

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	08CR888
	)	
	)	Judge James B. Zagel
ROD BLAGOJEVICH	)	

**DEFENDANT ROD BLAGOJEVICH S  
OMNIBUS MOTION FOR RELIEF  
BASED ON THE SUPREME COURT S RULING ON HONEST SERVICES**

Now Comes Defendant Rod Blagojevich, by and through his counsel and hereby files his Omnibus Motion for Relief, requesting a mistrial and dismissal of the indictment, along with other alternative relief. In support of said motion, defendant states the following:

**I. Relief Requested**

Defendant Rod Blagojevich moves this Court for a mistrial and dismissal of the indictment. The Supreme Court s ruling on honest services in *United States v. Skilling* substantively altered the statute. The counts alleging honest services were indicted and charged under the old version of the statute. The indictment tracks the language of the old statute. Prosecution on this unconstitutionally vague statute cannot go forward.

In the same vein, because of the changes to the statute, further prosecution of Blagojevich under the new framework violates the *ex post facto* clause of the U.S. Constitution. The honest services charges must be dismissed.

In addition, the due process violations in this case compel this Court to dismiss the indictment *in toto*. A fundamental right of any defendant is that he have full notice of the charges he is facing at the start of trial. The Fifth Amendment Due Process clause of the Constitution provides that a defendant have full notice of the charges to allow for meaningful defense. An indictment must be charged with specificity to enable a defendant to defend against the charges alleged.

Blagojevich and his counsel have been denied the fundamental right to know the charges before the start of trial, and to effectively defend against them. Evidence and testimony related to the honest services charges (which would otherwise be inadmissible) has been presented to the jury in great detail and tainted these proceedings.

Indeed, the day that the honest services ruling was issued by the Supreme Court (and immediately after the defense requested a temporary stay in testimony to read the cases and file any necessary motions) the government resumed its questioning of witness John Harris without taking time to consider, in good faith, potential dismissal of the honest services counts. Moreover, the government published for the jury two calls that allege honest services deprivation (Tab 33, related to Count 5 and Tab 44, related to Count 7).

This blatant derogation of the “special responsibilities of a prosecutor<sup>1</sup>” and disregard of the Supreme Court’s ruling should not be sanctioned by this tribunal.

The government in this case sought a second superseding indictment to bolster its case if and when the honest services statute was modified or declared unconstitutional. Clearly, the government foresaw the potential need to dismiss the honest services counts in the indictment against Blagojevich. It offends the notion of justice for the government to use the tool of the grand jury to charge Blagojevich in a subsequent indictment with additional charges in order to salvage its chances of a conviction in the event the case ended up in its current position, only then to object to dismissal of these charges. This tactic by the government is disingenuous, improper and violative of the duty of a prosecutor.

It is worth noting that Comment 1 to the Rule 3.8 of the ARDC 2010 Rules of Professional Responsibility notes that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded *procedural justice* and that guilt is decided upon the basis of sufficient evidence.” (emphasis added). Also worth noting is the oft-quoted language from *Berger v. United States*<sup>2</sup>, again cited in the comments to Rule 3.8 of the Rules of Professional Responsibility:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty

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<sup>1</sup> ARDC 2010 Rules of Professional Conduct, Rule 3.8, available at [http://www.iardc.org/newrules2010.htm#3.8:\\_SPECIAL\\_RESPONSIBILITIES\\_OF\\_A\\_PROSECUTOR](http://www.iardc.org/newrules2010.htm#3.8:_SPECIAL_RESPONSIBILITIES_OF_A_PROSECUTOR)

<sup>2</sup> 295 U.S. 78, 88, (1935).

whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, *while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*

(emphasis added).

Blagojevich cannot receive a fair trial under the current circumstances and a mistrial and dismissal of the indictment is warranted. The continued prosecution of Blagojevich on honest services is blatantly unconstitutional. The Court's prior analogy to a boxing match is apropos to this issue. Where the government is not "playing fair," Blagojevich asks this Court to step in as referee and ensure that fairness predominates.

At a minimum, if this court denies Blagojevich's request for mistrial and dismissal of the indictment, defendant requests that the court dismiss the honest services charges and instruct the jury to disregard the portions of testimony and evidence related thereto (as such evidence would not have been admitted absent the honest services counts).

As a less favored alternative, defendant requests that this Court order the government to file a Bill of Particulars. While defendant does not believe this would satisfy the requirements of due process, it would permit the defense to have an understanding of the government's bases for continued prosecution of these charges.

For example, insofar as the as the vague honest services are morphed in this case to be predicated on bribery or kickbacks, the government must provide with specificity the manner in which they allege such bribery or kickbacks (i.e., Who was bribed? When and where did the bribe take place?).

