

decision in *Skilling* provides the defendant with no basis for relief.

DISCUSSION

I. The Supreme Court's Decision in *Skilling* Has No Impact on the Charges in this Case.

A. The Supreme Court's Decision in *Skilling*

On June 26, 2010, the Supreme Court addressed issues related to the honest-services fraud statute, 18 U.S.C. § 1346, in *Skilling v. United States*, –U.S.–, 2010 WL 2518587 (June 24, 2010) (No. 08-1894). The Court in *Skilling* was asked to decide whether § 1346 – which defines the term “scheme or artifice to defraud” for purposes of the mail and wire fraud statutes to include “a scheme or artifice to deprive another of the intangible right of honest services” – is unconstitutionally vague. Consistent with the Court's traditional preference for considering whether a statute is amenable to a limiting construction before striking it as impermissibly vague, the Court found that courts of appeals have generally upheld use of the statute in three categories of cases – those involving bribery, kickbacks, or undisclosed financial self-dealing.

Considering cases predating *McNally v. United States*, 483 U.S. 350, 360 (1987) in which the Supreme Court excluded schemes to defraud others of honest services from the reach of the federal mail and wire fraud statutes, as well as cases that followed § 1346's enactment, the Court decided to confine the reach of § 1346 to bribery and kickback schemes, which it characterized as the “solid core” of the statute. *Skilling*, 2010 WL 2518587 at *30 (“Interpreted to encompass only bribery and

kickback schemes, § 1346 is not unconstitutionally vague.”). In so doing, the Court removed from the coverage of the statute cases involving undisclosed financial self-dealing, explaining that such cases would raise the due process concerns underlying the vagueness doctrine. Because Skilling’s conduct did not involve bribery or kickbacks, the Court concluded that he did not commit honest-services fraud. The Court remanded the case to the court of appeals for a determination whether Skilling’s conspiracy conviction, which was based on multiple objects including honest-services fraud, must be reversed, and whether his convictions for other offenses were tainted by the honest-services charge. Justice Scalia, joined by Justices Thomas and Kennedy, concurred in the judgment on the honest-services issue, but stated that they would have held that the honest-services statute is unconstitutionally vague.

B. The Fraud Counts Allege a Scheme to Defraud Involving Bribes or Kickbacks.

The Second Superseding Indictment charges Blagojevich with racketeering, conspiracy to commit racketeering acts, mail and wire fraud, attempted extortion, conspiracy to commit extortion, bribery, and conspiracy to commit bribery, related to defendants’ efforts to use the powers of the Office of the Governor of the State of Illinois, and of certain state boards and commissions subject to influence by the Office of the Governor, to take and cause governmental actions, including: appointments to boards and commissions; the awarding of state business, grants, and investment fund allocations; the enactment of legislation and executive orders; and the appointment of a United States Senator; in order to obtain financial benefits for themselves and

others, including campaign contributions for Blagojevich, and employment for Blagojevich and his wife. In light of *Skilling*, the relevant question is whether the conduct alleged in the honest services charges allege that Blagojevich participated in a scheme to obtain bribes or kickbacks. If it did, then the charges of honest services fraud are constitutionally sound. A review of the actions alleged to have been taken as part of the scheme to defraud reveals that the honest-services fraud counts in the Second Superseding Indictment do indeed allege that Blagojevich's scheme involved soliciting of bribes and kickbacks.¹

Specifically, the Second Superseding Indictment alleges that, as part of the scheme to defraud:

- Blagojevich, Alonzo Monk, Chris Kelly and Tony Rezko agreed that they would use Blagojevich's position as Governor and Monk's position as Chief of Staff for financial gain that would be divided among them, and that Blagojevich and others implemented the agreement by soliciting bribes and kickbacks.
- Blagojevich, Monk, Kelly and Rezko agreed to direct lucrative state business relating to the refinancing of billions of dollars in State of Illinois Pension Obligation Bonds to a company whose lobbyist agreed to provide hundreds of thousands of dollars (kickbacks) out of the fee that the lobbyist would collect.
- Kelly, Rezko, William Cellini, and Stuart Levine agreed that Kelly and Rezko would use their influence with the Blagojevich administration to assist Cellini and Levine in maintaining influence over the activities of the Teachers Retirement System (TRS), and in return, Cellini and Levine would cause TRS to invest in funds and use the services of law firms selected by Kelly and Rezko, at times in exchange for substantial contributions (bribes and kickbacks) to Friends of Blagojevich.

