonus, or investors' "property right" in controlling the company's assets. None of those theories are valid now; all were a basis for the conviction.

If the government's argument were accepted, then *Skilling* would mean nothing. The government could charge a defendant with "money or property"

fraud (without specifying the money or property in the indictment, as here), offer evidence of corporate governance and fiduciary duty standards, argue that a company officer or employee violated those standards in order to be paid a salary or a bonus or other disclosed compensation, mention that shareholders need honest information, and contend that his violations of duty (his false statements) were somehow communicated to investors in a conference call, at a meeting, or in an SEC report, where someone may have relied on the misinformation to buy, sell or hold shares in the company. It would allow the government to lay out a smorgasbord of "property" choices (legal or not) and then, after the jury naturally convicted because the standard of criminal conduct was so low, choose the strongest theory to defend the verdict. That broad construction of Title 18 fraud is what *Skilling* held was unconstitutional. The government is bound by *Redzic* and the many earlier cases that embraced its reasoning (usually at the behest of the government) and may not ignore it here in the hope that this court will too.

In an attempt to distance itself from its now-improper arguments to the jury, the government claims that "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" (Gov't Br at 23). The Supreme Court has taken a contrary view. It remanded *Redzic* to the Eight Circuit for reconsideration in light of *Skilling* even though section 1346 was not charged and the jury was not instructed on "honest services." *See Redzic v. United States*, 130 S. Ct. 3543 (2010). Moreover, the government's citations are to cases that bear no resemblance to this one and are nothing like the facts in *Skilling*. Instead, the cases cited by the government were largely brought by inmates who confused the constitutional limitation of section 1346 to bribes and kickbacks with their argument that it limited the mail and wire fraud statutes to bribes and kickbacks.[3]

[3] Where the court discussed the evidence, each of these cases undisputedly included traditionally accepted "money or property," such as embezzled funds. Thus, in *Crowe v. Haynes*, CV210-130, 2011 WL 1558419 (S.D. Ga. Jan. 12, 2011) report and

Indeed, the government's position here is especially baseless in light of its own decision to dismiss the indictment – after *Skilling* was decided – in *United States v. Lake*, 2011 WL 42878 (D. Kan. Jan. 6, 2011). In that case, the defendants were charged with "7 counts of wire fraud, 17 counts of money laundering, 14 counts of circumvention of internal financial controls, and 1 count of conspiracy to engage in these substantive offenses," *United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007), including "money and property" fraud and "honest services" fraud, *United States v. Wittig*, 575 F.3d 1085, 1105 *et seq*. (10th Cir. 2009). The defendants did not claim in prior appeals that the honest services charges were unconstitutional, yet the government dismissed the case after *Skilling* was decided by the Supreme Court.[4] The government's pretense here that this case is different because the prosecutors argued the honest services theory but omitted it from the indictment is baseless, contradicts the government's own actions in very similar cases, and thus is vindictive.

Third, the government abandons its salary, bonus, and right to control arguments to the jury and the court, and now claims – in one sentence of its brief –

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recommendation adopted, CV210-130, 2011 WL 1559223 (S.D. Ga. Apr. 25, 2011), the court simply held – without citation to the evidence presented at the defendant's trial – that the defendant "has not shown Skilling or Black establish that he was convicted of a nonexistent offense." In *United States v. Jones*, CRIM. 5:09-00304-1, 2011 WL 1398504 (W.D. La. Apr. 7, 2011), the defendant was convicted of embezzling money from her employer: "These activities are not honest services related, and, accordingly, the Government did not invoke § 1346 or honest services in charging Jones with fraud. In *Skilling*, the Supreme Court contrasted honest services fraud with more conventional notions of fraud, like embezzlement." In *DeGuzman v. United States*, SA-10-CA-951-XR, 2011 WL 777934 (W.D. Tex. Feb. 25, 2011), the defendant pled guilty to a scheme where she received kickbacks. In *Aliucci v. United States*, CIV. 10-1297, 2011 WL 635264 (W.D. Pa. Feb. 11, 2011), the defendant lied to Global Nursing Solutions, Inc. that she had performed services, when she had not, and her company was paid $1 million, and she pled guilty. In *United States v. Conti*, CRIM. 08-05 ERIE, 2010 WL 4613798 (W.D. Pa. Nov. 5, 2010), the defendants were "accused of purchasing distressed homes in the city of Erie, performing superficial repairs and sham restorations to make the homes appear to be in significantly better shape than they were, and then selling the homes at drastically inflated prices to unsuspecting buyers."

[4] Wittig was not charged after the dismissal. http://www.kansascity.com/2011/08/05/3059859/ex-westar-official-wittig-wins.html

that the money and property in this case was "the property through either the purchase or retention of Friedman's shares." (Gov't Br at 22). If adopted, this theory would gut the holding in *Skilling* and the money or property elements of the federal fraud statutes. The government's proposed theory is simply the obverse of the concept of dishonest services fraud. Title 18 frauds after *Skilling* require proof that either (1) the defendant obtained money or property through the scheme to defraud or (2) the defendant received a bribe or kickback as a result of performing dishonestly. They cannot be satisfied with proof that the defendant performed dishonestly and in return for disclosed compensation or the defendant's dishonest performance may have affected investors' decisions.

