No. _____

In the Supreme Court of the United States

STEVEN J. TERRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

SYLVESTER SUMMERS, JR.
Counsel of Record
Lexington Village
7804 Linwood Avenue
Cleveland, OH 44103
(216) 407-6773
slyatlaw@msn.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. In the context of a First Amendment protected contribution to a judicial campaign, does the *McCormick v. United States,* 500 U.S. 257, 273 (1991), holding that campaign contributions cannot constitute bribery unless "the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act" mean "explicit," or if not an explicit agreement, what quality and quantity of evidence is needed to permit a jury to only infer that an explicit agreement existed?

Does this standard require proof of an "explicit" *quid pro quo* promise or undertaking in the sense of actually being communicated expressly, as various Circuits have stated; or can there be a conviction based instead only on the jury's inference that there was an unstated, inferred and implied agreement, a state of mind, connecting the contribution and the corrupt official action?

II. May a public official be prosecuted for the receipt of lawful campaign contributions in the absence of sufficient evidence of an "explicit" *quid pro quo* connection between those lawful campaign contributions and some official act?

III. Must there be a specific link with or connection between the giving of a campaign contribution from a donor to a public official for use in a political campaign and the latter's performance of a specific and particular official act in order to

sustain an Honest Services statute conviction and avoid a First Amendment concern?

PARTIES TO THE PROCEEDING BELOW

The parties to this proceeding are those named in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISION AND STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Steven J. Terry ("Judge Terry") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The decision of the court of appeal is reported at 707 F.3d 607 (6th Cir. 2013), and is reproduced herein. (Petitioner's Appendix ("Pet. App." at A). The judgment of the U. S. District Court from the Northern District of Ohio, Eastern Division, is reproduced herein. (Pet. App. C).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Court of Appeals issued its judgment on February 14, 2013. (Pet. App. A). On April 29, 2013, the Court of Appeals denied Judge Terry's timely petition for rehearing and rehearing en banc. (Pet. App. B). On May 10, 2013, the Court of Appeals issued a mandate order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides in pertinent part:

Constitution provides, "Congress shall make no law . . . abridging the freedom of speech. . . and to petition the government for a redress of grievances."

18 U.S.C. § 1346 provides in full:

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

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the criminalization of protected activity by the First Amendment—the giving and receiving of lawful campaign contributions --based on a vague and indefinite standard that will alter two vital underpinnings of our democracy: the desire of individual citizens to run for political office in a system that largely depends upon contributions and the liberty of constituents to contribute to political campaigns without fear of criminal liability. The Sixth Circuit adopted an expansive and unprecedented interpretation of the *quid pro quo* standard necessary to sustain a conviction in an undisputed campaign contribution case for "honest services" mail fraud under 18 U.S.C. §§ 2, 1341 & 1346, conspiracy to commit "honest services" mail fraud under 18 U.S.C. § 371, ruling that criminal liability may be imposed whenever the prosecution presents evidence that a public official understood that a contribution made to a political campaign was motivated by the donor's desire for the official to take certain actions, and such actions were taken by the official.

All political candidates and donors have a First Amendment right to accept or give campaign contributions, so long as those contributions are not

bribes. This Court defines campaign contributions as political speech but has upheld limitations on campaign contributions to candidates in the interest of preventing corruption or the appearance of corruption. See*, United States v. McGregor,* 879 F. Supp. 2d 1308, 1312 (M. Ala. 2012)*,* citing *Buckley v. Valeo*, 424 U.S. 1, 19-25 (1976)). Politicians and citizens may also have a due-process right to know what political activity is legal. Fair notice to officials and donors allows both individuals to engage in democracy with full knowledge of the legal parameters. *McGregor,* 879 F. Supp. 2d at 1312.

Knowing that this case was a campaign contribution case, the Sixth Circuit paid lip service to *McCormick v. United States*, 500 U.S. 257, 273 (1991), in which this Court held that the prosecution must demonstrate an explicit *quid pro quo* connection between or link with a political campaign contribution and a particular official act in the campaign contribution case context, *to wit*, an explicit promise made in return for a contribution. This Court recognized that applying the exact same standard to prosecute public officials for receiving campaign contributions as traditional cash payoffs, illegal gratuities or personal gifts would jeopardize our democratic system because the financing of political campaigns depends upon officials accepting contributions from people expecting some kind of benefit in return. See also, *United States v. Sun-Diamond*, 526 U.S. 398, 405-408 (1999)(The line between legal lobbying and criminal conduct is crossed only, however, when a gift possesses a particular link to official acts.) "Specifically, when the gift is given with an "intent 'to influence' an official act" by way of a corrupt exchange—i.e., a quid pro quo—a defendant

has committed bribery or honest-services fraud." *United States v. Ring*, 706 F.3d 460, 464 (D.C. Cir. 2013), citing *Sun-Diamond,* 526 U.S. at 404)); see also, *Citizens United v. Federal Elections Commission*, 588 U.S. 310, 359 (2010)(The Court reaffirmed the First Amendment principles that underlie *McCormick*, emphatically rejecting any notion that individuals who serve influence and access through the making of campaign contribution engage in "corruption.").

The Sixth Circuit paradoxically held that such a *quid pro quo* may be implied and inferred by the jury without a connection with or link to the particular official act; that a public official understood that a donor made a contribution with the expectation that certain acts would be performed in return. In this way, the Sixth Circuit's approach treats campaign contributions exactly the same as garden-variety and traditional cash payoffs. (Pet. App. A).This Court's ruling in *McCormick*, which explicitly distinguished campaign contributions from all other types of payments because of their significance to the democratic process, does not support that outcome. Just recently, the D.C. Circuit recognized the significance of distinguishing traditional cash payoffs and illegal gifts from campaign contributions. See, *Ring*, 706 F.3d at 465-466[1]. The Sixth Circuit

---

[1] In *Ring*, supra, the D.C. Circuit distinguished campaign contributions from other "things of value" provided by lobbyists, noting that while contributions implicate First Amendment concerns, "the First Amendment interest in giving hockey tickets to public officials is … de minimis." *Id*. at 466. Thus, whereas a prosecution predicated on campaign contributions would require proof of an explicit quid pro quo to quell constitutional concerns,

disregards both the political and legal significance of this First Amendment issue in the campaign contribution context.

For these reasons – because there is a disagreement within the Circuits, and because the question is important to our democracy – this Court should grant review to clarify the *McCormick* standard.

STATEMENT OF THE CASE

A. The Procedural History, Charges, Conviction, Sentence and Appeals

On March 9, 2011, an Indictment charged Judge Terry with five counts of criminal conduct, including Conspiracy to Commit Mail and Honest Services Mail Fraud, in violation of 18 U.S.C.§ 1349, as charged in Count 1, Mail Fraud, as charged in Count 2, and related and substantive offenses of Honest Services Mail Fraud, in violation of 18 U.S.C.§ 1341 and 1346 as charged in Counts 3, 4 and 5. The Indictment was replete with direct and indirect references to violations of the Canons of the Ohio Code of Judicial Conduct ("Canons") as a basis for the crimes charged. It has always been the government's theory of prosecution that what the government perceived to be violations committed by Judge Terry of the Canons provided the basis for crimes in criminal prosecution.

---

the government can prove a case based on other gifts without proof of an explicit agreement.

On June 13, 2011, following a five day jury trial, the jury returned guilty verdicts on Count 1 and Counts 3 and 4 of the Indictment. The jury returned not guilty verdicts on Count 2 and Count 5. The charges alleged in Count 2 concerned the genesis and focal point of the investigation regarding a bank's motion for summary judgment discussed between Judge Terry and Frank Russo ("Russo") on July 17 and July 18, 2008 and the denial of two motions for summary judgment – the official act – by Judge Terry against the Lanes and American Home Bank ("AHB"). Unrebutted expert testimony was presented by Judge Terry that the denial of both of the motions for summary judgment was required as a matter of law, as the case involved complex issues of material fact. (Pet. App. D, at 46-53). The government never offered any proof that AHB was entitled to a favorable summary judgment ruling. The jury also found Judge Terry not guilty on Count 5 which identified a letter sent by Judge Terry to Russo thanking Russo for his $500.00 campaign contribution from 2007, support and political advice which were the subject matter of the conduct embraced in Counts 1, 3 and 4. (Pet. App. B).

On October 4, 2011, Judge Terry was sentenced to 63 months of imprisonment, 48 months of supervised release, and he was also ordered to pay restitution and forfeiture amounts to the government and AHB. (Pet. App. B).

Judge Terry timely appealed his convictions on Count 1, 3 and 4 to the Sixth Circuit who affirmed the convictions on February 14, 2013. (Pet. App. A). Although there was direct evidence that Judge Terry's campaign for election received two car magnets,

letterhead and envelopes from Russo's PAC, the Sixth Circuit, without ever addressing the merits of Counts 3 and 4 of the Indictment in their opinion, held that the jury could somehow infer that there must have been an implied agreement between Judge Terry and Russo at some point to exchange lawful campaign contributions to conduct a particular official act. (Pet. App. A).

On February 26, 2013, Judge Terry filed a Petition for Rehearing and Rehearing En Banc. That Petition was denied on April 29, 2013. (Pet. App. B).

B. Facts of the Case.

Judge Terry was not one of the five individuals targeted in the public corruption investigation which began in December of 2007. It was not until July 17 and July 18, 2008, that Judge Terry became a person of interest in the corruption investigation. Telephone calls between Judge Terry and target defendant, Russo, were intercepted on these dates which became the genesis and focal point of the charges returned against Judge Terry. None of those calls involved any agreement about exchanging campaign contributions, such as a $500.00 check, car magnets, letterhead and envelopes, for any official act. These calls concerned a civil matter pending before Judge Terry that involved a foreclosure case being litigated by a close associate of Russo, and his clients the Lanes in a foreclosure action filed against the Lanes by AHB. The case was on the foreclosure docket inherited by Judge Terry when he was appointed judge by Ohio Governor Strickland to a vacancy on the bench in April of 2007. At the time, the civil foreclosure case had been pending for over four years.

The subject matter of the July 17 and July 18, 2008, intercepted calls between Judge Terry and Russo, who in 2007 had given an unconnected campaign check and in-kind contributions to Judge Terry's election committee[2], concerned the requested lawful denial by Judge Terry of motions for summary judgment and the denial of both the AHB and Lane motions by Judge Terry. Judge Terry learned of the content of the July 17 and July 18, 2008, intercepted calls between Judge Terry and Russo following the September 24, 2008, search of Judge Terry's court chambers. Through communications by his counsel with the United States Attorney's Office, Judge Terry related that campaign contributions, support and advice were legally given by Russo; and, that the denial of the motions for summary judgment in the foreclosure action pending before Judge Terry was required as a matter of law and could not form the basis for a criminal prosecution. (Pet. App. D).

Following the September 24, 2008, search conducted by the Government of Judge Terry's court chambers, Judge Terry won election over his opponent to the Cuyahoga County Common Pleas Court in November of 2008, by a margin of victory of over 20,000 votes. Following his election in 2008, no ethical infractions were sought or alleged against Judge Terry, and he

---

[2] Russo testified that he was not solicited by Judge Terry for any political campaign contributions, including a campaign check for $500.00 and Brothers Printing expenditures (envelopes, letterhead and two car magnets totaling $688.54). Russo also testified that he liked Judge Terry and would have given these contributions anyway to "jump start" his judicial campaign. (Pet. App. E, at 56-62).

served with honor and distinction as a County Judge presiding over 80 criminal and civil trials.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision fails to recognize and resolve an issue of exceptional importance in a manner that conflicts with decisions of this Court and other Circuits. This Court's corrective intervention is therefore both necessary and warranted. See, Sup. Ct. R. 10(a).

I. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE CONFUSION AND CONFLICT IN THE CIRCUITS ABOUT THE PROPER APPLICATION OF FEDERAL CRIMINAL "HONEST SERVICES" STATUTE THAT REGULATES CONDUCT AT THE HEART OF THE POLITICAL PROCESS.

In recent decades, this Court has decided two major cases that define the essential elements of the criminal law of extortion or bribery in the context of federal anti-corruption prosecutions of public officials. Both cases date to the early 1990s, in the initial stages of the substantial rise of prosecutions of this sort. Yet as district courts, circuit courts and academic experts in this area have recognized, those two cases stand in considerable opposition with each other and have created ongoing uncertainty and conflicts in the lower courts over issues as fundamental as the appropriate boundary between core democratic political activity and criminal bribery. This Court's return to these issues is necessary to resolve this long standing and ever

increasing tension and bring clarity, certainty, and predictability to this highly-sensitive area of the law of First Amendment issues — particularly given the ambitious use in recent years by prosecutors of the honest-services bribery law, 18 U.S.C. § 1341 and § 1346 to allege bribery involving state and local officials based on otherwise protected political activity such as campaign contributions.

The first case, *McCormick*, supra, held that a campaign contribution could be the basis for extortion under the Hobbs Act, 18 U.S.C. § 1951, only if the context involved an "explicit *quid pro quo*." 500 U.S. at 271–74. This Court used a variety of exact, consistent formulations to specify the high and precise threshold that had to be crossed before solicitation of campaign contributions crossed the line into extortion. The Court required "an explicit promise or undertaking by the official to perform or not to perform an official act. . . . [so that] the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.* at 273. This high and clear threshold was essential, in this Court's view, to ensure adequate breathing room for core political activity and fair notice of potential criminal liability. *Id.* at 272–73.

This Court continued: "In such situations the official *asserts* that his official conduct *will be controlled* by the terms or promise of the undertaking." *Id.* (emphasis supplied). The "explicit" *quid pro quo* standard was necessary because *McCormick* left no doubt that "to hold otherwise would open to prosecution" conduct that has long been legal and is necessary "so long as election campaigns are financed by private contributions. . . ." *Id.* at 272. The Court's use of the words "explicit,"

"asserts," "controlled by the terms or promise," convey the need for articulated commitments, not inferences or implications[3], in order to satisfy the *McCormick* standard.

In *McCormick*, Justice Scalia wrote that receipt of money by a public official "should not be interpreted to cover campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for *an explicit promise* of favorable future action." 500 U.S. at 276, Scalia, J., concurring (emphasis supplied). There can be no doubt that an explicit, and not an inferred or implied promise, is essential to sustain a criminal conviction in a campaign contribution case. And in the campaign contribution context with such political campaign items as two car magnets, letterhead and envelopes in Judge Terry's case, the need for explicitness is magnified because of the chilling effect on free speech and the disconnect between a direct benefit of in-kind lawful contributions to a candidate as opposed to a direct cash benefit to advancing a campaign.

---

[3] A recent commentator has criticized the notion that explicit can be rephrased in any way to avoid its accepted meaning. Recounting different dictionary definitions, she concluded "[t]here is simply no indication in either *McCormick* or *Evans* that the Court meant for the word "explicit" to mean anything other than its plain meaning - clear, unambiguous, direct, and leaving nothing to inference." Ilissa B. Gold, "*Explicit, Express, and Everything in Between" The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s*," 36 Wash. U. I. L. & Pol'y 261, 283 (2011). Thus a "quid pro quo agreement cannot be both explicit and implicit. . . ." *Id.*

But a year later, the second case, *Evans v. United States*, 504 U.S. 255 (1992), involving a cash payment to an elected official made by a FBI undercover agent during a sting operation, appeared to conclude that an explicit *quid pro quo*, sufficient to overcome the threshold *McCormick* set, was not required. Evans was not a campaign contribution case with any "free speech" concerns under the First Amendment. The defendant in *Evans* took $7,000 cash to vote in favor of a rezoning application. The difference between *McCormick* and *Evans* is quite significant here. The Court in *McCormick* was careful to limit that decision to actual campaign contributions, and Justice Thomas emphasized that in his dissent in *Evans*. 504 U.S. at 287, Thomas, J., dissenting, joined by Chief Justice Rehnquist and Justice Scalia. *Evans* stated that the government "need only show that a public official has obtained a payment to which he was not entitled, *knowing that the payment was made in return for official acts*." 504 U.S. at 268 (emphasis added). Because this language suggests—or has been taken by some lower courts to suggest—that less than an explicit *quid pro quo* is required to establish extortion, the relationship between *McCormick* and *Evans* confounds this fundamental arena of the law of democracy and leaves federal prosecutors with excessive discretion. Review in *Evans* was granted "to resolve a conflict in the Circuits over the question whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act. . . ." 504 U.S. at 256. *Evans* did not intend to, or attempt to, water down "explicit." The only question in *Evans* was whether a public official had to take the first step – "induce" the payment.

Thus, as Professor of Law Daniel H. Lowenstein, perhaps the leading academic expert on the law concerning campaign contributions and bribery, put it: "whether *Evans* actually modifies *McCormick*, and if so to what degree, is unclear." See Lowenstein, *When Is a Campaign Contribution* a Bribe?, *in Private and Public Corruption*, at 130 (William C. Heffernan & John Kleinig eds., 2004). Surveying the lower-court decisions, Professor Lowenstein concludes that some lower courts have reasoned that *Evans* did modify *McCormick* and "thereby have dissipated at least some of the clarity that seemed to have been obtained by the majority in *McCormick*." *Id.* at 149. Professor Lowenstein goes on to note: "The *quid pro quo* requirement has become even more elastic in the hands of some of the lower courts subsequent to *Evans*." *Id.* at 154; see, e.g., *United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995) (holding that, after *Evans*, the *quid pro quo* requirement is "not onerous"); *United States v. Coyne*, 4 F.3d 100, 111 (2nd Cir. 1993)(upholding bribery and extortion convictions on the view that "the jury was free to infer" a crime without proof of an explicit *quid pro quo*). Professor Lowenstein observes that some lower courts have so watered down the *quid pro quo* requirement that it has become "all water." Lowenstein, *Campaign Contribution*, *supra*, at 155.

Just last year, District Court Judge Myron Thompson, released an opinion outlining the continued inconsistency, confusion and lack of clarity in federal law regarding jury instructions in public corruption cases involving the legal standards for cases in the campaign contribution context. In conjunction with this Court's holdings in the *McCormick* and *Evans* pair, Judge Thompson writes that the proper standard for

convictions in the context of campaign contributions must be strict so as not to conflict with the First Amendment guarantees. *McGregor*, 879 F. Supp. 2d 1308,1314-16.

Circuit courts are uncertain whether the *McCormick* and *Evans* pair of cases creates a special rule for campaign contributions alleged to be bribes or a general rule for all bribery cases. A series of Circuit decisions reflect the struggle to reconcile *McCormick* and *Evans*. See, e.g., *United States v. Ganim*, 510 F.3d 134, 142–43 (2nd Cir. 2007)(concluding that *McCormick* created a unique rule for "the special context of campaign contributions," while *Evans* established a different rule for extortion and bribery in other contexts)(opinion by Sotomayor, J.); *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001)(concluding that "[w]e are not convinced that *Evans* clearly settles the question" whether proof that campaign contributions constitute a bribe requires an express *quid pro quo*, while bribes through other means can be proven under a lesser standard); *United States v. Blandford*, 33 F.3d 685, 695 (6th Cir. 1994)(Exactly what effect *Evans* had on *McCormick* is not altogether clear."); *United States v. Montoya*, 945 F.2d 1068, 1074 n. 2 (9th Cir. 1991)(noting, in Hobbs Act case, that "we see no rational distinction between cash payments claimed by the official to be lawful campaign contributions or those alleged to be legitimate honoraria" for purposes of the proof necessary to establish a *quid pro quo*); *see generally* Norman Abrams, Sara Sun Beale & Susan Riva Klein, *Federal Criminal Law and Its Enforcement* 232 (5th ed. 2010) ("The prevailing view that *Evans* applies only to non-campaign contributions is difficult to reconcile with the

fact that *Evans* itself arose out of a payment made to a county commissioner during his reelection campaign.").

It is clear that the *McCormick/Evans* struggle still persists today. See, *United States v. Abbey*, 560 F.3d 513 (6th Cir. 2009) began its analysis this way: "This Court took its first stab at harmonizing these decisions in *United States v. Blandford* . . . . In *Blandford* we stated that *McCormick's quid pro quo* requirement should not apply outside the campaign-contribution context . . . ." *Id.* at 517. *Abbey* then pointed to *United States v. Collins*, 78 F.3d 1021 (6th Cir. 1996) which called for *quid pro quo* proof in all Hobbs Act cases, but noting that "not all *quid pro quos* are made of the same stuff." *Id.*

The linguistic turmoil continues across the Circuit decisions trying to resolve the *McCormick/Evans* meaning. The Ninth Circuit wrote that *McCormick* held "the government must prove that there was an explicit *quid pro quo*," and continued:

> *see also United States v. Ganim*, 510 F.3d 134, 142 (2nd Cir. 2007) ("[P]roof of an express promise is necessary when the payments are made in the form of campaign contributions."). However, "[w]hether or not there is a *quid pro quo* requirement in the non-campaign context is an issue that has not been directly addressed by the Supreme Court. *United States v. Collins*, 78 F.3d 1021, 1034 (6th Cir. 1996).

United States v. Kincaid-Chancey, 556 F.3d 923 (9th Cir. 2009).

This confusion would be bad enough in an area as constitutionally and politically sensitive as the boundary between federal crimes and political activity. However, the uncertainty and lack of precision that plagues the law of federal bribery and campaign contributions — because this Court has not addressed these issues since the early 1990s — is all the worse because it is directly at odds with this Court's later jurisprudence in related areas of federal criminal regulation of alleged political corruption. In these other areas, this Court has insisted that federal statutes define the boundary between criminal and non-criminal activity with clarity, precision and accuracy, particularly in the area of political corruption and when federal anti-corruption laws reach into the activities of state and local officials.

The stigma of a criminal judgment and "[t]he terrible nature of prison," William J. Stuntz, *Substance, Process, And The Civil-Criminal Line*, 7 J. of Contemp. Legal Issues 1, 24 (1996), require that this most awesome power be exercised with care, and that individuals be subjected to criminal punishment only when they violate clear proscriptions. A criminal statute that fails to "define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement" violates the Due Process Clause and is void for vagueness. *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010)(quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); see also *United States v. Bass*, 404 U.S. 336, 349 (1971)(citing "an instinctive distaste against men languishing in

prison unless the lawmaker has clearly said they should").

When a criminal statute applies to activity that furthers First Amendment interests, courts must exercise "particular care" to ensure that the statute "provide[s] more notice and allow[s] less discretion than for other activities." *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988); see also *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011)(Kennedy, J., concurring)(vague statute affecting First Amendment interests "is an invitation to selective enforcement; and even if enforcement is undertaken in good faith, the dangers of suppression of particular speech or associational ties may well be too significant to be accepted"). Judge Terry was a political candidate, and campaigning stands at the core of the First Amendment's guarantees of free speech and the right to petition the government. While those protections do not extend to bribery, the proper exercise of those rights must not be criminalized by the improper application of the "Honest Services" statute. Otherwise, vast amounts of conduct that are not criminal, have never been thought to be criminal, and clearly should not be criminal — for example, a judicial candidate's campaign election committee receives lawful in-kind contributions such as two car magnets, envelopes and letterhead to "jump start" a campaign — would expose countless elected officials, in politics and government service, to the threat of lengthy jail terms.