¹ Some of the following incidents which are characterized as bribes may also be legally characterized as kickbacks, and *vice versa*.

- Businessman Ali Ata was solicited by Rezko to make political contributions to Blagojevich. When he brought one \$25,000 contribution to Blagojevich, Blagojevich referred to giving Ata a state position, and after he gave another \$25,000 contribution, Blagojevich again referred to Ata joining his administration and mentioned that it had better be a job where Ata could make some money. Blagojevich then appointed Ata as the executive director of the Illinois Finance Authority. Awarding position in exchange for campaign contributions constitutes taking a bribe.
- Political fundraiser Joseph Cari had conversations with Blagojevich, Levine, Rezko, and Kelly, including a conversation where Rezko said that, in exchange for raising money for Blagojevich (*i.e.*, paying a bribe), the Blagojevich administration would be helpful to Cari's business interests.
- Kelly informed a lobbyist that, according to Rezko, the lobbyist's clients would have to make a \$50,000 campaign contribution (*i.e.*, pay a bribe) to Blagojevich in order to become a fund manager for TRS.
- Rezko, Kelly and Levine agreed that they would use their influence and Levine's position at TRS to prevent Capri Capital from receiving a potential \$220 million allocation from TRS unless Capri Capital or one of its principals agreed to make a payment (a bribe), such as arranging for campaign contributions to Blagojevich, and they communicated this to Capri Capital through Cellini.
- To ensure that Blagojevich and Monk would continue to give Rezko substantial influence over appointments to boards and commissions, the selection of candidates for state employment, and the awarding of state contracts, grants, and investment fund allocations, Rezko gave Monk cash gifts and he gave Blagojevich payments through Blagojevich's wife's real estate business (*i.e.*, paid bribes), which payments were purportedly for real estate transactions and services, but Blagojevich's wife had actually performed little or no such services.
- At Blagojevich's direction, Chief of Staff John Harris set up meetings for Blagojevich's wife with two financial institutions that had business with the state in hopes that those businesses would assist in getting Blagojevich's wife a job, and when these institutions were unhelpful, Blagojevich said that he did not want the institutions receiving further state business, thereby indicating that further state business would be conditioned on employment for Blagojevich's wife, which would

make such employment a kickback.

- When Deputy Governor Bradley Tusk inquired of Blagojevich as to whether a \$2 million grant for the benefit of a publicly supported school in then-Congressman Rahm Emanuel's district could be released, Blagojevich said that he wanted it communicated to Emanuel that Emanuel's brother needed to have a fundraiser for Blagojevich, thereby seeking a bribe from Emanuel's brother in exchange for the release of the grant money.

- Blagojevich advised lobbyist John Wyma that he intended to provide additional state money to Children's Memorial Hospital, but that Blagojevich wanted to get \$50,000 in campaign contributions, and when no contributions were received, he asked Deputy Governor Robert Greenlee whether the state money could be pulled back, indicating that the state money was conditioned on receiving a bribe of campaign contributions.

- Blagojevich wanted \$100,000 in campaign contributions from racetrack executive John Johnston prior to Blagojevich signing legislation that would benefit Johnston's racetrack business, and that Monk communicated this to Johnston, thus indicating that Johnston had to pay contributions as a bribe in exchange for Blagojevich's signing the legislation.