The government's proposal should be rejected here for multiple reasons:

- The government does not cite to any place in the record where it argued this theory to the jury, thus its reliance on it here to prove the money or property element is illusory. (The court used the phrase "investment decisions" once in its jury instructions in its definition of materiality, not in its explanation of the money/property element. 4403:13-16. In opposing Stinn's Rule 29 and 33 motions after the trial, the government also referred to investment decisions only as evidence of materiality. Dkt 299 at 8.)
- The government's new theory was rejected in a Second Circuit post-*McNally* and pre-section 1346 decision. *See United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994) ("lack of information that might have an impact on the decision regarding where government money is spent, without more, is not a tangible harm and therefore does not constitute a deprivation of section 1341 'property'").
- The case relied on by the government – *United States v. Rowe*, 56 F.2d 747 (2d Cir. 1932) – does not authorize the government to prove Title 18 fraud (and satisfy the money/property element) with evidence that the defendant sold something to someone for what it was worth, even if

the defendant misrepresented its "true" value. In *Rowe*, the defendants convinced their victims to part with actual money to buy property the defendants claimed could quickly be sold at an increased price "knowing they could not." *Id.* at 748. The defendants argued that the indictment was defective because it did not "allege that the claimants suffered any *loss*." *Id.* at 749 (emphasis added). When there is no money or property at issue in the case, the courts have used the quote from *Rowe* as another way of saying that the defendant deprived his employer of honest services. *See United States v. Finley*, 705 F. Supp. 1272, 1286 (N.D. Ill. 1988); *United States v. Gross*, 1999 WL 1044843 (D.V.I. Nov. 5, 1999). The Seventh Circuit recognized that *Rowe*'s language reflected an early description of honest services. After remand from the Supreme Court, in *United States v. Black*, 625 F.3d 386, 392 (7th Cir. 2010), the Court, quoting *Rowe*, held that, where the defendants violated their duty of candor to the board of directors, leading to false filings with the SEC, but no loss to the company, that was "a solid honest-services case before the Supreme Court weighed in, but not a solid pecuniary-fraud case."

- The Second Circuit rejected any suggestion from *Rowe* that the government need not allege and prove a definable harm. *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970); *see United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987) ("The *Rowe* case, however, was thoroughly distinguished in *Regent*."). *Regent* rejected the government's claim that *Rowe* held that false representations were "per se fraudulent despite the absence of any proof of actual injury to any customer." *Regent*, 421 F.2d at 1181. Instead, it found no evidence of tangible harm to the customer, and reversed the convictions, where the government proved the defendants made misrepresentations to gain access to customers. *Id.* at 1182.

- If *Rowe* really stood for the proposition that the government need only claim that people may have bought, sold or held stock based on alleged misrepresentations, then the government would have proffered it to the Supreme Court in *Skilling*. In any event, to the extent that the language in *Rowe* may be read to excuse allegations and proof that the defendant obtained money or property, that language did not survive *Skilling*.
- The case the government cites after its quote from *Rowe* demonstrates that no court has adopted or may adopt the government's new claim that simply deciding whether and when to trade on misinformation satisfies the money or property element of Title 18 fraud. In *Wallace v. United States*, CIV 09-806-GPM, 2010 WL 5162027 (S.D. Ill. Dec. 14, 2010), the jury found that "Wallace and his business, Downstate Transportation Services (DTS), defrauded Medicaid by billing for 'unloaded' miles – miles in which no passenger was in the taxi – in clear violation of Medicaid plan operation. The loss to Medicaid totaled approximately $500,000." The defendant there thus billed Medicaid for work he did not do and obtained money. It offers no support whatsoever for the government's suggestion that it can satisfy the money/property element with proof that the defendant sold something for what it was worth.
- The Solicitor General of the United States has already taken the position in the Supreme Court in both the *Skilling*[5] and *Black*[6] appeals that the "investment decisions" theory is part of an honest services claim.

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[5] The government brief in *Skilling* admitted the "investment decisions" theory is an honest services argument: "the government explained in its opening statement that ***the honest-services fraud scheme*** entailed private gain to the conspirators from the sale of Enron stock:

> [T]hese two men [petitioner and Lay] chose to violate their duties of loyalty and trust by lying over and over again about the true financial condition of Enron, ***concealing from [the] employees and investors information which was critical***

- The government never suggested the "investment decisions" theory in the indictment or to this court as a basis for a jury instruction. It likely never presented the theory to the grand jury. The government withheld virtually all of the grand jury materials in this case, so its claim that the grand jury was not asked to indict the defendant for honest services fraud rings hollow. Given the lack of *any* mention of money or property in the indictment, it seems more likely that the government provided no guidance or evidence at all to the grand jury about what it was required to prove.
- The "investment decisions" theory makes no sense under the Title 18 fraud statutes in theory or as applied here. If it is permissible to prove money/property fraud by simply proving misleading statements in SEC reports and an intent that shareholders will rely on those reports in order to make decisions whether to buy or sell shares, then (a) the government would effectively eliminate the requirement in section 1348 that the fraud be in connection with the purchase and sale of securities, and (b) there would be no money or property element at all. A CEO who made knowingly false statements in mailed SEC reports would simply be guilty of fraud and carted off to prison. Whether that was enough to convict someone in the pre-*Skilling* era of honest services prosecutions or not, *Skilling* held such prosecutions to be unconstitutionally vague. *Skilling* 130 S. Ct at 2906. The "investment decision" theory would

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> ***for them to make good decisions about what to do with their own stock***; and at the same time, they repeatedly put their own interests in front of those investors by self-dealing, by selling their own stock."