The confusion and lack of clarity continues. In 2009, the Sixth Circuit held that *Evans* and *McCormick* were two different legal standards – one for non-campaign cases where public officials receive cash bribes and the

other for campaign contribution cases. *Abbey*, 560 F.3d at 516–19. See also, *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936–38 (9th Cir. 2009). Two other Circuits — the Third and Seventh — have indicated that they will hold *McCormick* to be the sole standard for campaign contribution cases in the future. Compare, *United States v. Antico*, 275 F.3d 245, 257 (3rd Cir. 2001) and *United States v. Allen*, 10 F.3d 405, 411–12 (7th Cir. 1993); see also, *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir.1993). The Eleventh Circuit stands alone in trying to reconcile *McCormick* and *Evans* in the campaign context in *United States v. Siegelman*, 561 F.3d 1215(11th Cir. 2009).

Now, in 2013, that same court's holding in *Abbey* is now somehow inapplicable to the campaign contributions provided by the donor in this action. Without any rationale, the Sixth Circuit treated this matter as if it was a non-campaign case like *Evans* when it knew that Judge Terry never received any traditional cash payments, illegal gratuities, personal gifts or other non-political items unrelated to his politically protected activity.

The prosecution in this case involves otherwise constitutionally protected activity. The government nonetheless disclaims the need to prove an express or explicit "quid pro quo" and instead rests on inferences and implications from actions that are otherwise not improper or related – the giving of legitimate campaign items such as a $500.00 campaign check, two campaign car magnets, letterhead and envelopes to a judicial campaign from a political donor – let alone criminal, in themselves.

The critical questions are what standard of proof the government must meet when this kind of political activity is alleged to be a bribe and what evidence suffices to meet that standard. That this level of uncertainty exists about these critical questions at the intersection of democratic politics and bribery is troubling. That federal prosecutors in cases involving unquestionable free speech and political activity should not be able to circumvent the vagueness and lack of concerns *Skilling* identified by invoking vaguely defined conceptions of honest-services bribery that rest on inferences and implications compounds the concern.

The Sixth Circuit's adoption of the *Evans* standard to somehow dilute the "quid pro quo" standard in this campaign case presents important constitutional questions for this Court: Did *Evans* alter or modify the *McCormick* standard for campaign contributions cases as so many lower court decisions suggest? Does *Evans*, in which review was granted only on the question of whether an "inducement" or demand is an element of the offense of extortion "under color of official right," stand for the legal proposition that an "explicit promise" may be inferred or implied by jury in a political or judicial campaign case involving political campaign items such as two car magnets, envelope and letterhead without any evidence?

In cases of public corruption, *Skilling*'s cure of "honest services" vagueness by limiting 18 U.S.C.§ 1346 to bribery and kickback schemes will be of limited effect unless the confusion and uncertainty in current bribery law are cured as well. To provide the clarity that this area of the law requires, to resolve the ongoing inconsistency, confusion and uncertainty

regarding the relationship between *McCormick* and *Evans*, and to bring interpretation of the honest-services bribery law into harmony with this Court's decisions involving other federal anti-corruption criminal laws, the Court should grant the Petition.

II. A PUBLIC OFFICIAL MAY NOT BE PROSECUTED FOR THE RECEIPT OF A CAMPAIGN CONTRIBUTION IN THE ABSENCE OF AN EXPLICIT *QUID PRO QUO* CONNECTION BETWEEN THE CAMPAIGN CONTRIBUTION AND AN OFFICIAL ACT.

The Sixth Circuit's interpretation of the government's evidentiary burden frustrates rather than furthers this Court's ruling in *McCormick* and continues the confusion amongst the circuits and other lowers courts. In *McCormick*, this Court held that for criminal prosecutions involving campaign contributions, the government must establish an explicit *quid pro quo* connection between the contribution and an official act—in which "payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act"— so that there is no possible doubt that the challenged transaction was corrupt. *McCormick*, 500 U.S. at 273; see also, *Ring*, 706 F.3d at 466 (D.C. Circuit recognized the legal distinction between campaign contributions and non-campaign benefits and the proper legal standard of proof for each type of contribution). However, the jury instructions approved by the lower courts permitted a conviction based on an implicit or inferred *quid pro quo* legal standard that impermissibly treats First Amendment protected

campaign contributions, such as two car magnets, letterhead and envelopes, exactly the same as traditional cash payoffs or illegal gratuities and gifts. This approach sows confusion as to what conduct constitutes a federal crime in these circumstances and destroys the protections that this Court has established in campaign contribution and First Amendment cases.

In *McCormick*, 500 U.S. at 272, this Court made clear that "[w]hatever ethical considerations and appearances may indicate," it is no crime to make campaign contributions to Members of Congress who take actions one views as favorable. The *McCormick* Court wrote that:

> Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. at 272. Thus, the *McCormick* Court held, campaign contributions may be the basis of a public corruption prosecution "only if the payments are made in return for an *explicit promise or undertaking* by the official to perform or not perform an official act." *Id*. at 273 (emphasis added)[4].

We respectfully submit that this Court should require that prosecutors prove the existence of an explicit agreement by a public official that he will perform an official act in exchange for contribution to a political campaign, and that jurors are charged that the existence of an explicit promise or agreement must be found, before criminal liability will attach for either: (a) making a political contribution with the hope or expectation of a subsequent official action; or (b) taking an official action after receiving a political contribution from a known donor.

---

[4] *McCormick* involved extortion, but bribery and extortion are "different sides of the same coin," *Allen*, 10 F.3d at 411 (7th Cir. 1993), and the *McCormick* rule has been applied to bribery. See *Evans*, 504 U.S. at 268; *United States v. Siegleman*, 640 F.3d 1159, 1172-74, n.14 (11th Cir. 2011)(assuming without deciding that *McCormick* applies to federal-funds bribery and honest services fraud); *Ring*, 706 F.3d at 466 (*McCormick*, which concerned extortion, extends to honest services fraud).

A. Under *McCormick*, All Political Contributions May Not Give Rise To Criminal Liability In The Absence Of An Explicit Quid Pro Quo Connection Between Or Link To The Contribution And The Particular Official Act.

In *McCormick*, the government prosecuted Robert McCormick, a West Virginia state legislator, on five counts of violating the Hobbs Act, and one count of filing a false income tax return. *Id.* at 261. The trial judge's supplemental jury instructions on the Hobbs Act claims included the following statement:

> It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation. In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.

Id. at 265. The jury convicted McCormick on the tax evasion count and the first Hobbs Act count. *Id.*

The Court of Appeals for the Fourth Circuit rejected McCormick's claim that a conviction of an elected official under the Hobbs Act required proof of an explicit *quid pro quo*, *to wit*, an explicit promise of

official action or inaction in exchange for any payment or property received. *Id.* at 265-66. Instead, the court concluded that no such showing was needed where the parties never intended the payments to be "legitimate" campaign contributions. *Id.* at 266. As this Court described the lower courts' rulings, "[t]he trial court and the Court of Appeals were of the view that it was unnecessary to prove that, in exchange for a campaign contribution, the official *specifically promised* to perform or not to perform an act incident to his office." *Id.* at 267 n.5 (emphasis added).

This Court rejected the Fourth Circuit's analysis, recognizing that applying the same standard to prosecute public officials for receiving campaign contributions as traditional payoffs would jeopardize our democratic system because the financing of political campaigns depends upon officials accepting contributions from people expecting some kind of benefit in return. *Id*. at 272-73. To prevent the Hobbs Act from unduly infringing upon legitimate political activity, this Court held that the prosecution is required to prove an explicit *quid pro quo* where campaign contributions are at issue. *Id.* at 273. The explicit *quid pro quo* requirement effectively limits the ability of anti-corruption statutes, such as the honest services statutes, to reach the giving or receiving of campaign contributions except in cases where the prosecution proves beyond a reasonable doubt that such payments were made in return for an "explicit promise" or agreement by a public official to take official action in exchange for a contribution, as manifested by the official's actual assertion that his conduct will be guided by that promise. The standard

articulated by the Sixth Circuit is a significant departure from this Court's well reasoned view.

B. The Sixth Circuit's Ruling Departs From This Court's Holding In *McCormick* By Redefining The Explicit *Quid Pro Quo* Requirement As Satisfied By Only An Inference Of The Public Official's Unspoken State Of Mind Linking A Lawful Contribution With A Particular Official Act.

The core issue with the Sixth Circuit, as it is with some other circuits, is that the court's desire to ignore the First Amendment constitutional protections established by this Court in *McCormick* for campaign cases, and simply apply the lesser implicit standard held in *Evans*, which was a non- campaign case that did not have First Amendment concerns.

The Sixth Circuit's reliance on *Evans* to support the application of an implicit or inferred *quid pro quo* standard in campaign contribution cases cannot be squared with this Court's mandate in *McCormick* that "it would require statutory language more explicit than the Hobbs Act contains to justify" criminalizing the giving or receiving of campaign contributions upon anything less than proof of an "explicit promise or undertaking to perform or not to perform an official act," whereby "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *McCormick*, 500 U.S. at 272. Like the Hobbs Act, the text of the "honest services" statute does not contain language suggesting that a crime occurs when an official accepts campaign contribution to his

election committee, such as two car campaign magnets, envelopes and letterhead, that he understands is motivated by the donor's desire for the official to take certain actions, which are thereafter taken. In the absence of a specific directive by Congress, proof of an explicit *quid pro quo* is required.

The Sixth Circuit's ruling also departs from and conflicts with its own precedent, and the decisions of other Circuits, which, in ruling that *McCormick's* explicit *quid pro quo* standard applies in campaign contribution cases, have correctly recognized that applying an implicit or inferred *quid pro quo* standard in *both* campaign contribution and traditional payoff cases disregards the critical distinction between these types of cases. See, *Blandford*, 33 F.3d at 697("Indeed, a strong argument could be advanced for treating campaign contribution cases disparately. Campaign contributions, as the *McCormick* Court noted, enjoy what might be labeled a presumption of legitimacy."). Just four years ago , the Sixth Circuit held that, unlike campaign contributions cases, the government need not demonstrate an explicit *quid pro quo* outside campaign contributions cases. *Abbey*, 560 F.3d at 517. Other Circuits, including the Second, Third, Fourth, Ninth and D.C., have similarly, distinguished campaign contributions from traditional payoffs for the purposes of criminal liability. See also, *Ganim*, 510 F.3d at 142; *Antico*, 274 F.3d at 257 (declining to extend *McCormick's* explicit quid pro quo standard to non-campaign contribution cases); *Taylor*, 993 F.2d at 385; *Kincaid-Chauncey*, 556 F.3d at 937 (proof of an explicit *quid pro quo* is required where the "unlawfully gained property is in the form of a campaign contribution" while in other cases, "an agreement implied from the

official's words and actions is sufficient to satisfy this element"); *Ring*, 706 F.3d at 466 (The *McCormick* standard does not apply to "things of value" outside of the campaign contribution context).

The evidence demonstrates the fallacy of the Sixth Circuit's approach in this case. If there was sufficient admissible evidence to prove beyond a reasonable doubt that Judge Terry entered into a mutual agreement whereby Judge Terry explicitly or expressly promised that he would only deny the summary judgment motion of the AHB in exchange for political donations such as two car magnets, envelopes and letterhead to a judicial campaign committee, and if the jury was properly instructed that it must find the existence of a such an explicit or expressed *quid pro quo* agreement based upon the admissible evidence before it, then a conviction could properly stand. Conversely, allowing a conviction based upon an "agreement" merely inferred from insufficient evidence of an unspoken and inferred state of mind of the campaign donor, and not the donee, cannot and should not be what this Court intended by *McCormick* and the First Amendment.