- Blagojevich told construction executive Gerald Krozel that he would announce a \$1.5 billion road building program and that he might authorize an additional \$6 billion road building program later on. He also asked for Krozel's help in raising campaign contributions. Blagojevich then told John Wyma that he was planning on announcing a \$1.8 billion road building program and that he could have announced a larger amount of money for road projects, but he wanted to see how Krozel performed in raising contributions. Blagojevich later called Krozel, spoke with him about the \$1.8 billion road program and asked him how the fundraising was coming, all of which constituted an attempt to solicit a bribe campaign contributions in exchange for Blagojevich's allocation of funds for road building.

- With the assistance of Robert Blagojevich and others, Blagojevich, devised means of using Blagojevich's power to appoint a United States Senator in exchange for financial benefits for himself and his wife, which would thereby have constituted bribes, and which included Presidential appointment of Blagojevich to high-ranking positions in the federal

government, a highly paid leadership position with a private foundation dependent on federal aid, a highly paid leadership position with an organization known as “Change to Win,” employment for Blagojevich’s wife, a highly paid leadership position with a newly-created not-for-profit corporation, and substantial campaign fundraising assistance.

Since the factual allegations in the mail fraud charges describe a scheme to solicit bribes or kickbacks in exchange for various governmental actions, the honest services fraud charges in this case fall well within the “solid core” of the statute, as defined in the *Skilling* decision, and are not constitutionally defective. *Skilling*, 2010 WL 2518587 at 30 (“As to fair notice, ‘whatever the school of thought concerning the scope and meaning of’ §1346, it has always been ‘as plain as a pikestaff that’ bribes and kickbacks constitute honest-services fraud. . . . A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under §1346 on vagueness grounds.) Thus, defendant is not entitled to dismissal of the mail fraud counts, much less the entire indictment.

II. Even in the Absence of the Honest-Services Fraud Charges, the Evidence Challenged by Defendant Would Be Relevant and Admissible.

Blagojevich claims that “[e]vidence 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.” Def. Motion at 2. Contrary to defendant’s contention, all of the evidence relating to the fraud counts, including the evidence that has been presented to the jury, is relevant and admissible with regard to other counts in the Second Superseding Indictment and, therefore, would have been admitted even in the absence of honest-services fraud charges. The following is a list of the factual

allegations contained in the fraud counts, along with a list of other counts to which evidence supporting those allegations is also relevant and admissible.

Factual Allegations in Fraud Counts	Other Counts to Which Same Evidence is Relevant
Sharing Financial Benefits from State Actions	Count 1 (racketeering– means and method of enterprise); Count 2 (racketeering conspiracy– act in furtherance)
The Pension Obligation Bond Deal	Count 1 (racketeering– means and method of enterprise, and Racketeering Act #1); Count 2 (racketeering conspiracy– act in furtherance)
Maintaining Control Over TRS	Count 1 (racketeering– means and method of enterprise); Count 2 (racketeering conspiracy– act in furtherance)
The Solicitation of Ali Ata	Count 1 (racketeering– means and method of enterprise); Count 2 (racketeering conspiracy– act in furtherance)
The Solicitation of Joe Cari	Count 1 (racketeering– means and method of enterprise); Count 2 (racketeering conspiracy– act in furtherance)
Campaign Contributions Solicited for TRS Investments	Count 1 (racketeering– means and method of enterprise); Count 2 (racketeering conspiracy– act in furtherance)
The Attempted Extortion of Capri Capital	Count 1 (racketeering– means and method of enterprise); Count 2 (racketeering conspiracy– act in furtherance)