## II. The *Skilling* Decision

In *Skilling*, the Supreme Court “consider[ed] whether Skilling’s conspiracy conviction was premised on an improper theory of honest-services wire fraud.” *Skilling*, Slip Op. at 34. The Supreme Court detailed the history of honest-services fraud and noted that the challenged statute was passed by Congress in response to the Supreme Court ruling in *McNally v. United States*, 483 U.S. 350 (1987), which as the Court described, “stopped the development of the intangible-rights doctrine in its tracks.” *Skilling*, Slip Op. at 37.

The honest services statute enacted by Congress in 1987 stated:

“For the purposes of the[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, §1341, and wire fraud, §1346], the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” §1346.

The Court ruled that as it stood, the statute was vague, but the Court would “construe[ ] rather than invalidate[ ]” the statute. *Skilling*, Slip Op. at 39. Ultimately, the Court looked to the pre-*McNally* cases and determined that the “core” of that body of case law “involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.” *Skilling*, Slip Op. at 39-40. The Court ruled that the honest-

services statute's "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing – and defining – similar crimes" citing to, *inter alia*, 18 U.S.C. §666(a)(2). Thus, the elements of bribery must be charged in the indictment and proven beyond a reasonable doubt in order to convict on honest services<sup>3</sup>. The alternate basis for charging honest services under *Skilling* is by charging in the indictment that the defendant took "kickbacks". *Skilling*, Slip Op. at 48-49. The changes in the law, as "construed" and restructured by the Supreme Court, are substantive changes.

In a dissenting opinion joined by Justices Thomas and Kennedy, Justice Scalia opined that the honest services statute is vague and violates due process. Scalia wrote that the majority's ruling improperly "transform[ed] the prohibition of

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<sup>3</sup> The Seventh Circuit Pattern Jury Instruction for bribery (18 U.S.C. 666) directs:

To sustain the charge of bribery, the government must prove the following propositions:

First, that the defendant was an agent of [an organization] [a [state] [local] [Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]];

Second, that the defendant solicited, demanded, accepted or agreed to accept anything of value from another person;

Third, that the defendant did so corruptly with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the [organization] [government or agency];

Fourth, that this business, transaction or series of transactions involved any thing of a value of \$5,000 or more; and

Fifth, that the [organization] [government or agency], in a one year period, received benefits of more than \$10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

honest-services fraud 'into a prohibition of bribery and kickbacks'" and "defined [a] new federal crime[ ]". *Skilling*, Scalia Dissent at \*1.

Scalia's view is that the honest services statute "fails to provide fair notice and encourages arbitrary enforcement because it provides no definition of the right of honest services whose deprivation it prohibits." *Skilling*, Scalia Dissent at \*2.

Scalia noted that "even with the bribery and kickback limitation the statute does not answer the question 'What is the criterion of guilt?'" *Skilling*, Scalia Dissent at \*8. This concern is exacerbated in the instant case because not even the indictment indicates "the criterion of guilt".

The changes made to the statute render the charges in this case unconstitutional. The indictment lays out the elements of pre-*Skilling* honest services. That legal basis no longer exists as a valid charge. Regardless of whether §666 was separately charged in the indictment, the counts of honest services must be dismissed because they fail to state an offense within the proscription of the law. Moreover, the conspiracy count must fall as well. The government (even in its second superseding indictment that was intended to shield itself from the fallout of an honest services reversal) chose to reallege and incorporate Count One into Count Three, and then Count Three into all of the honest services counts (through Thirteen). The conspiracy alleges a scheme to deprive honest services and it is unconstitutional as charged in this case. All thirteen counts should be dismissed.

### III. Constitutional Deprivations

#### A. Due Process Violation

Blagojevich has the constitutional right to be informed of the nature and cause of the accusations against him. U.S. Const. Amend. VI. It is well settled that a defendant must have full notice of the facts that comprise the charges in an indictment. It is

fundamental in the law of criminal procedure that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, although it may follow the language of the statute.

*United States v. Simmons*, 96 U.S. 360, 362 (1877). See also, *United States v. Keller*, 730 F. Supp. 151 (N.D. Ill. 1990), citing to *United States v. Gironda*, 758 F.2d 1201, 1209 (7th Cir. 1985) (“A sufficient indictment should state all the elements of the offense, inform the defendant of the charges so he or she may prepare a defense, and enable the defendant to plead the judgment as a bar to a later prosecution.”)

To proceed in a prosecution after trial has begun and the elements of the offense have been restructured does not comport with the constitutional guarantee of due process.