2010 WL 302206 at *51-52 (emphasis added).

[6] In arguing against a contemplated harm requirement to section 1346, the Solicitor General noted that "'honest services fraud bleeds into money or property fraud' when disclosure of a breach of duty of loyalty would lead the principal to seek a more advantageous financial deal." Brief for United States at 23, *Black v. United States*, 130 S. Ct. 2963 (2010) (No. 08-876), 2009 WL 3155001 at *23.

open the door for the government to pursue the vague prosecutions that it did under honest services. Tellingly, the government in *Skilling* never argued for such a theory of property. Brief for the United States, *Skilling v. United States*, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 302206.

- The government never proved more than that the stock price fell in November 2003 – the date on which the alleged corrective disclosure was released by Friedman's (and on which Suglia's separate fraud was disclosed). The only shareholder who testified, Nesbitt, testified (out of the jury's presence) that he invested in 1993; bought and sold two or three times (2267:21-22); bought shares at $4 per share and more than doubled his money on some of those shares (2268:5-7); made a profit some of the times (2267:5); reduced his positions when Friedman's loaned money to its sister company (not an issue in the case) (2269:5-10); and did not sell his stock until August 2005 (2265:19-20) – almost two years after Stinn left the company. Nesbitt sustained no losses immediately following the November 2003 press release, after which Friedman's stock price dropped (2272:3) and may even have bought shares after the November 2003 disclosures that the government claimed corrected prior misinformation (2272:21). In other words, Nesbitt's financial losses, if any, cannot be attributed to Stinn.
- In any event, the government mixed this "investment decision" theory in with its other honest services arguments, as well as its salary/bonus/right to control theories – all of which were defective – and there is no way to know which theory the jury settled on. A jury may choose from among different legitimate theories and convict if they are unanimous on one theory, but a jury may not be given four different theories (three of which the government now concedes are defective) and be asked to choose from among them.

In short, the government's proposed "investment decisions" theory would improperly create criminal liability for large swath of the population, as Justice Breyer explained in the oral argument in *Black*: "When the criminal code was reenacted … one kind of joke was that ... the law would be read as a crime to do wrong…. Now you see the problem? It may be you would never prosecute it. It may be a jury would never convict. But that isn't the basis for having a statute that picks up 80 or 100 million people." Transcript of Oral Argument at 35-36, *Black v. United States*, 130 S. Ct. 2963 (2010) (No. 08-876), 2010 WL 2009 WL 4623518. In the government's view, every breach of fiduciary finding in the Delaware state courts would be an automatic criminal conviction.

In the Supreme Court, the government admitted that the disclosed compensation (salary/bonus) theory was not part of the pre-*McNally* caselaw, but asked the Court to extend the law to include them as proof of money or property:

> Justice Alito: Were there any pre-McNally cases that involved a situation like this, where the benefit to the employee was in the form of the employee's disclosed compensation?
>
> Mr. Dreeben: There were not to my knowledge, Justice Alito, and I would frankly acknowledge that this case is a logical extension of the basic principle that we have urged the Court to adopt in the nondisclosure cases.

Transcript of Oral Argument at 52-53, *Skilling v. United States*, 130 S. Ct. 2896 (2010) (No. 08-1394), 2010 WL 710521.

The government did not suggest to the Supreme Court that the investment theory was part of that request to extend the law. Instead, it suggested that the investment theory could be offered to prove the Rule 10b-5 claims against Skilling: "any juror finding that the government proved the honest services object of the conspiracy also would have found that the government proved the securities fraud [10b-5] object." 2010 WL 302206 at *53. On remand, the government also did not argue that Skilling could be convicted of a Title 18 fraud count based on a

claim that Skilling's salary, bonus, or shareholders' investment decisions constituted money or property. It thus conceded that none of these constituted money or property and rather were part of an honest services theory (or a 10b-5 claim).

Indeed, the Supreme Court expressly rejected the "Government's theory at trial that Skilling 'profited from the fraudulent scheme…through the receipt of salary and bonuses" because "[t]he Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations." *Skilling*, 130 S. Ct. at 2934. In other words, salary and a bonus (and investment decisions) were not enough.