Benefits Given To Blagojevich and Alonzo Monk	Count 1 (racketeering– means and method of enterprise); Count 2 (racketeering conspiracy– act in furtherance)
Search for Employment for Blagojevich’s Wife	Count 1 (racketeering– means and method of enterprise); Count 2 (racketeering conspiracy– act in furtherance)
Solicitation of United States Congressman A	Count 1 (racketeering– means and method of enterprise, and Racketeering Act #2); Count 2 (racketeering conspiracy– act in furtherance); Count 14 (attempted extortion)
Solicitation of Children's Memorial Hospital	Count 1 (racketeering– means and method of enterprise, and Racketeering Act #3); Count 2 (racketeering conspiracy– act in furtherance); Count 15 (attempted extortion); Count 16 (bribery)
Solicitation of Racetrack Executive	Count 1 (racketeering– means and method of enterprise, and Racketeering Act #4); Count 2 (racketeering conspiracy– act in furtherance); Count 17 (conspiracy to commit extortion); Count 18 (conspiracy to commit bribery)
Solicitation of Highway Contractor	Count 1 (racketeering– means and method of enterprise, and Racketeering Act #5); Count 2 (racketeering conspiracy– act in furtherance); Count 19 (attempted extortion); Count 20 (bribery)

Efforts to Obtain Personal Financial Benefits for Blagojevich in Return for his Appointment of a United States Senator	Count 1 (racketeering– means and method of enterprise, and Racketeering Act #6); Count 2 (racketeering conspiracy– act in furtherance); Count 21 (conspiracy to commit extortion); Count 22 (attempted extortion); Count 23 (conspiracy to commit bribery)
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III. The Honest Services Charges Are Not Barred by Ex Post Facto Principles.

The Constitution’s prohibition against “ex post facto laws” (U.S. Const. art. I, § 9, cl. 3) “is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts.” *California Department of Corrections v. Morales*, 514 U.S. 499, 504 (1995) (*citing Collins v. Youngblood*, 497 U.S. 37 (1990)). The Supreme Court has long held that this clause applies only to penal laws which: (a) create new criminal prohibitions; (b) aggravate existing criminal prohibitions; (c) increase the punishment for existing crimes; and (d) alter the legal rules of evidence to permit conviction based upon less evidence than previously required. *See, e.g., Miller v. Florida*, 482 U.S. 423, 429 (1987)(*quoting Calder v. Bull*, 3 Dall. 386, 390 (1798) (opinion of Chase, J.)); *accord Carmell v. Texas*, 529 U.S. 513, 521-22 (2000). Thus, the Ex Post Facto Clause applies only to laws that are penal in nature, that apply to events occurring before its enactment, and that disadvantage the defendant affected by it. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (quotation marks and citation omitted).

Contrary to Blagojevich’s contention, ex post facto considerations are not implicated in this case. The Supreme Court’s construction of the honest services fraud

statute in *Skilling* does not define an entirely new crime, create a new aggravated crime, increase the punishment for an existing crime; or alter the legal rules of evidence used to prove the crime. *See, e.g., Carmell*, 529 U.S. at 521-522. Because Blagojevich's conduct, as alleged in the Second Superseding Indictment, falls into the bribe-and-kickback core of § 1346, Blagojevich is not affected, much less disadvantaged, by the Supreme Court's narrow construction of the honest services statute in *Skilling*.²

IV. Defendant is Not Entitled to a Bill of Particulars.

Blagojevich seeks in the alternative a bill of particulars, claiming that, after the Supreme Court's decision in *Skilling*, he no longer "has notice of the charges of the indictment." Def. Mot. at 15. The Court should deny this request because (i) the indictment sufficiently informs Blagojevich of the charges, and (ii) the government has already turned over to defendant extensive disclosures of witness statements, documents, recordings, and other evidence it will seek to introduce at trial.

Rule 7(f) of the Federal Rules of Criminal Procedure authorizes a bill of

² *Skilling* narrowed, rather than expanded, the categories of conduct covered by § 1346. Thus, even if *Skilling* did work a change in the charges pending against Blagojevich (which it did not), that change would not violate the notice and review functions served by a grand jury's issuance of an indictment. *United States v. Duff*, 76 F.3d 122, 126 (7th Cir. 1996) ("a prosecutor may elect to proceed on a subset of the allegations in the indictment, proving a conspiracy smaller than the one alleged"); *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir.2003) ("Where charges are constructively narrowed or where a generally framed indictment encompasses the specific legal theory or evidence used at trial, there is no constructive amendment.").