**B. Ex post facto Violation**

The *ex post facto* clause of the Constitution does not permit the prosecution of honest services in this case. In fact, the changes to the statute are legally irrelevant – that the statute changed is what is at issue. See *United States v. Pfeifer*, 371 F.3d 430 (8<sup>th</sup> Cir. 2004). (Statute violates *Ex post facto* Clause if it applies to events occurring before its enactment and alters definition of criminal conduct or increases punishment for crime.)

The fact that the Supreme Court altered the statute (as opposed to Congress) does not negate the fact that the statute has indeed changed substantively. See *United States v. Wasserman*, 504 F.2d 1012 (5<sup>th</sup> Cir. 1974) (Policy considerations which support prohibition against *ex post facto* application of criminal statute are also applicable to judicial decisions which affect interpretation of criminal statute).

The new post-*Skilling* statute has different elements and jury instructions. The substantive changes render it an *ex post facto* violation. See *Reed v. Quarterman*, 504 F.3d 465 (5<sup>th</sup> Cir. 2007).

In fact it is well-settled that there are four categories of *ex post facto* application of a statute and the fourth category includes a law that alters the statute in a way that requires different testimony than the original version in existence at the time of the alleged acts. See *Stogner v. California*, 539 U.S. 607 (2003), citing *Calder v. Bull*, 3 U.S. 386, 90-91 (1798) (*Ex post facto* includes any “law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to

*convict the offender*. All these, and similar laws, are manifestly unjust and oppressive.” (emphasis added).

The critical question for an *ex post facto* violation is whether the law changes the legal consequences of acts completed before its effective date. *Carmell v. Texas*, 529 U.S. 513 (2000). The Supreme Court noted that the Framers included the bill of attainder and *ex post facto* provisions in the constitution and considered them “perhaps greater securities to liberty and republicanism than any [the Constitution] contains.” U.S. Const., Art. I, § 10. The Federalist No. 84, p. 511 (C. Rossiter ed. 1961) (A. Hamilton).

The *Carmell* Court further detailed:

The general interpretation has been, and is, . . . that the prohibition reaches every law, whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done; or whereby the act, if a crime, is aggravated in enormity, or punishment; *or whereby different*, or less evidence, is required to convict an offender, than was required, when the act was committed.’ 3 Commentaries on the Constitution of the United States § 1339, p. 212 (1833) (emphasis added).

In *Carmell*, the Court reversed the conviction of the defendant who was convicted on a state statute that was revised to lessen the amount of evidence needed to sustain a conviction (the statute at the time of the alleged acts required corroboration of the victim’s testimony; the new law, found to be unconstitutionally charged *ex post facto*, required only the victim’s testimony). While the facts are somewhat different in the instant case, the reasoning of *Carmell* is the same. As in *Carmell*, the revised honest services statute “is unquestionably a law that alters

the legal rules of evidence, and receives less, *or different, testimony*, than the law required at the time of the commission of the offence, in order to convict the offender.” *Carmell* at 530.

Dismissal of the honest services counts in this case would be consistent with the Supreme Court’s rationale of *ex post facto* violations – “one of the principal interests that the *Ex post facto* Clause was designed to serve [is] fundamental justice.” *Carmell* at 594. The Court also noted the importance of the prohibition insofar as it intersects with due process rights (discussed *supra*), “namely, that legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” *Id.*, citing to *Miller v. Florida*, 482 U.S. 423, 430 (1987).

The *Skilling* decision substantially changed the statute, and requires “different” elements and testimony, as well as jury instructions. Honest services cannot be constitutionally prosecuted in this case.

**IV. Particular Honest-Related Counts and Evidence Which Should Be Stricken and the Jury Instructed to Disregard**

It is the defendant’s position that the taint of the constitutional violation (including deprivation of due process and notice) compels dismissal of the indictment as a whole. To the extent that the Court declines to rule in this manner, defendant believes that at a minimum, all of the honest services counts should be dismissed and related evidence stricken as follows:

- A. Count 1 (violations of honest services alleged at pp. 31, 34, 39)
- B. Count 2 (violations of honest services alleged at p. 42)