Finally, the government's position about the applicability of *Skilling* to Stinn's case is flawed because it purposely confuses the securities fraud section it charged here – 18 U.S.C. § 1348 – with the securities fraud alleged in *Skilling* – §10(b) and Rule 10b-5, and then argues that Stinn's conviction should be affirmed because Skilling's was affirmed after remand. (Gov't Br at 27). The short answer is that the Fifth Circuit relied solely on 10b-5 in affirming the conviction. *United States v. Skilling*, 638 F.3d 480 (5th Cir. 2011). There is no "money/property" element in a 10b-5 allegation, and thus the government in *Skilling* was only required to prove the traditional 10b-5 elements. The government's claims here are, therefore, flawed.

II. HARMLESS ERROR REVIEW MAY NOT BE USED IN THIS CASE

In his motion, Stinn provided three reasons why the court may not engage in harmless error analysis here: (1) the government's theory was based on the breach of fiduciary duty/dishonest services theory, and it did not proffer any distinct, constitutionally valid, alternate theory; (2) the government chose to incorporate all of its arguments and theories into each of the three counts, and having chosen that tactic, may not attempt to justify the conviction by teasing out

a subpart of its theory and allegations; and (3) it successfully opposed Stinn's request for a special verdict.

The government ignores the first two arguments.[7] Its failure to respond should be a construed as its concession that both arguments are irrefutable. When the government mixes together all of its theories and charges into three counts, no reviewing court can determine whether the error in each one (honest services) was somehow harmless in light of alleged "proper" money or property.

In regards to the third point, the government misstates the law. First, the government must concede that it successfully opposed a special verdict form that would have provided insight into the jury's decision. Having chosen that strategy, it is estopped from arguing harmless error. "Where a jury is presented with multiple theories of conviction, one of which is invalid, the jury's verdict must be overturned if it is impossible to tell which theory formed the basis for the conviction." *United States v. Szur*, 289 F.3d 200, 208 (2d Cir. 2002). By combining all of its theories and arguments into "one big conspiracy," the government itself created the uncertainty that created to help win a conviction.

The government made a calculated decision to lump all of Stinn's alleged misconduct together, incorporate all of the conduct into each of three counts, and then hope the jury would settle on one or more allegations to convict. It cannot show, however, what the jury concluded. If the government truly proffered the "investment decision" theory (and it did not), then it should not have been allowed to present evidence on and argue about corporate governance, fiduciary duties, Stinn's salary and bonus, and other business errors. If the government was not

[7] In footnote 9, the government claims that it did not "waive" harmless error analysis because it is "not something a party can waive." First, Stinn argued the government is estopped from arguing harmless error analysis because it made strategic decisions to charge the case, argue its evidence, and oppose the special verdict that all made it impossible to fairly conduct harmless error analysis. The government does not respond to that argument. Second, harmless error certainly may be waived. *E.g., United States v. Gonzalez-Flores*, 418 F.3d 1093 (9th Cir. 2005) ("when the government fails to argue harmlessness, we deem the issue waived and do not consider the harmlessness of any errors we find").

pursuing a theory of honest services, then it should not have put a lawyer on as an expert witness to talk about breaches of fiduciary duties. If all the government needed to show was that the "fraudulent" statements influenced an investor's decision, then it should not have been able to present evidence of Friedman's declining stock price in November 2003 accompanying the disclosure that the company would have a loss and Suglia was a thief. As the Second Circuit recently held in vacating convictions, *United States v. Ferguson*, __F.3d__, 2011 WL 3251464 at *7 (2d Cir. Aug. 1, 2011), a court may admit stock price drop evidence to prove materiality (if it actually proves it), but it is an abuse of discretion to allow the prosecutors to exploit that evidence to (1) "emphasize the losses caused by the transaction," (2) "humanize its prosecution," and (3) "prejudicially cast the defendants as causing an economic downturn that has affected every family in America." *Id.* at *8. That is what the government did here. It cannot separate the yolk from the egg. If there were a valid theory among those proffered at trial (and there are none), then the government still is prohibited from asking for harmless error review based upon its decision to combine all of its theories together. *See generally, Yates v. United* States, 354 U.S. 298 (1957).

The government argues Stinn cannot meet the harmless error test as it defines that test: that Stinn may only prevail if the jurors would not have convicted him "had honest services theory of fraud been unavailable to them." (Gov't Br at 26). In other words, according to the government, this court may only vacate the conviction if Stinn would have been acquitted if the court excluded all of the honest services arguments and testimony, and the arguments about salary, bonus, and the right to control assets. In support, the government argues that Skilling's conviction was affirmed after remand to the Fifth Circuit because of the "alternative theory" that Skilling committed securities fraud (Gov't Br at 27).

First, the government's discussion of the standard of harmless error is wrong. Harmless error is properly analyzed under *Chapman* v. *California*, where the Supreme Court held that a constitutional error requires reversal if there is "a

reasonable possibility that the [error] complained of might have contributed to the conviction." 386 U.S. 18, 23-24 (1967). Constitutional error may be found harmless only *if the prosecution* establishes "beyond a reasonable doubt" that the error "did not contribute to the verdict obtained." *Id.* at 24. In *Neder v. United States*, 527 U.S. 1 (1999) (cited in *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (per curiam)), the Court reaffirmed *Chapman* and held an error may only be found to be harmless if a reviewing court is able to "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id*. at 19. This court, and any appellate court, may not substitute its judgment about the guilt of the defendant. Rather, it must ask whether the "record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id*. Omitting all of the proof about fiduciary duty breaches, salary, bonus, and (even though they do not exist) decisions by shareholders to buy, sell or hold stock based on particular challenged transactions would have left the jury with no theory of money or property on which to convict. Stinn's Rule 29 motion would have been granted because Stinn did not obtain – or intend to obtain – any form of money or property within the meaning of the fraud statutes.