C. The Sixth Circuit's Ruling Allowed The Government To Encourage A Jury To Convict On The Basis Of Constitutionally Protected First Amendment Conduct And Disregard The Requirement That The Government Must Still Prove Bribery With A Linkage Between The Campaign Contribution And The Particular Official Act.

In *Sun-Diamond*, supra, this Court addressed the question when, precisely, the gift of "things of value" to a government official becomes criminal. This Court found that gifts may legally be given to an official "based on his official position and not linked to an identifiable act" taken, or to be taken, by the official. 526 U.S. at 406-07. As the *Sun-Diamond* Court held, gifts to an official become criminal only when they are linked to particular official acts. *Id*. at 404-05, 408. The Sun-Diamond Court also took note of the "distinguishing feature" that makes bribery so much more serious than gratuities — a *quid pro quo*, or the exchange of a thing of value for an official act. *Id*. at 404-05. An illegal gratuity, by contrast, "may constitute merely a reward for some future act that the public official will take . . . or for a past act that he has already taken." *Id*. at 405.

In sum, *Sun-Diamond* differentiates three different scenarios in which an individual provides a "thing of value" to a government official:

1. When the "thing of value" is given not in connection with a particular official act, but merely "to build a reservoir of goodwill that

might affect one or more of a multitude of unspecified acts," there is no crime[5];

2. When the same individual provides the same "thing of value" to the same official as a "reward" for "some particular official act," he violates the gratuities statute, 18 U.S.C. §201(c); and

3. When the same individual provides the same "thing of value" to the same official "in exchange for an official act" — *i.e.*, where there is a *quid pro quo* between the thing of value and the official act — he commits bribery.

Sun-Diamond, 526 U.S. at 405; see also *United States v. Kemp*, 500 F.3d 257, 281 (3rd Cir. 2007)("bribery may not be founded on a mere intent to curry favor. . . . There is a critical difference between bribery and generalized gifts provided in an attempt to build goodwill")(citing *Sun-Diamond*). Scenario (1) is not illegal. The crucial factual distinction between scenarios (2) and (3) (*i.e.,* between a gratuity and a bribe) is the difference between a "reward," on one hand, and an "exchange," or *quid pro quo*, on the other.

Even where a thing of value is linked to a particular official act, in order to prove bribery, the government must show that the linkage between alleged gift and

---

[5] Judge Terry's campaign contributions fall under Scenario (1), above, based on Russo's testimony which stated that his unsolicited campaign donations were made to Judge Terry's election committee – none of which were personal gifts that personally enriched Judge Terry and violated the Canons – were to "jump start" Judge Terry's campaign. (Pet. App. E, at 56-62).

act involved an exchange, rather than a mere unilateral "reward." Since *Skilling* limits honest services fraud to bribery and kickbacks, and *Sun-Diamond* holds that gifts meant to "build a reservoir of good will" and even a "reward" for an official act are insufficient to show bribery, it necessarily follows that the gift of "things of value" to an official to build goodwill, or even as a reward for a particular act, are insufficient to support a conviction for honest services fraud. For example, if a donor to a political campaign gives expensive sports tickets to a public official, who then takes an act favorable to the donor's client, there is no gratuity absent additional evidence that the gift was a "reward" for the act, rather than a generalized attempt to "curry favor." *Sun-Diamond*, 526 U.S. at 405. And absent still further evidence of an actual "exchange" between the gift and the act, these facts do not permit a conviction for bribery under *Sun-Diamond*, or for honest services fraud under *Skilling*.

Even if, the bribery statute's prohibition on "offer[ing]" a bribe means that the donor may be convicted whether or not the public official agrees to an exchange, such an exchange must be proposed, understood, or agreed to before bribery can be shown. Otherwise, the bribery statute's *quid pro quo* or "exchange" requirement would be meaningless. The *Sun-Diamond* Court made clear that even if the giver of a thing of value hopes or even intends that the gift will result in some particular official action, that mere unilateral intent or hope is insufficient to elevate the gift to a bribe. 526 U.S. at 405. Even if a "thing of value" is conveyed to an official in connection with a particular official act, absent the recipient's agreement — explicit or implicit — to the exchange, or, at least,

the offeror's proposal of an exchange, the gift can be, at most, a mere unilateral reward (and therefore a gratuity) rather than an exchange.

The jury instructions allowed in this case failed to preserve this critical constitutional distinction[6]. (Pet App. F, at 66-68). The lower court, with subsequent approval of the Sixth Circuit, instructed the jury that it could convict Judge Terry with the lesser *quid pro quo* standard associated with traditional cash payoffs cases where a jury could easily infer there was an implied exchange , and not the explicit *quid pro quo* standard approved by the *McCormick* Court in campaign contribution cases with First Amendment protections. However, to prove bribery it is not sufficient merely to show that an official had been

---

[6] In *Skilling,* this Court adopted a limiting construction of the honest services statute, 18 U.S.C. § 1346, in order to save it from unconstitutional vagueness. This Court held that the honest-services fraud statute "covers only bribery and kickback schemes." 130 S.Ct. at 2907. *Skilling* mandates that the instructions for wire fraud, bribery and extortion cases require the jury to find that a defendant engaged in an express quid pro quo. *Skilling*, 130 S. Ct. at 2931 . See also, *McCormick*, 500 U.S. at 271-3, & n. 9. This Court held that "[C]onstitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory." *Skilling*, 130 S. Ct. at 2934 (citing *Yates v. United States*, 354 U.S. 298 (1957)). "Any omission or misstatement of an element of an offense in the jury instructions is constitutional error and, therefore, requires reversal unless we find the error 'harmless beyond a reasonable doubt.'" *United States v. Kilbride*, 584 F.3d 1240, 1247 (9th Cir. 2009)(quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Here, the jury was instructed on alternate legal theories of guilt for a conviction, such as a failure to disclose and conflict of interest theories. (Pet. App. F, at 66-68).

enriched – there still must be an identifiable exchange, particularly with campaign contributions and political protected activity.

There was no such exchange between Russo, as the donor, and Judge Terry, as the campaign donee, regarding the items described in Count 3 (two car magnets) and Count 4 (letterhead and envelopes) of the Indictment. The lower court went on to instruct the jury that no explicit *quid pro quo* was required for these campaign items by focusing solely on Russo's unilateral intent. By focusing solely on the donor's unilateral intent, Russo, and omitting any requirement that the government prove an explicit agreement to exchange, or even that the donor offered one, this instruction allowed the jury to convict Judge Terry for honest services fraud upon a showing of something less than a bribery scheme – i.e., in-kind campaign items to build goodwill or a mere reward, rather than an actual "exchange." See, *United States v. Schaffer*, 183 F.3d 833, 841 (D.C. Cir. 1999).

III. THE INDICTMENT AND PROSECUTION OF AN ELECTED OFFICIAL UNDER THE "HONEST SERVICES" STATUTE IN THIS CASE WITHOUT REQUIRING SIGNIFICANT LIMITS ON ITS COVERAGE PRODUCES A SIGNIFICANT BURDEN ON A FIRST AMENDMENT RIGHT.

This case is of exceptional importance to all elected officials in this nation. Criminalizing the giving and receiving of political contributions under either "bribery" or "honest services" statutes without any evidentiary proof in the record of an explicit *quid pro*

quo agreement regarding those campaign contributions would have strong repercussions that go beyond the conviction of Judge Terry. The Sixth Circuit's approach puts at risk every political candidate who accepts legitimate campaign contributions, no matter the monetary value, with the knowledge that the donor hopes to influence that candidate, and every donor who contributes to a campaign with the hope or expectation of receiving a benefit who goes on to receive such a benefit. An interpretation that criminalizes activities that fall far short of an explicit *quid pro quo* can only lead to an impermissible chilling effect on the First Amendment right to contribute to political campaigns.

This Court has unequivocally held that governmental limitations on political contributions are subject to strict scrutiny because they impinge on the First Amendment's protection of free speech and political association. See, e.g., *Buckley*, 424 U.S. at 14-23 (1976); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295-298 (1981). Political contributions are especially protected under the First Amendment when — as in this case — lawful political campaigns are at issue, since "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14; see also*, Roth v. United States*, 354 U.S. 476, 484 (1957). Contributions to a judicial campaigns, which do not violate state election laws or the Canons, also do not financially benefit the individual judge in the same way as a contribution to an elected official's campaign, and thus there is a reduced likelihood that such donations could lead to corruption. *See, e.g., First*

Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978); *F.E.C. v. Wis. Right to Life*, 127 S. Ct. 2652, 2677 (2007) (Scalia, J., concurring).

The holding of the Sixth Circuit fails to recognize and consider that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." *Buckley*, 424 U.S. at 27-28. The explicit *quid pro quo* requirement in *McCormick*, *to wit*, an "explicit promise or undertaking by the official to perform or not to perform an official act" in return for a contribution, *McCormick*, 500 U.S. at 273, was intended to exclude all but "the most blatant and specific" *quid pro quo* arrangements from prosecution in campaign contribution cases.

Public officials and political donors must understand that they will not be indicted or convicted simply because there is insufficient evidence from which one may infer or imply a connection between or link to a political contribution and a particular official act. This Court has been especially cautious of laws that lack ascertainable standards of guilt in the sensitive First Amendment area. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 109 n. 5 (1972). This same principle precludes criminal liability where the legal duties that the defendant is accused of violating are not clearly defined. See *United States v. Harris*, 347 U.S. 612, 617 (1954). Requiring an explicit *quid pro quo* for a conviction in cases involving contributions items to a political campaign, as this Court required in *McCormick* with respect to election campaigns, would avoid the "dangerous" First Amendment implications

that even the Sixth Circuit failed to recognize are implicated by the criminalization of such conduct. *Siegelman*, 561 F.3d at 1224 n.13. Indeed, the fear of unfettered prosecutorial discretion afforded by a statute whose broad language permits such indictments can only have a chilling effect on free speech and political association protected by the First Amendment. See, *Kolender*, 461 U.S. at 358 (1983)(citations omitted); see also *Grayned*, 408 U.S. at 108. If the government's ability to criminalize the giving and receiving of campaign contributions is untethered by clear bright line rules, the vicissitudes of politically motivated prosecutions will have an adverse effect on the lawful conduct of not only existing elected officials and donors, but also those persons contemplating either running for elected office or contributing to political campaigns.

This Court held that the explicit *quid pro quo* standard established in *McCormick* "define[d] the forbidden zone of conduct with sufficient clarity," *McCormick*, 500 U.S. at 273, but the Sixth Circuit's ruling, unlike the D.C. Circuit and other circuits, effectively nullified that First Amendment standard for any future campaign contribution cases. The conviction of public officials under a charge of "honest services" mail fraud, conspiracy to commit that offense, or bribery, based on an alleged implied or inferred agreement without the showing of an explicit *quid pro quo* linkage between the official action and the political contributions, will have an impermissible impact on how political campaigns are run throughout the country. This Court should take action now to clarify the standards under which this critical aspect of the democratic process may be subject to the criminal laws.

CONCLUSION

By granting review, this Court would have the opportunity to right an injustice, to exonerate a former state court judge, who accepted lawful campaign donations under Ohio law and the Canons, and then lawfully denied all of the motions for summary judgement of the parties – the official act.