particulars only where the indictment fails to apprise the defendant of the offense with which he is charged. Such a bill is not necessary when the indictment “sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial.” *United States v. Fassnacht*, 332 F.3d 440, 447 (7th Cir. 2003)(quoting *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981)); *United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991). So long as the indictment meets this standard, no bill of particulars is needed, for a defendant has only a constitutional right to know the offenses with which he is charged, not “the details of how it will be proved.” *Kendall*, 665 F.2d at 135; *United States v. Richardson*, 130 F.3d 765, 776 (7th Cir. 1997); *United States v. Balogun*, 971 F. Supp. 1215, 1227 (N.D. Ill. 1997). Thus, a bill of particulars may not be used to obtain evidentiary details about the government’s case. *See also United States v. Glecier*, 923 F.2d 496, 501 (7th Cir.1991).

In considering whether a bill of particulars is required to inform the defendant of the nature of the charges, the Court considers the degree of discovery available to the defense absent such a bill, as well as the clarity of the indictment. *United States v. Roy*, 574 F.2d 386, 391 (7th Cir. 1978) (“A bill of particulars is not required when information necessary for a defendant’s defense can be obtained through some other satisfactory form.”); *Fassnacht*, 332 F.3d at 446-47.

Here, Blagojevich is charged in a 112-page indictment which contains ample detail about the nature of the charges and the offending conduct. The government has also provided extensive discovery to Blagojevich, including witness statements,

documents, recordings, and other evidence it will seek to introduce at trial, as this Court has had occasion to note. The government's extensive disclosures render a bill of particulars unnecessary. See *Fassnacht*, 332 F.3d at 446-7; *United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991); *Gleazier*, 923 F.2d at 502 (“[w]e have consistently held that where the indictment provides sufficient information to inform the defendant of the nature of the charges against him, and the government provides the defendant with information about the alleged overt acts and co-conspirators prior to trial, the defendant has not suffered prejudice from the refusal of the request for a bill of particulars”).

The Supreme Court's decision in *Skilling* does not change the pending charges or in any way deprive Blagojevich of notice. As explained above, *Skilling* squarely supports the charges here; it holds that “a criminal defendant who participated in a bribery or kickback scheme” (like Blagojevich) “cannot tenably complain about prosecution under §1346 on vagueness grounds.” As such, the decision only confirms the propriety of charging Blagojevich with honest-services fraud, as he stands charged with conduct which the Court characterized as falling within the “solid core” of §1346. *Skilling*, 2010 WL 2518587 at 30. Accordingly, the *Skilling* decision provides no reason for Blagojevich to need, or to obtain, a bill of particulars.

IV. The Defendant's Repeated Charges of Misconduct Are Spurious.

In this motion, Blagojevich continues what is becoming a routine practice of making spurious accusations of misconduct against the prosecutors in this case. Quite obviously, there is no misconduct in pursuing charges that were legally proper before the Supreme Court issued its decision in *Skilling*, and are legally proper now. The fact that the government added certain charges against Blagojevich by way of a superceding indictment prior to trial in no way undermines the validity of these charges or suggests even a modicum of misconduct on the part of prosecutors. *United States v. Jarrett*, 447 F.3d 520, 525 (7th Cir. 2006) (“[G]overnment prosecutors have a wide discretion over whether, how, and when to bring a case. In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”). The accusations contained in the motion provide Blagojevich with no basis for relief; to the contrary, making frivolous and unwarranted accusations of misconduct is itself unethical. *See United States v. Stafford*, 136 F.3d 1109, 1113 (7th Cir. 1998) (“For one lawyer to accuse another of unethical behavior without any evidence to back up the accusation is unethical.”)

CONCLUSION

For all of the following reasons, the government respectfully requests that the defendant Blagojevich's motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

**Government's Memorandum in Opposition to
Defendant Rod Blagojevich's Omnibus Motion for Relief
Based on the Supreme Court's Ruling on Honest Services**

was served on June 29, 2010, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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