In this case, Stinn demonstrated more than a "reasonable possibility" that the government's arguments about Stinn's breaches of fiduciary duty and his alleged dishonest services to reap his salary and bonus led to his conviction. The only theories presented to the jury were improper under *Skilling*; there were no viable alternate theories, including the new "investment decisions" theory. In the words of *Neder*, if the jury had been told that it had to find some money or property – and that money or property could not be Stinn's salary or bonus, shareholders' "right to control" assets, or their right to information in order to make investment decisions, then no court could conclude "beyond a reasonable doubt" that Stinn would have been convicted.

Second, the government confuses Rule 10b-5 securities fraud with section 1348 securities fraud and contends that Stinn's conviction should be affirmed

because the Fifth Circuit found "overwhelming" evidence that Skilling participated in a conspiracy to violate Rule 10b-5.[8] But, as Stinn explained in his motion, 10b-5 does not have a money or property element. A conspiracy to violate section 1348 (as charged here) must still be a conspiracy to obtain money or property that, according to the government's argument and evidence at trial, was satisfied with proof of dishonest services.

Finally, there was no evidence, let alone overwhelming evidence, to satisfy the money or property element here.[9] The government has cited no evidence (because there was none) of Stinn obtaining "money or property" within the meaning of the federal fraud statutes as limited by *Skilling*. The government is not entitled to have its error regarding one element excused because it contends there was overwhelming evidence to prove other elements of the offense; it must present the alleged overwhelming evidence of the element at issue, and it has not. *See Neder v. United States*, 527 U.S. 1, 15-16 (1999) (harmless error where trial court improperly did not charge the jury on materiality, but there was overwhelming evidence of materiality and defendant did not argue materiality); *United States v. Kaplan*, 490 F.3d 110, 128 (2d Cir. 2007) (harmless error where court improperly gave conscious avoidance instruction but where there was overwhelming evidence of knowledge).

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[8] "[A] court may not affirm a conviction based solely on overwhelming evidence of the properly instructed ground." *United States v. Holly*, 488 F.3d 1298, 1307 n.6 (10th Cir. 2007) (citing *Stromberg*, 283 U.S. 359, 368 (1931)). Although the Second Circuit followed a different approach in *United States v. Jackson*, 196 F.3d 383 (2d Cir. 1999), it questioned its decision in *Monsanto v. United States*, 348 F.3d 345, 350-51 (2d Cir. 2003); *see United States v. Needham*, 604 F.3d 673 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 355 (2010).

[9] Nor was there overwhelming evidence that a crime took place. In contrast to practically every case brought under the federal fraud statutes, whether for honest services or not, there was no allegation of a bribe, kickback, sale of shares of inflated stock, diversion of company funds for personal gain, or the appropriation of funds to a third party with whom there is an undisclosed interest. The government prosecuted Stinn for bad projections and alleged accounting errors, a far cry from the "core" prosecutions under the federal fraud statutes.

With respect to the government's claim that there was generally "overwhelming evidence" in the case (that is, evidence to prove other elements of the offense), that evidence is irrelevant to the issues here and it was not overwhelming in any event. The government claims Stinn lied to Friedman's shareholders, its outside auditor, its Audit Committee, and analysts (Gov't Br at 2), but Stinn put on a strong defense that the SEC reports were accurate and the evidence that executives "cooked the books" came from a CFO who defended his accounting until the moment he was caught in a separate fraud and had to concoct an accounting fraud scheme to testify his way out of prison – which he did.

The government cites to a part of Suglia's testimony as support for its claim that the evidence of manipulating the earnings per share was overwhelming, but that testimony is not only irrelevant to the money/property element, it was also without detail, superficial and conclusory, and without any corroboration (even as to the correct earnings per share numbers). Suglia testified that he and Stinn would "basically" discuss the earnings target they were "shooting for" and would come to a number they believed they could "justifiably report" and then Suglia would "cook the books" to arrive at that number. Suglia said the number they set was "based on performance for that particular quarter – predominantly sales drive." "[W]e would report a number as close to the consensus estimate that we felt we could get away with." 1009:10-16. Other than the vague references to "cook the books" and "get away with" (phrases implying a bad intent), there is nothing in the testimony cited to by the government that suggests an intent to do anything other than maximize earnings, a goal of every corporation in the United States.

As another example, the government claims Friedman's used scooping, hiding the X files, and understating the allowance for doubtful accounts in violation of GAAP to meet its financial goals, and that Stinn and others falsified the allowance, the currency percentage, and the delinquency percentage. Again, the government does not establish any connection between those claims and any

money or property obtained by Stinn. At trial, the government offered no proof (a) of what the right allowance should have been (the Audit Committee director who testified agreed that he signed off on 10.5%); (b) that Ernst & Young disputed the allowance (Stinn submitted memos at sentencing from Ernst & Young that said a *lower* reserve was justified and that showed it approved the reserve); and (c) of what the "correct" currency or delinquency rate might have been so as to prove materiality. Overwhelming evidence on one element cannot negate the lack of evidence on another element.