Respectfully submitted,

Sylvester Summers, Jr.
Counsel of Record
Lexington Village
7804 Linwood Avenue
Cleveland, Ohio 44103
(216) 298-1589
(216) 407-6773
slyatlaw@msn.com

Counsel for Petitioner

September 23, 2013

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-4130

[Filed February 14, 2013]

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 13a0040p.06

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
STEVEN J. TERRY,	)
	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:10-cr-390-1—Sara E. Lioi, District Judge.

Argued: October 10, 2012

Decided and Filed: February 14, 2013

Before: SUTTON, GRIFFIN and WHITE, Circuit Judges.

COUNSEL

ARGUED: Sylvester Summers, Jr., SYLVESTER SUMMERS, JR., CO., LPA, Cleveland, Ohio, for Appellant. Daniel R. Ranke, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee. **ON BRIEF:** Sylvester Summers, Jr., SYLVESTER SUMMERS, JR., CO., LPA, Cleveland, Ohio, for Appellant. Daniel R. Ranke, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

OPINION

SUTTON, Circuit Judge. "If you can't eat [lobbyists'] food, drink their booze, . . . take their money and then vote against them, you've got no business being [in politics]," said Jesse Unruh, a one-time Speaker of the California General Assembly, in the 1960s. Bill Boyarsky, *Big Daddy: Jesse Unruh and the Art of Power Politics* 112 (2007). That is one way of looking at it. Another way of looking at it comes courtesy of the federal anti-corruption statutes, one of which prohibits an official from accepting things of value "in return for" official acts. 18 U.S.C. § 201(b)(2). A jury found that a state court judge did just that and convicted him of several honest services fraud violations. We affirm.

App. 3

I.

In April 2007, Governor Ted Strickland appointed Steven Terry to fill a vacancy on the Cuyahoga County Court of Common Pleas. Soon after, Terry announced that he intended to seek reelection to retain the seat the following November. Having never run for elected office before, Terry sought the help of County Auditor Frank Russo, a presence in Cleveland politics. Russo agreed to help Terry with his reelection campaign and indeed had already helped him by recommending Terry to the Governor for the appointment and by lobbying members of the local judicial nominating committee to support him.

Terry knew that Russo was helping him behind the scenes. What Terry did not know was that the FBI was investigating Russo on corruption charges and that federal agents had tapped Russo's phones. On July 15, 2008, Russo had a phone conversation with a local attorney, Joe O'Malley, about two foreclosure cases on Terry's docket. O'Malley represented several homeowners in a lawsuit against American Home Bank, and he asked Russo to convince Terry to deny the bank's motions for summary judgment. Russo promised to call Terry and make sure Terry did what he was "supposed to do" with the cases. Gov't Ex. 116; 2 Trial Tr. 294.

Two days later, Russo and Terry spoke on the phone. Russo told Terry to deny the motions for summary judgment, and Terry said he would. In the same conversation, the two men also discussed Russo's attendance at future fundraisers for Terry's reelection campaign.

That same day, Terry contacted the magistrate judge responsible for the foreclosure cases and told her to deny the motions for summary judgment. Surprised by Terry's directive, the magistrate passed along the docket so that Terry could deny the motions himself. Terry did just that, even though he never reviewed the case files, never read the motions before denying them and never obtained a recommendation from the magistrate or anyone else (within the court system) about how to rule on the motions.

Terry's collaboration came relatively cheap. Russo's political action committee donated $500 to Terry's reelection campaign in July 2007. Russo's committee purchased around $700 worth of stationery, envelopes and car magnets for Terry's campaign in July 2007. And Russo had his official staff work for Terry's campaign during business hours and provided other political help throughout the relevant time period. In exchange for this assistance, Russo explained that he expected Terry "to answer the phone any time I called. And any time I called with a recommendation, or a problem, or a case, I would expect Steve to give it special attention" and "follow through for me." 2 Trial Tr. 290. Russo in other words expected that his political and financial patronage meant Terry "would do what I asked him to do," including "granting [] a motion so it wouldn't tie [a] case up." *Id*. For his part in this and like-minded arrangements with other Cleveland-area officials, Russo pled guilty to twenty-one political corruption counts of one form or another and received a 262-month prison sentence.

For his part, Terry ran into similar problems. A grand jury indicted him on five political corruption

charges. Count One alleged that Terry conspired with Russo to commit mail fraud and honest services fraud. Count Two alleged that Terry committed mail fraud by denying the bank's summary judgment motions. And Counts Three, Four and Five alleged that he committed honest services fraud by "accepting gifts, payments, and other things of value from Russo and others in exchange for favorable official action." R. 24 ¶ 52. Each honest services fraud count was tied to a mailed document: Counts Three and Four stemmed from checks Russo's political action committee wrote to pay for Terry's stationery, envelopes and car magnets, while Count Five stemmed from a thank you note Terry wrote to Russo. *Id*. ¶ 54.

After a five-day trial, a jury convicted Terry on Counts One, Three and Four, and acquitted him on Counts Two and Five. The district court sentenced him to 63 months in prison on each count, to be served concurrently.

II.

Terry presses three arguments on appeal: (1) the district court should have dismissed the indictment because it failed to identify a crime under *United States v. Skilling*, 130 S. Ct. 2896 (2010); (2) the district court improperly instructed the jury on the requirements for showing that Terry accepted a bribe; and (3) insufficient evidence showed that Terry accepted a bribe.

A.

The district court correctly denied Terry's motion to dismiss. An indictment must contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged" and a "citation of the statute . . . that the defendant is alleged to have violated." Fed. R. Crim. P. 7(c). Terry's indictment did just that. It outlined the contours of the relationship between Terry and Russo, detailed how Russo instructed Terry to deny the bank's motions for summary judgment, listed the benefits Terry received from Russo and mentioned each statute Terry allegedly violated.

The indictment also complied with *Skilling*. Honest services mail fraud requires the government to prove that the defendant used the mail to carry out a "scheme or artifice to defraud" another, 18 U.S.C. § 1341, of "the intangible right of honest services," *id*. § 1346. That intangible right, *Skilling* made clear, covers only schemes in which the defendant deprives another of his honest services by participating in a bribery or kickback scheme. 130 S. Ct. at 2931. The relevant counts of Terry's indictment allege that he "devised and intended to devise a scheme and artifice to defraud" the citizens of Cuyahoga County (including the litigants before him) of honest services "through bribery and kickbacks" that he "knowingly caused to be delivered by mail." R. 24 ¶ 51. Several details supported the allegations, including the checks from Russo's political action committee that traveled through the mail and the summary-judgment motions that Terry denied at Russo's behest.

Terry argues that, in upholding the indictment, the district court misread *Skilling* to say that honest services fraud required the government to prove that he *also* violated a state-law duty. But why should Terry care? Right or wrong, the district court's decision benefitted Terry. By requiring the government to show Terry violated a state-law duty, the district court *added* an element to the government's case. That helped Terry; it could not conceivably prejudice him. In narrowing honest services fraud to require a bribe or kickback, *Skilling* did nothing to prevent federal courts from narrowing the offense still further to include only bribes or kickbacks that also violate a state-law duty. *See* 130 S. Ct. at 2928 n.36 (noting without elaboration that "[c]ourts have disagreed about whether § 1346 prosecutions must be based on a violation of state law"). We thus need not wade into the debate over whether a state-law violation is a precondition of honest services fraud. *Compare United States v. Brumley*, 116 F.3d 728, 734–735 (5th Cir. 1997), *with United States v. Weyhrauch*, 548 F.3d 1237, 1245–46 (9th Cir. 2008).

B.

Terry's second claim turns on the proper definition of a bribe when it comes to a public official. The slate is not clean. Bribery in this setting has long been taken seriously. *See, e.g.*, Herodotus, *The Histories* 5:25 (A.D. Godley trans., Harvard Univ. Press 1920) (describing how, in ancient Persia, a judge who accepted a bribe was flayed alive and his successor was forced to sit on a chair made from the predecessor's skin). Punishment for the offense today is less severe, but the prohibition

remains. The political-corruption statutes and cases make a few principles in this area clear:

- A public official can commit honest services fraud only by accepting a bribe or a kickback. *Skilling*, 130 S. Ct. at 2931.

- A public official accepts a bribe when he "corruptly . . . receives . . . anything of value . . . in return for . . . being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2); *see also* 18 U.S.C. § 666(a)(1)(B) (similar definition in federal-programs bribery statute); Ohio Rev. Code § 2921.02(b) (similar definition in state bribery statute).

- One element of bribery is that the public official must agree that "his official conduct will be controlled by the terms of the promise or the undertaking." *McCormick v. United States*, 500 U.S. 257, 273 (1991); *see also United States v. Brewster*, 408 U.S. 501, 526 (1972) ("The illegal conduct is taking or agreeing to take money for a promise to act in a certain way."); *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (looking to extortion cases to interpret a bribery statute because the two crimes are "different sides of the same coin").

- This agreement must include a quid pro quo—the receipt of something of value "in exchange for an official act." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999).

- The agreement between the public official and the person offering the bribe need not spell out which payments control which particular official acts. Rather, "it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose." *United States v. Abbey*, 560 F.3d 513, 518 (6th Cir. 2009); *accord United States v. Jefferson*, 674 F.3d 332, 358–59 (4th Cir. 2012); *Ryan v. United States*, 688 F.3d 845, 852 (7th Cir. 2012); *United States v. Ganim*, 510 F.3d 134, 147 (2d Cir. 2007).

That is a start. These principles, to be sure, do not spell out what kinds of agreements—and what level of specificity—must exist between the person offering a bribe and the public official receiving it. And some cases debate how "specific," "express" or "explicit" a quid pro quo must be to violate the bribery, extortion and kickback laws. *See, e.g.*, *United States v. Ring*, ___ F.3d ___, No. 11-3100, 2013 WL 276020, at *4 (D.C. Cir. 2013) ("[C]ourts have struggled to pin down the definition of an explicit quid pro quo in various contexts."); *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011); *United States v. Bahel*, 662 F.3d 610, 635 n.6 (2d Cir. 2011); *United States v. Whitfield*, 590 F.3d 325, 348–54 (5th Cir. 2009).

Yet these adjectives do not add a new element to these criminal statutes but signal that the statutory requirement must be met—that the payments were made in connection with an agreement, which is to say "in return for" official actions under it. So long as a public official agrees that payments will influence an official act, that suffices. What is needed is an

agreement, full stop, which can be formal or informal, written or oral. As most bribery agreements will be oral and informal, the question is one of inferences taken from what the participants say, mean and do, all matters that juries are fully equipped to assess. "[M]otives and consequences, not formalities," are the keys for determining whether a public official entered an agreement to accept a bribe, and the trier of fact is "quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor." *United States v. Evans*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring in part and concurring in the judgment); *see also McCormick*, 500 U.S. at 270 ("It goes without saying that matters of intent are for the jury to consider."); *Ring*, 2013 WL 276020, at *7 (noting that intent "distinguishes criminal corruption from commonplace political and business activities"); *United States v. Wright*, 665 F.3d 560, 569 (3d Cir. 2012) ("We rely on the good sense of jurors . . . to distinguish intent from knowledge or recklessness where the direct evidence [of a quid pro quo] is necessarily scanty.").