- C. Count 3 (violations of honest services alleged at pp.44, 45, 46, 66
- D. Count 4 (violations of honest services alleged at p. 67)
- E. Count 5 (violations of honest services alleged at p. 68)
- F. Count 6 (violations of honest services alleged at p. 69)
- G. Count 7 (violations of honest services alleged at p. 70)
- H. Count 8 (violations of honest services alleged at p. 71)
- I. Count 9 (violations of honest services alleged at p. 72)
- J. Count 10 (violations of honest services alleged at p. 73)
- K. Count 11 (violations of honest services alleged at p. 74)
- L. Count 12 (violations of honest services alleged at p. 75)
- M. Count 13 (violations of honest services alleged at p. 76)
- N. Forfeiture Allegation Two (violations of honest services alleged at p. 111)
- O. Evidence already admitted regarding phone call at Tab 33 (related to Count 5) including the call itself and testimony of witnesses as it relates to this allegation being stricken.
- P. Evidence already admitted regarding phone call at Tab 44 (related to Count 7) including the call itself and testimony of witnesses as it relates to this allegation being stricken.
- Q. Evidence already admitted regarding phone call at Tab 37 (related to allegations of Blagojevich's alleged efforts to obtain a highly paid leadership position with a newly created not-for-profit corporation in

return for his appointment of a United States Senator in the form of (see Indictment, p. 63-64, 70, 71-74, 92, 98, 102-103))

- R. Evidence already admitted regarding phone call at Tab 38 (related to allegations of Blagojevich's efforts to obtain a highly paid leadership position with an organization known as "Change to Win" in return for his appointment of a United States Senator in the form of (see Indictment, p. 63))
- S. Evidence already admitted regarding phone call at Tab 45 (related to allegations of Blagojevich's efforts to obtain a highly paid leadership position with a newly created not-for-profit corporation and a highly paid leadership position with an organization known as "Change to Win" in return for his appointment of a United States Senator in the form of (see Indictment, p. 63-64, 70, 71-74, 92, 98, 102-103))
- T. Evidence already admitted regarding phone call at Tab 54 (related to Blagojevich's criterion for appointing a Senator.)<sup>4</sup>
- U. Evidence already admitted regarding phone call at Tab 56 (related to consideration of Emil Jones for the senate seat. This uncharged evidence relates to honest services and should therefore be excluded. The call is also related to uncharged allegations that Blagojevich

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<sup>4</sup> In this call, the government played a reference by Blagojevich to "legal, personal, political" priorities. At the direction of the government, Harris testified to what he understood Blagojevich to mean by those words. This call was cited in defendant's pre-trial motion requesting the exclusion of honest services related evidence.

attempted to secure a job for himself after he left office as a professor at the University of Illinois through appointments to the University of Illinois 'Board of Trustees. This uncharged evidence also relates to honest services allegations.)

V. Evidence already admitted regarding phone call at Tab 64 (related to the University of Illinois uncharged honest services-related allegations.)

W. Evidence already admitted regarding phone call at Tab 81 & 82 (Relate to allegations surrounding Blagojevich's discussions of acquiring a \$15 million science and technology grant for Wrigley Field. This uncharged conduct relates to honest services.)

X. Testimony and evidence introduced through the government's witnesses related to honest services allegations. These witnesses include but are not limited to:

- a. Lon Monk
- b. John Johnston
- c. Joseph Cari
- d. John Harris
- e. Jill Hayden
- f. Ali Ata

## V. Request for Bill of Particulars

In the event that the court does not dismiss this cause or the honest services counts, defendant will be prejudiced and does not have notice of the charges in the indictment. The change to the honest services statute puts this case in a unique situation. When trial began, Blagojevich was on notice of and charged with traditional, pre-*Skilling* honest services deprivation in thirteen (13) counts including as the conspiracy to defraud through the deprivation of honest services that touches on the other counts.

It is evident that to go forward on the charges as they currently exist in the indictment would be unconstitutional. To now change the elements of honest services (from what they were when trial commenced) is patently unfair. Moreover, it is inconceivable to defense counsel how a number of the counts could be charged under the new framework of bribery- or kickback-based honest services. It may be worth noting that when the government seized the opportunity to re-indict Blagojevich to insulate its prosecution from any fallout from *Skilling*, et al., it did not charge a number of the honest services as bribery or kickback counts. That is, simply, because the facts alleged are *not* briberies or kickbacks. To now permit the government to cling to these honest services counts and prosecute them under some theory of bribery/kickback would be wholly unjust.

It is also problematic that there are several subsections to the bribery statute (18 U.S.C. 666). The defendant should not be in the position of guessing as to which

parts would be alleged by the government in a bribery-based honest services allegation.

If the court rules that the charges may stand, defense counsel urges the Court to order the government to file a Bill of Particulars to enable the defense to prepare (albeit mid-trial) for defense of the newly-framed allegation(s).

**WHEREFORE**, defendant Rod Blagojevich respectfully requests this Honorable Court grant a mistrial and dismiss the second superseding indictment, or in the alternative dismiss the charges alleging honest services deprivation, or as a less favored alternative, order the government to submit a Bill of Particulars.

Respectfully submitted,

/s/ Sam Adam

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