III. STINN DID NOT WAIVE HIS RIGHT TO FILE THIS MOTION

The government claims Stinn procedurally defaulted by failing to raise his claims on direct appeal, and he has not shown cause and prejudice for doing so. It misstates the law.

A defendant is excused from raising on direct appeal any claim based on a new rule of constitutional law with retroactive effect decided after direct appeal. *Reed v. Ross*, 468 U.S. 1, 17 (1984). Stinn's claim is based on just such a new rule. The Court in *Skilling* held that it could only preserve the honest services statute "without transgressing constitutional limitations," by limiting it to "bribe-and-kickback … pre-McNally case law." *Skilling* 130 S. Ct. at 2931. *Skilling*'s holding applies retroactively on collateral review because it narrows the scope of substantive law. *Bousley v. United States*, 523 U.S. 614, 620 (1998). Finally, *Skilling* was decided after Stinn filed his direct appeal. Stinn's appellate brief was filed on October 21, 2009, and *Skilling* was not decided until June 24, 2010.

The government contends Stinn has defaulted because previous challenges to section 1346 demonstrate that the claim was not so "novel" as to be legally unavailable. (Gov't Br at 29). For support, it points to the cert petitions granted in the *Black* and *Weyhrauch* cases. Yet, neither of those cases dealt with the constitutionality of the statute.[10] That question was addressed by *Skilling*, which

[10] *Black v. United States*, No. 08-876, 2009 WL 75563 (U.S. Jan. 9, 2009), addressed the questions of noneconomic harm and prejudicial instruction error. *Weyhrauch v. United*

the government concedes was not filed before Stinn's direct appeal. (Gov't Br at 30).

Furthermore, the government ignores the cornerstone of *Reed*'s reasoning – that "failure to raise a claim for which there was no basis in existing law" satisfies the cause requirement. *Reed*, 468 U.S. at 15. The government admits that "no circuit courts had invalidated section 1346 because it was unconstitutionally vague." (Gov't Br at 32), *see also Skilling*, 130 S. Ct. at 2927 (noting that "all Court of Appeals had embraced the honest-services theory of fraud.") When a Supreme Court decision overturns "a long standing and widespread practice…which a near unanimous body of lower court authority has expressly approved," it is almost certain that there could have been "no reasonable basis" on which to challenge the previous law. *Reed*, 468 U.S. at 17. The unanimity of the law before *Skilling* clearly shows there was no reasonable basis, much less a requirement, that Stinn address this issue on direct appeal.

In any event, if the government were right (and it is not), and every defendant accused of dishonest services was on notice that he had to raise his *Skilling* claim before *Skilling* was decided, then Stinn was deprived of effective assistance of counsel. While Stinn disputes that he was required to raise the issue on appeal, if this Court determines otherwise, then it must find that he was denied effective assistance. If this court embraces the government's contention, then Stinn will move to amend his motion to include such a claim. Ineffective assistance of counsel may constitute cause for a petitioner's failure to pursue a constitutional claim if the ineffective assistance itself is a constitutional claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). "[A] petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and

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States, No. 08-1196, 2009 WL 797581 (U.S. Mar. 25, 2009), addressed the question of the creation of a federal common law. Neither raised the issue of whether the statute was unconstitutionally vague.

significantly weaker." *Jones v. Barnes*, 463 U.S. 745, 754 (1983). If the issues were as obvious as the government contends they were, then Stinn had constitutionally deficient counsel on appeal.

The government argues that Stinn waived his right to raise the *Skilling* claim because he argued in his pre-trial motion to dismiss that the government failed to allege any money or property in which he "acknowledged that he was not being prosecuted for honest services fraud." (Gov't Br at 34) The government misstates Stinn's motion to dismiss and his petition here. Stinn argued in his pre-trial motion that the indictment was defective because it was silent about the money or property involved in the case and that it was phrased in a way to suggest that "Mr. Stinn is guilty because he deprived the company of honest services, even though it does not cite to 18 U.S.C. §1346." Dkt 134 at 53 and n. 17.

In his current motion, Stinn pointed out that the government's only response to his motion to dismiss for failure to allege money or property was to cite to a section 10(b) case, which has no money or property element. Dkt 146 at 14 n. 3. Thus, Stinn did not "understand" (Gov't Br at 35) that there was no honest services fraud; rather, he understood that the indictment provided no notice or guidance at all about how the government intended to prove money or property *and* it appeared the government would advance an honest services theory at trial. It was only at trial when Stinn learned the multiple, and improper, theories of money or property the government advanced. But, at the time of his appeal, Stinn had no obligation to raise an issue that every circuit had concluded was a sufficient method to satisfy the money or property element. *See Skilling*, 130 S. Ct. at 2927.