That a bribe doubles as a campaign contribution does not by itself insulate it from scrutiny. No doubt, a contribution is more likely to be a duty-free gift than a bribe because a contribution has a legitimate alternative explanation: The donor supports the candidate's election for all manner of possible reasons. *See Buckley v. Valeo*, 424 U.S. 1, 21 (1976). But the prosecution may rebut that alternative explanation, and context may show that an otherwise legitimate contribution is a bribe. Take *Evans*. In that case, the Court permitted a jury to convict a state legislator who

attempted to claim the payment he received was a campaign contribution. *See* 504 U.S. at 257–59. Take as well the Fifth Circuit's decision in *Whitfield*. Two state judges argued that the loan guarantees they received were made in the context of their electoral campaigns and thus required special protection, but the court upheld a finding that the payments were bribes. 590 F.3d at 353. If an official receives money "through promises to improperly employ his public influence," he has accepted a bribe. *Abbey*, 560 F.3d at 519. A donor who gives money in the hope of unspecified future assistance does not agree to exchange payments for actions. No bribe thus occurs if the elected official later does something that benefits the donor. On the other hand, if a donor (like Russo) makes a contribution so that an elected official will "do what I asked him to do," 2 Trial Tr. 290, and the official (like Terry) accepts the payment with the same understanding, the donor and the official have formed a corrupt bargain. That agreement marks the difference between a run-of-the-mine contribution and a bribe.

Hold on, says Terry: Bribery should have two definitions, not one, a definition for public officials who may not receive campaign contributions and a definition for those who may. For public officials who may not receive campaign contributions—appointed officials, for instance—any payment in exchange for a future benefit is a bribe, he says. Terry Letter Br. at 3. But for officials who may accept campaign contributions, a payment becomes a bribe only if it is made "in exchange for a *specific* official act or omission." *Id*. (emphasis added). Congress, however, did not distinguish between public officials who may legally accept contributions and those who may not in

the bribery statutes. Nor has the Supreme Court. It has refused to "distinguish[] between legal and illegal campaign contributions" in the context of extortion. *McCormick*, 500 U.S. at 271; *see also United States v. Brewster*, 506 F.2d 62, 77 (D.C. Cir. 1974) (refusing to carve out an exception in the federal bribery statute for campaign contributions). An agreement, once again, is the dividing line between permissible and impermissible payments.

Terry persists that campaign contributions must meet a higher standard to become a bribe because "the financing of political campaigns depends upon officials accepting contributions from people expecting some kind of benefit in return." Terry Reply Br. at 20. That sentiment may sum up Frank Russo's donation strategy, but a contribution also may represent nothing more than "a general expression of support for the candidate and his views." *Buckley*, 424 U.S. at 21. Just as "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009), not every contribution to an elected judge is a bribe. Whatever else *McCormick* may mean, it does not give an elected judge the First Amendment right to sell a case so long as the buyer has not picked out *which* case at the time of sale.

The jury instructions in this case accurately conveyed that an agreement is the key component of a bribe. The district court told the jury that, in order to find that Terry violated the honest services fraud statute, it needed to find a "quid pro quo": that is, Terry agreed "to accept [a] thing of value in exchange for official action." 5 Trial Tr. 1189. A "thing of value"

could include a campaign contribution, so long as that was "received in exchange for official acts." *Id*. at 1192. Terry's intent to exchange official acts for contributions could be "based on [Terry's] words, conduct, acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them." *Id*. Each payment did not need to be tied to a specific official act, so long as Terry understood that, "whenever the opportunity present[ed] itself," Terry would "take specific official actions on the giver's behalf." *Id*. at 1190. These instructions matched the definition of bribery. The jury needed to find that Terry agreed to accept things of value in exchange for official acts.

C.

Based on these instructions, the jury found that Terry accepted a bribe. We may overturn that conclusion only if, after "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

A jury could find that Terry and Russo entered an agreement to fix cases. Start with the benefits, financial and otherwise, that Russo provided to Terry during the relevant time period. He gave Terry's campaign $500. He supplied Terry's campaign with approximately $700 in campaign materials. He expected his employees in the Auditor's office to engage in electioneering for Terry during office hours. And he hired a woman Terry had fired from his chambers staff to prevent Terry from suffering negative publicity.

A flow of benefits from one person to a public official, to be sure, does not by itself establish bribery. The benefits instead must be part and parcel of an agreement by the beneficiary to perform public acts for the patron. That existed as well. On one side of the bargain, Russo thought that they had a deal. In return for showering Terry with benefits, Russo expected Terry to use his official powers whenever and however Russo requested. Any time Russo called, he expected Terry to "give it special attention" and "follow through with me." 2 Trial Tr. 290. "Special attention," he clarified, meant that "whether it would be a character reference or whether it would be a case," Terry would "do what I asked him to do." *Id*.

So, too, on the other side of the bargain. Although Terry disclaimed at trial any agreement to fix cases in which Russo had a stake, his actions belied his words. Terry's rulings on the foreclosure cases were, at the very least, highly irregular, and the reality that a tape recording captured the Russo-Terry conversation immediately preceding these rulings did Terry no favor. No subtle winks and nods were needed. Russo straight up asked Terry to deny the bank's motions for summary judgment in the two cases, and with Terry's tape-recorded reply ("Got it." Gov't Ex. 117), Terry agreed to do just that. And he did, within hours of the conversation. Here is the timeline: Terry and Russo spoke at 11:58 a.m. on July 17; Terry called the magistrate later that afternoon, around 12:30 p.m.; and Terry called Russo at 10:31 a.m. the next morning to confirm he had denied the motions. Without reading the motions, without consulting the case files and without relying on the recommendation of anyone—within the court system—who had read the

files, Terry did just what Russo asked. That is not an everyday occurrence in the judicial branch, and a jury could readily infer that Terry's unusual behavior, along with the other evidence, stemmed from an agreement to use his position as a public official to do Russo's bidding in return for Russo's financial, campaign and staff support.

In the face of this evidence, Terry claims that the record nonetheless does not establish an agreement between him and Russo to exchange campaign contributions and help for official acts. Yes and no. Yes, the government never presented a formal agreement between Russo and Terry stating that Russo's gifts would control Terry's actions. But no, there was ample evidence for the jury to infer that an agreement nonetheless existed between the two men.

Not every campaign contribution, we recognize, is a bribe in sheep's clothing. Without anything more, a jury could not reasonably infer that a campaign contribution is a bribe solely because a public official accepts a contribution and later takes an action that benefits a donor. *See, e.g., McCormick*, 500 U.S. at 272. But when a public official acts as a donor's marionette—by deciding a case to a donor's benefit immediately after the donor asks him to and without reading anything about the case—a jury can reject legitimate explanations for a contribution and infer that it flowed from a bribery agreement. Here, the jury rejected any legitimate explanation for Russo's contributions in the face of strong circumstantial evidence that Terry and Russo had a corrupt bargain. Once the jury found Terry and Russo had an agreement, it could easily find that Terry accepted a

bribe, violating the honest services fraud statute along the way. The same holds true for Terry's conspiracy conviction.

III.

For these reasons, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-4130

[Filed February 14, 2013]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee,	)
	)
v.	)
	)
STEVEN J. TERRY,	)
	)
Defendant - Appellant.	)
	)

Before: SUTTON, GRIFFIN and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

_____

Deborah S. Hunt, Clerk

APPENDIX B

AO 245B (Rev. 06/05) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Case Number: 1:10CR390
USM Number: 56273-060

[Dated October 4, 2011]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
STEVEN J. TERRY	)
	)

JUDGMENT IN A CRIMINAL CASE

Angelo Lonardo, Edward LaRue, Christopher Tomarios
Defendant's Attorney

THE DEFENDANT was found guilty on counts one, three, and four, of the superseding indictment, after a jury/bench trial.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
18:1341, 1346 & 1349	**Conspiracy to Commit Mail Fraid and Honest Services Mail Fraud**	**11/17/2008**	**1**
18:1341, 1346 & 2	**Honest Services Mail Fraud**	**07/11/2007**	**3**
18:1341, 1346 & 2	**Honest Services Mail Fraud**	**07/17/2007**	**4**

The defendant is sentenced as provided in Pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The Defendant has been found not guilty on counts 2 and 5.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of any

material change in the defendant's economic circumstances.

Date of Imposition of Judgment
October 4, 2011

s/ Sara Lioi
Signature of Judge

Honorable Sara Lioi U.S. District Judge
Name of Judge Title of Judge

October 4, 2011
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 63 months on each of counts 1, 3, 4, to run concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:
FCI Milan, Michigan

* * *

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years. This term consists of 2 years on each of Counts 1, 3 and 4, to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

* * *

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant comply with the Northern District of Ohio Offender Employment Policy which may include participation in training, education, counseling and/or daily job search as directed by the pretrial services and probation officer. If not in compliance with the condition of supervision requiring full-time employment at a lawful occupation, the defendant may be directed to perform up to 20 hours of community service per week until employed, as approved or

directed by the pretrial services and probation officer.

6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal

record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation office with access to any request financial information.

The defendant shall perform 250 hours of community service as directed by the probation officer.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	**Fine**	**Restitution**
Totals:	**$300.00**	**$0.00**	**$27,880.79**

* * *

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If a defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee

Cuyahoga County
Office of the County Executive
1219 Ontario Ave, Cleveland, OH 44113

American Home Bank, now Graystone Tower Bank
Attn: Susan Reinard, Mortgage Department
Ref. Lane # 13433
3840 Hempland Rd., Mountville, PA 17554

	Total Loss*	Restitution Ordered	Priority or Percentage
		$16, 380.79	
		$11,500.00	
Totals:	**$0.00**	**$27,880.79**	

* * *

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALITIES

Based on a review of the defendant's financial condition as set forth in the presentence investigation report, the Court finds that the defendant does not have the ability to pay a fine. The Court waives the fine in this case.

The defendant shall pay restitution in the amount of $16,380.79 to Cuyahoga County, through the Clerk of the U.S. District Court. Additionally, restitution in the amount of $11,500.00 is to be paid to American Home Bank, now Graystone Tower Bank, through the Clerk of the U.S. District Court. Restitution is due and payable immediately.

The defendant shall pay 25% of defendant's gross income per month, through the Federal Bureau of Prisons Inmate Financial Responsibility Program. If a restitution balance remains upon release from imprisonment, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release of at least a minimum of 10% of defendant's gross monthly income during the term of supervised release and thereafter as prescribed by law.

Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before and after the date of this Judgment.

SCHEDULE OF PAYMENTS

* * *

F ☒ Special instructions regarding payment of criminal monetary penalties:

☒ A special assessment of $ 300 is due in full immediately as to count(s) 1, 3, & 4 PAYMENT IS TO BE MADE PAYABLE AND SENT TO THE CLERK, U.S. DISTRICT COURT.

* * *

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: Forfeiture in the amount of $29,319.33 is hereby order. A separate detailed order of forfeiture to follow.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-4130

[Filed April 29, 2013]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
STEVEN J. TERRY,	)
	)
Defendant-Appellant.	)
	)

ORDER

BEFORE: SUTTON, GRIFFIN, and WHITE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other

active judges[*] of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[*] Chief Judge Batchelder recused herself from participation in this ruling.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Case Number: 1:10CR390

[Filed May 2, 2011]

B. Jessie Hill
Associate Professor of Law
Associate Director,
Center for Social Justice

11075 East Boulevard
Cleveland, Ohio 44106-7148

Phone 216.368.0553
Fax 216.368.2086
E-mail jessie.hill@case.edu

http://law.case.edu

Expert Report of Jessie Hill
Professor of Law
Case Western Reserve University School of Law

May 2, 2011

I. Statement of Opinions and Basis and Reasons Therefor

It is my opinion, to a reasonable degree of legal certainty, that the decision to deny the two summary judgment motions in the consolidated cases *K&L Excavation Ltd v. Auburn Building* Co., et al., No. CV-03-51572 and *Avon Poured Wall, Inc. v. Brian Lane, et al.,* No. 04-519620, was required as a matter of law, because each contained genuine issues of material fact.

A. Factual and Procedural History

The civil cases *K&L Excavation Ltd.* v. *Auburn Building Co.,* et al., No. CV-03-51572 and *Avon Poured Wall. Inc. v. Brian Lane, et al.,* No. CV-04-519620, which were filed in the Cuyahoga County Court of Common Pleas, arose out of the same set of occurrences and were consolidated under docket number CV-03-51572 on June 17, 2005. For simplicity, the consolidated cases will be referred to as "the *Lane* litigation" or "the *Lane* case" throughout this report.

The *Lane* litigation arose out of a home construction project gone badly awry. Brian and Erin Lane ("the Lanes") borrowed money from American Home Bank ("AHB") in December 2002 in order to construct a log home. Auburn Building Company ("ABC") was to serve as general contractor, and K&L Excavation and Avon Poured Wall ("APW") were hired by ABC as subcontractors to excavate and to pour the foundation and walls, respectively. Shortly after work began on the property, unforeseen difficulties were encountered, cost overuns ensued, and ABC, as well as its subcontractors, claimed that they were never fully paid

for the work they performed. When those subcontractors filed mechanics liens on the Lanes' property, AHB stopped advancing cash. to the Lanes, and the construction project was never completed. In addition, in the fall of 2004, after the *Lane* litigation had begun, the Lanes stopped making payments to American Home Bank.

Subcontractor K&L Excavation filed a complaint against ABC, the Lanes, and AHB on November 20, 2003. The complaint sought to foreclose on the Lanes' property to recover $14,085 owed tor excavation work on the Lanes' property; ABC and AHB were joined as defendants because of their apparent interest in the property. AHB answered and asserted a cross-claim against the Lanes to recover the full amount due on their promissory note—$68,216.39—apparently on the theory that the Lanes were in default by virtue of the mechanic's lien being placed on their property and the civil suit to enforce that lien, allowing AHB to accelerate the loan. The Lanes had not, at that time, stopped making payments to AHB on the note.

The Lanes also answered the complaint and asserted a counter-claim against K&L, as well as a cross-claim against ABC. With respect to K&L, the Answer asserted both that the mechanic's lien did not comply with the relevant provisions of the Ohio Revised Code (sec. 1311.011) and that the lien was wrongfully filed. The Lanes also answered the counter-claim by AHB and asserted a counter-/cross-claim back against AHB, asserting that AHB engaged in gross negligence in failing to fulfill certain duties to the Lanes pertaining to completion of and payment tor the initial construction work performed on the Lanes'

property. Additional pleadings were filed in K&L's suit, as well, but the only ones relevant to the summary judgment motions in the *Lane* litigation are 1) AHB's motion for leave to file an amended crossclaim and counterclaim for foreclosure against the Lanes for their default on the mortgage payments to AHB, which was granted;[**] and 2) the Lanes' motion for leave to file an amended answer asserting additional affirmative defenses against AHB. The Lanes' motion for leave to file an amended answer was denied on July 18, 2008—the same date the summary judgment motions were denied.

Separately, on January 14, 2004, a complaint was filed by subcontractor Avon Poured Wall against the Lanes, American Home Bank, the Cuyahoga County Treasurer, and K&L Excavating, seeking recovery on its contract and on a mechanic's lien filed against the Lanes' property in the amount of $21,771.50. The Lanes answered, asserting various affirmative defenses— including that APW's lien did not conform to the requirements of state law—and asserting a counterclaim against APW for improperly filing the mechanic's lien and thereby slandering the Lanes' title. The Lanes' answer also included cross-claims against

---

[**] AHB also filed a Second Amended Answer, Cross-Claim and Counterclaim on September 25, 2006, almost three months after its first Amended Answer, Cross-Claim and Counterclaim was filed on June 30, 2006, but it is not clear from the record that AHB ever received leave to file that second amended pleading.

ABC and its principal, Jacob D. Webber.[***] Other pleadings were filed in APW's case but are not directly relevant here.

Two motions for summary judgment were filed in the *Lane* litigation, both of which were denied on July 18, 2008, by journal entry (without opinion) by Judge Steven Terry. The first motion ("Lane Motion") was filed by the Lanes on November 29, 2006, seeking summary judgment against plaintiff Avon Poured Wall on the ground that APW's lien was not timely filed. The second motion ("AHB Motion") was filed by AHB on March 28, 2008, and asserted that AHB was entitled to summary judgment on its cross-claim and counter-claim against the Lanes and on all of the Lanes' claims against AHB.

B. Summary Judgment: General Considerations

1. The Nature of Summary Judgment

Summary judgment is governed by Ohio Rule of Civil Procedure 56, which provides, in pertinent part:

[***] ABC was not initially joined in the suit filed by APW, but it was a defendant in the suit filed by K&L, which was consolidated with the suit filed by APW. Webber was never joined and never served. The Lanes' Answer to APW's complaint asserted a cross-claim against "Defendant" for violation of the Consumer Sales Practices Act. It is not clear to which defendant this claim refers, but it appears to refer to ABC.

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

The Ohio summary judgment rule is substantially identical to the rule governing summary judgment in federal cases, Federal Rule of Civil Procedure 56.[****] *See* Gregory A. Gordillo, *Summary Judgment and the* Celotex *Standard,* 42 Cleve. St. L. Rev. 263, 274-75 (1994) (noting that the Ohio Supreme Court adopted the federal summary judgment analysis in *Wing v. Anchor Media, Ltd.,* 570 N.E. 2d 1095 (Ohio 1991)).

[****] Federal Rule of Civil Procedure 56 was amended effective December 1, 2010, but those amendments do not affect the substantive standard for granting summary judgment

Although summary judgment has been considered a standard, and even vital, part of pretrial practice in federal court ever since the U.S. Supreme Court's "trilogy" of summary judgment cases in 1986 suggested that it should be viewed as such, *see, e.g.,* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment,* 100 Yale L.J. 73, 79 (1990) (stating that the "summary judgment trilogy" of *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986), and *Matsushita Electric Industrial Corp. v. Zenith Radio,* 477 U.S. 574 (1986), "g[a]ve increased prominence to summary judgment in modern litigation"), summary judgment has been subject to criticism by academic and non-academic commentators alike. Moreover, despite the state-federal symmetry in summary judgment standards, there is a widespread perception that summary judgment is more common in federal court than in state court. Steven Steinglass, *Section 1983 Litigation in the Ohio Courts: An Introduction for Ohio Lawyers and Judges,* 41 Cleve. St. L. Rev. 407, 437-38 (1993) ("Despite the virtually identical rules, federal judges are far more likely than Ohio judges to dispose of cases on summary judgment."); *see also* Gregory P. Joseph, *Federal Litigation-Where Did It Go Off Track?,* 34 Litig. 5 (No. 4, Summer 2008) (noting that summary judgment's transformation into "a centerpiece of federal litigation over the past 25 years" is one reason why plaintiffs avoid federal court when they have a choice) (citing Joe S. Cecil, et al., *A Quarter Century of Swnmary Judgment Practice in Six Federal Courts,* 4 J. Empirical Legal Stud. 821 (2007)). Indeed, the Ohio Supreme Court urged in *Murphy v. City of Reynoldsburg,* 604 N.E.2d 138 (1992), that summary judgment "must be awarded with caution," *id.* at 140.

Reliable statistics are extremely hard to come by, however. *Cf.* Gordillo, *supra,* at 278 n. 106 (noting the difficulties associated with gathering empirical data on summary judgment motions in federal court, which apply with equal force to state court motions).

There are several reasons why a judge might decline to award summary judgment in a close case. First and foremost, summary judgment deprives one party of its day in court, and our system's traditional respect for the jury therefore counsels against using the summary judgment mechanism too avidly. Indeed, this aspect of summary judgment has come under serious fire by academic commentators. Professor Suja Thomas of the University of Illinois College of Law recently argued that summary judgment is an unconstitutional deprivation of the Seventh Amendment right to a jury trial in federal court and perhaps of state constitutional analogues. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional,* 93 Va. L. Rev. 139 (2007). Professor Thomas's theory has garnered the attention of some judges, as well as of the Advisory Committee of the Federal Rules of Civil Procedure. Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report,* 93 Iowa L Rev. 1613, 1621-22 (2008).

Second, judges may deny summary judgment in a close case because they wish to encourage private settlement of the case, which is usually more likely after denial of summary judgment. *See, e.g.,* John Bronsteen, *Against Summary Judgment,* 75 Geo. Wash. L. Rev. 522, 530 (2007) (noting that many case settle after summary judgment is denied). Settlement may be more efficient than a trial and even more efficient than a grant of summary judgment or partial

summary judgment, especially if that grant results in an appeal and, ultimately, a trial. Indeed, some judges may avoid summary judgment in close cases precisely because they run a greater risk of reversal on appeal than if they had let the case go to trial: appellate courts are significantly more deferential to a jury's findings of fact than to a lower court's findings on summary judgment, which are reviewed de novo like legal conclusions. Grafton v. Ohio Edison Co., 77 Ohio St. 3d 102, 105 (1996) ("[T]he determination of whether the trial court properly granted summary judgment below involves only questions of law and is considered on a *de novo* basis."); *Gugliotta v. Morano,* 161 Ohio App. 3d 152, 166-67 (Ohio App. 9th Dist. 2005) (stating that the appellate court gives deference to jury findings).

Finally, the summary judgment standard is considered by many commentators to be somewhat vague and therefore subject to conflicting interpretations by different judges. *See, e.g.,* Mark Moller, *Procedure's Ambiguity,* 86 Ind. L.J. 645, 651-54 (2011) (describing some ambiguities created in the summary judgment standard by the Supreme Court's *Celotex* trilogy); William W. Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure* 14-15 (Federal Judicial Center report, 1991) (discussing the difficulty of distinguishing between questions of law and questions of fact). In the vast majority of cases, therefore, there is a large range of decision-making on summary judgment that would be considered reasonable. The decision is one calling for legal judgment, not mathematical calculation. *See, e.g., Safeco Ins. Co. of Illinois v. Treinis,* 606 N.E.2d 379, 383 (Ill. App. Ct. 1992) ("In a motion for summary

judgment, mathematical precision is not needed. A more or less intuitive evaluation or common sense judgment must be made .... ").

2. General Considerations Pertaining to the Appropriateness of Summary Judgment in the *Lane* Litigation

The above statements pertaining to the appropriateness of summary judgment in general also apply to the *Lane* litigation. In addition, there are at least two characteristics specific to the *Lane* litigation that suggest that summary judgment would have been particularly inappropriate.

First, the *Lane* case was relatively complicated in terms of the number of parties joined and the number of claims, counter-claims, and cross-claims involved. Although there is no legal bar to granting summary judgment in complex cases, concerns about the efficiency of wading through a large number of claims, defenses, and complex factual questions might counsel against summary judgment in such a case. Such efficiency concerns are particularly acute in state court, where dockets are often extremely crowded and judges do not have as many law clerks as in federal court. *See* Steinglass, *supra,* at 438 ("Independent of doctrine, it is often easier for state court judges to deny summary judgment and to set a case for trial rather than to produce a written opinion granting summary judgment. Federal judges, on the other hand, are more likely to refer the stack of depositions, affidavits, and briefs to a law clerk (or law student intern), a luxury available to few state trial courts"). In the *Lane* litigation, Judge Terry inherited the cases from another judge, and the

Lane motion had been pending for over nineteen months when he denied it, suggesting that time and docket concerns may have been an issue in this case.