IV. DISMISSAL OF JUROR 10 VIOLATED STINN'S SIXTH AMENDMENT RIGHT TO A UNANIMOUS JURY

The government's description of events preceding the dismissal of one of the jurors is not a full recitation of the events nor does it or can it explain why the "issues" regarding Juror 10 did not become issues until after everyone in the courtroom knew she had voted to acquit. However, the government's tailored

description concedes facts that support Stinn's motion: (a) A juror (#10) came out of the jury room; (b) the court did not make any inquiry into the reasons for her leaving the jury room to determine whether it was her "fault" or that of the other jurors frustrated by her unwillingness to bend to their will; (c) the juror allegedly fainted,[11] but the court was not concerned about it until it knew Juror 10 voted to acquit; and (d) Juror 10 was "distressed," but, again, the court did nothing until it knew her vote.

The government claims Stinn's argument is not a new constitutional claim and it is based on an "inapposite, out-of-circuit" ruling. (Gov't Br at 36-37). It argues that the Second Circuit considered his juror claim on direct appeal and, relying on Fed. R. Crim. P. 23(b)(3), concluded that this court properly found "good cause" to excuse the juror. It further argues this court must "presume" that the Second Circuit denied Stinn's juror dismissal argument on constitutional grounds (Gov't Br at 39), and, in addition, argues the Second Circuit wrote an opinion denying Stinn's constitutional argument. The government is wrong.

It is clear the Second Circuit did not address Stinn's more fundamental constitutional claim regarding the dismissal of Juror 10. While Stinn did cite to the case law in his appeal that prohibits dismissing a juror when there is "any possibility" that the reason for the dismissal is based on the juror's vote, the Second Circuit did not affirm his conviction on that ground. That Court merely said there was "no evidence that Juror 10 was removed for her holdout status" and acknowledged that the District Court did not "abuse its discretion" in that decision. That was an affirmance of "good cause" – a reason to remove the juror – and not an affirmance because there was "no possibility" that the juror's vote may have affected the decision to remove her. It was certainly not an affirmation that the decision to dismiss her, when everyone knew the juror voted to acquit, did not violate Stinn's Sixth Amendment rights. There is no appellate review of

[11] In fact, the juror did not faint; she fanned herself, the court asked if she wanted water, and the juror said, "I'm ok," 4287:13.

constitutional claims that relies on the "abuse of discretion" standard. *See United States v. Quinones*, 313 F.3d 49, 60 (2d Cir. 2002) ("Questions of constitutional interpretation are reviewed *de novo*"); *United States v. King*, 276 F.3d 109, 111 (2d Cir. 2002) ("The district court's dismissal of the indictment raises questions of constitutional interpretation, and thus we review the district court's decision *de novo*."). A court may not violate a defendant's Sixth Amendment right in the exercise of discretion. Stinn's constitutional claim that he was denied his Sixth Amendment right to a unanimous jury remains and was properly raised in this 2255 motion.

The government's brief points out that "[a] judge's power to dismiss a juror…is constrained by the "good cause" requirement in Rule 23(b) ***and*** by the Sixth Amendment." (Gov't Br at 37-38) (emphasis added). The Second Circuit, however, did not decide whether Stinn was denied his constitutional right to a unanimous jury, never mentioned anything about the "possibility" that the juror was dismissed because of her views, and clearly only considered whether there was "cause" to remove her. As *Williams* makes clear, that is not enough. One can have cause to remove a juror, but if there is any possibility that removal is based on the juror's views, then the Sixth Amendment prohibits the trial court from dismissing her. The sequence of events at the trial demonstrates that there was more than a "possibility" that Juror 10 was dismissed because of her vote.

Indeed, after learning about the juror's vote, the trial court failed to engage in the required two-step analysis to determine whether the juror could disregard the extraneous information she had received and thus revealed that its goal was to dismiss the juror because of her views. "A mistrial or other remedial measure is required only if juror misconduct and actual prejudice are found." *United States v. Cox*, 324 F.3d 77, 86 (2d Cir. 2003). The Second Circuit has held that it is "not the mere fact of infiltration of some molecules of extra-record matter…but the nature of what has been infiltrated and the possibility of prejudice." *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994). "[W]here an extraneous influence is

shown, the court must apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror." *Id.*

Because it is the issue of prejudice, not the extraneous information, which determines whether a court should take remedial measures, appellate courts have often reversed when a trial court does not inquire sufficiently into the nature of the event to determine if there is prejudice. *See United States v. Lara-Ramirez*, 519 F.3d 76, 86 (1st Cir. 2008) ("In sum, although the questioning of the jury foreperson may have been enough to establish that a 'taint producing event' had occurred, it fell far short of establishing the magnitude of the 'taint producing event' and the 'extent of any resultant prejudice'"); *United States v. Resko*, 3 F.3d 684, 690-91 (3d Cir. 1993) ("Simply put, the questionnaire raised more questions than it answered. Based on the results of the questionnaire, we know that every juror engaged in premature discussions. Yet there is no way to know the nature of those discussions – whether they involved merely brief and inconsequential conversations about minor matters or whether they involved full-blown discussion of the defendants' guilt or innocence"); *United States v. Bristol Martir*, 570 F.3d 29, 43 (1st Cir. 2009) ("Although we accord the district court great flexibility in applying a curative procedure in the face of juror misconduct, we must still resolve whether the trial court investigated the claim appropriately and resolved it in a satisfactory manner.").

In Stinn's case, the court decided that Juror 10 committed misconduct by speaking to her sister about the meaning of two words ("fraud" and "conspiracy"). The juror's confusion was not unusual; Judge Hand expressed the same confusion in *United States v. Rowe*, 56 F.2d 747, 748 (2d Cir. 1932): "The indictment laid the scheme and conspiracy – for there is no substantial difference between the two when more than one are involved – as follows." Here, the court undertook no investigation to determine whether the juror's brief discussion about the meaning of "fraud" and "conspiracy" actually prejudiced the juror to such a degree that dismissal was necessary. The court never applied an objective test to determine

prejudice, nor did it attempt to determine the nature of the extraneous influence to see whether and what remedial measure was necessary. *See Lara-Ramirez*, 519 F.3d at 85 (finding inadequate the trial court's assumption of "ineradicable taint without pursuing the alternatives, suggested by defense counsel, that might have disproved any such taint or suggested the appropriateness of a curative instruction").

In fact, the court chose to "relieve her for cause," 4650:1-4, without applying the critical second step of the proper analysis – whether the extraneous information was prejudicial. When courts have applied that analysis, they have found jurors' contact with far more serious extraneous information not to be prejudicial after conducting a prejudice inquiry. *See United States v. Bradshaw*, 281 F.3d 278 (1st Cir. 2002) (deliberating jurors who saw three counts of a severed indictment were found not to be prejudiced after judge conducted individual interviews with jurors and gave curative instruction.); *United States v. Console*, 13 F.3d 641 (3d Cir. 1993) (finding harmless the extraneous information that a jury received when a juror asked a lawyer the definition of the word "conspiracy" in a RICO case and told that definition to the deliberating jury).

The court did not inquire into the "taint producing event" and did not ask Juror 10 if she could disregard the extraneous information. Instead, the court rejected Stinn's correct assertion that such extraneous information could be handled with a curative instruction: with respect to "this notion that something could be curable[,] I tend to doubt it…." 4664:14-15.

The court's decision to dismiss the juror could not have been based upon incurable prejudice because the court never asked any questions of the juror (or other jurors) to determine whether there was prejudice and whether it was curable.[12] *See Resko*, 3 F.3d at 691 (noting even under the wide discretion

[12] Juror 10's acknowledgement that after speaking with her sister she was still confused only highlights the lack of prejudice of this extraneous information and the effectiveness

afforded to the trial court that the judge's inquiry was insufficient "to make a reasoned determination" about the appropriate remedy for the jury misconduct.) Instead, the court said only that it was "satisfied that the juror cannot be rehabilitated by simply telling her once again not to speak to anyone outside of the jury room." 4668:5-7. The court's failure to comply with the two-step process required by the law – after the court learned of Juror 10's vote – demonstrates far more than "any possibility" that Juror 10 was dismissed because of her vote. *Williams* makes clear that, while a court may have cause to dismiss a juror, it may not do so in circumstances such as these.

V. STINN'S MOTION FOR BAIL SHOULD BE GRANTED

Stinn has provided strong legal bases to vacate his conviction in light of recent case law. In response, the government first argued (contrary to its own position and to uniform court decisions) that it may argue honest services to the jury, get a conviction based on that argument, but be relieved of any responsibility for having done so. That is not the law, and it is not the law the government has advocated in other cases.

Second, the government misstates the law on harmless error analysis, misstates its own strategic decisions to prevent Stinn from knowing the bases for his conviction, and misstates the precedent in *Black* in a failed attempt to convince the court to deny Stinn's motion. It also fails to provide any evidence, let alone overwhelming evidence, of proper "money or property" evidence, instead concocting a new but equally improper theory and ignoring the fact that its new theory (if truly argued to the jury) was mixed in with all of its improper arguments.

Third, the government's effort to claim Stinn waived his right to bring a claim under *Skilling* is meritless. Not only does it contradict long-standing Supreme Court precedent, it contradicts the government's own actions in cases

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a curative instruction could have had. *See* Gov't Br at 13, 4655:55-56 ("I don't know, it is a little confused. I'm still a little confused there.").

around the country, where the government has agreed to the dismissal of indictments – even indictments that include different charges – where it alleged dishonest services.

Stinn argued in his motion for bail that there was no likelihood that the government would defeat Stinn's motion through an attempt to show that the error in prosecuting Stinn on an illegal theory was harmless. He was right: the government does not attempt either to explain away its repeated honest services arguments or its strategic choices regarding how to charge the case and whether to oppose a special verdict, and it utterly fails to meet the harmless error standard.

In light of Stinn's arguments and the government's inadequate response, Stinn is entitled to be released on bail immediately.

CONCLUSION

For the foregoing reasons, Stinn respectfully requests that his motions for immediate release on bail and to vacate the judgment be granted.

Dated: August 12, 2011

Respectfully submitted,

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