Second, it is hard to ignore the historical context in which this foreclosure litigation unfolded. In mid-2008, when the summary judgment rulings were issued, the country was already in the midst of the mortgage foreclosure crisis, which hit Northeast Ohio particularly hard. Moreover, the crisis began earlier and appears poised to continue longer in Ohio than in the rest of the country. *See generally* Ann Mallach, *Addressing Ohio's Foreclosure* Crisis: *Taking the Next Steps,* at 2 (Brookings Institution Report, June 2009). Given this context, it would not be surprising to find a general climate of skepticism toward banks involved in foreclosure proceedings, among judges as among the general population.

C. The Lanes' Motion

The central thrust of the Lanes' motion for summary judgment against APW is that there is no question as to the untimeliness of APW's mechanic's lien under state law and that the lien is therefore void. At no point in their summary judgment brief did the Lanes specify whether they were seeking summary judgment on APW's claim against them or on their counterclaim against APW for slander of title, or both. In any case, it was clearly proper to deny the motion.

The Lanes' motion pointed to Ohio Revised Code section 1311.06(B)(1), which requires mechanic's liens tor work done on single-family family homes to be filed no later than sixty days after completion of the work.

APW's mechanic's lien was filed on October 3, 2003. The Lanes, pointing primarily to the deposition testimony of APW's vice president, Lorne Elbert, and to APW's first invoice dated July 21, 2003, plus a second invoice for waterproofing work dated July 23, 2003,[*****] that the lien was filed more than sixty days after completion of the construction work. APW, in opposition, argues that a later invoice from APW, dated August 5, 2003, indicates the true date of completion, and that the two invoices related to the same job. APW submitted an affidavit of the same Lorne Elbert in support of this view. Both parties agree there was no *written* contract between APW and the Lanes.

The issue of when APW's work was completed—the central and most material issue relevant to the Lanes' motion—is a classic issue of fact on which there is a genuine and material dispute, making the case suitable for factfinding by a jury and not for decision on summary judgment. On one hand, the Lanes secured an admission from Elbert that there were three phases to the job that APW was orally contracted to perform—setting and pouring the footers, setting and pouring the walls, and waterproofing the foundation—and that those three phases were completed by July 23, 2003. Elbert Dep. at 27-30; Defts Brian Lane & Erin Lane's Mot. for Summ J. at 3-4. On the other hand, APW points to the fact that the delivery of rock on August 5, 2003, was part of the original estimate; thus, APW contends, the later delivery of rock was part of the

---

[*****] That waterproofing work was subcontracted by APW to another company, Five Star Waterproofing, which issued the second invoice.

same job as the earlier work that was completed on July 23, 2003. In APW's view:

> [T]he work involved the 1) pouring of footers and walls, which was completed by July 21, 2003; 2) the subcontracting of waterproofing, which was completed on July 23, 2003; 3) the installation of block windows which was completed on August 5, 2003; and 4) 64 tons of rock which was completed on August 5, 2003 . . . . [T]here are clearly two events that could constitute the last day of work or labor on the property and would clearly make the filing of the Lien, on October 5, 2003, timely.

Pl.'s Br. ln Opp. to Defts. Brian Lane & Erin Lane's Mot. for Summ. J. with Aff. Of Louis Elbert Att. at 6. It is not the place of the judge on summary judgment, but rather of the jury, to decide which of these dates represents the last day on which APW performed work relevant to the mechanic's lien- in other words, whether there was one job or two separate jobs performed by APW.

Both parties discuss *Swim Rite Pool Co. v. Strausbaugh,* 2006-0hio-3612 (6th Dist. July 14, 2006), *available at* 2006 WL 1943325, which clearly does not control the outcome here. In that case, the Ohio Sixth District Court of Appeals, which does not issue binding precedent for the Cuyahoga County common pleas courts, held that summary judgment was properly granted based on the untimeliness of a mechanic's lien for construction work on a swimming pool. In that case, the court found that there had been two separate written contracts and that the work performed

pursuant to the second contract could not extend the time for filing the lien on the work performed under the first contract. *Id*. at paras. 20-21. The contracts in that case were executed several months apart, however, which distinguishes them from the invoices issued only several days apart in the Lanes' case. *Id.* Moreover, the court in *Swim Rite* noted that the *Swim Rite* case, unlike the Lanes' case, involved no slander of title issues, explaining that the existence of such issues, and the concomitant good-faith detenninations, would make it more difficult to grant summary judgment. *Id.* at para. 18. Finally, the court also noted that subcontracts, implied contracts, and oral contracts are more likely to raise issues of fact than original, written contracts. *Id.*

Given the conflicting evidence proffered by the parties and the lack of controlling legal precedent, the decision to deny summary judgment to the Lanes—on APW's claim against them and/or their counter-claim against APW—was clearly both reasonable and appropriate.

D. AHB's Motion

1. AHB's Arguments in Support and the Lanes' Arguments in Opposition

American Home Bank's motion sought summary judgment "with respect to Defendant American Home Bank, N.A.'s Cross-Claim and Counterclaim in foreclosure in these consolidated proceedings and on all claims asserted by Defendants Brian and Erin Lane."

Deft. AHB's Mot. for Summ. J. at [1].[******] Thus, AHB sought summary judgment on its claims against the Lanes for the amount due under the promissory note and for foreclosure on its mortgage, as well as on the Lanes' cross-claims alleging gross negligence on the part of the bank (which the bank described, in my view erroneously, as claims that the bank violated Ohio Revised Code section 1311.011). That motion, like the Lanes' motion, was properly denied.

AHB's motion argued simply that the Lanes were in material default of the note and the mortgage due to nonpayment and due to the mechanic's lien that was placed on the Lanes' property and not promptly discharged. AHB's motion also argued that AHB was entitled to reformation of its mortgage due to "mutual mistake of fact between the parties and/or scrivenors [sic] error," which resulted in an incorrect legal description of the Lanes' property being incorporated into the mortgage document. Deft. AHB's Mot. for Summ. J. at [8]. Finally, AHB argued that the Lanes' cross-claim against AHB must fail because Ohio Revised Code section 1311.011 does not apply to mortgage liens.

In countering the motion, the Lanes made various arguments, which they couched in terms of AHB's duty to mitigate damages; violation of the implied covenant of good faith; anticipatory repudiation; promissory estoppel; unclean hands; and rescission of contract.

[******] The version of this motion that is in my possession does not have page numbers. The bracketed page numbers are provided by me.

Many of those arguments, such as unclean hands, estoppel, rescission, and anticipatory repudiation, raised affirmative defenses that the Lanes sought to plead for the first time in an amended answer, for which they sought leave on May 15, 2008, after the motion for summary judgment was filed. As noted above, that leave was denied. The essence of the Lane's opposition, however, was simply that American Home Bank had taken or neglected to take several steps that could have prevented the near-total loss of value in the Lanes' property. For instance, the Lanes argue that the bank could and should have advanced further funds to the Lanes to allow the construction project to continue and that, by cutting off loan advances entirely, the bank kept the Lanes from being able to repair the existing problems on the property and continue to work toward building a home that would have value, become habitable, and redeem the investment both they and the bank had made. Indeed, the Lanes pointed out that they had been in negotiations with an officer from AHB and had reached an agreement regarding a new schedule for drawing on the loan that would allow the construction project to continue, and that the Lanes had made additional investments of their own funds to that end as well. The Lanes also argued that, at the time the bank chose to cut off funding for the project, it was at "a critical juncture," because "the log home kit was delivered to the work site at the end of 2002, [and] was not only subject to environmental elements that threatened its integrity, but to the whims of vandals." Brian & Erin Lane's Br. in Opp. at 9. In addition, the Lanes claimed that ABC's refusal to complete the work it was contracted to do left the property in such a state that, "[w]ithout the necessary to [sic] funds to move on to the next stage of the project, the new contractor

could not pick up where the old contractor left off." *Id.* The Lanes noted that the bank had authority to advance additional funds under the contract. *Id.* at 7-8.

In reply, the bank attacked the Lanes' affirmative defenses as waived. It further argued that the Lanes' default, as well as their obligation to pay, was unequivocal under the note and that their arguments to the contrary, based on mitigation of damages and the implied covenant of good faith, are unsupported by its contractual obligations Essentially, AHB's reply stated that, although the bank *could* have taken certain measures to assist the Lanes, it was not required to do so under the contract.[*******]

2. Denial of AHB's Motion for Summary Judgment Was Appropriate Because the Lanes Raised a Genuine Issue of Material Fact as to the Bank's Duty to Mitigate the Damages

There was clearly an issue of fact as to whether the bank had, and fulfilled, a duty to mitigate damages in the Lanes' case. The doctrine of mitigation, also referred to as the doctrine of avoidable consequences, "provides that damages which the injured party might have avoided with reasonable effort without undue

---

[*******] AHB's reply also asserted that there was no issue of fact with respect to certain of the Lanes' defenses, such as unclean hands and anticipatory repudiation, but as noted, these arguments are now irrelevant, because the Lanes did not obtain permission to amend their answer to include those defenses.

risk, expense, or humiliation are not to be charged against the party guilty of breaching the contract." *Bradley v. Pentajay Homes,* 1991 WL 122853 (Ohio Ct. App. 4th Dist. July 3, 1991) (citing 11 Williston on Contracts 274 (3d ed. 1968); Restatement of the Law 2d, Contracts 127 (1981)). Moreover, it is "a question of fact as to whether the non-defaulting plaintiff could have ultimately lessened the injury by exercise of ordinary care and at a reasonable expense." *Id.* at *4. Thus, although it may be the case that AHB could not have decreased the ultimate injury to the Lanes by advancing additional funds for construction, that is a question for the trier of fact. *See also Grooms v. Southern States Maysville Co-op, Inc.,* 1998 WL 321291, at *3 (Ohio Ct. App. 4th Dist. May 28, 1998) ("A determination as to whether the efforts expended by an injured party were reasonable, or whether damages could ultimately have been avoided, is typically denoted as a question for the trier of fact."). It was entirely reasonable tor Judge Terry to rule that this particular question of fact precluded summary judgment.

Although AHB cited one case for the proposition that the doctrine of avoidable consequences "is not applicable when there is an absolute promise to pay," that case does not govern here. The case, *Universal Investment Co. v. Sahara Motor Inn, Inc.,* 127 Ariz. 213 (1980), is an Arizona Supreme Court case, not an Ohio case. Moreover, the statement is made without any support, and it appears merely to support the proposition preceding it -- that "the doctrine of avoidable consequences affects the measure of damages, not the right to recover." *Id.* Although that proposition is accurate, it does not affect the

reasonableness of summary judgment in this case. As discussed below, AHB did not seek partial summary judgment; thus, an issue of fact affecting the amount of damages could provide a basis for denying the entire motion. As a final point, moreover, AHB bore the burden of proof on its own claims, which raised the showing it was required to make on summary judgment. It is more difficult tor parties bearing the burden of proof at trial to achieve summary judgment than it is for those that do not bear the burden, because the burden of a party on summary judgment corresponds to the trial burden- the defendant must show only that the plaintiff has come forward with insufficient evidence, but the plaintiff must show that it has come forward with so much evidence that no reasonable jury could find for the defendant. *See* lssacharoff & Loewenstein, *supra,* at 80-84.

3. Partial Summary Judgment May Have Been Appropriate, But It Was Not Required in This Case

Under Rule 56, judges may grant partial summary judgment. Ohio R. Civ. P. 56(A)-(B) (authorizing a party to move for summary judgment on "all or any part" of a claim). In this case, however, AHB moved for summary judgment on all of its claims, apparently as to both liability and damages, and, in its papers, AHB never requested partial relief in the alternative.

Thus, for example, it might have been reasonable to grant summary judgment on the issue of AHB's entitlement to reformation of its mortgage, which the Lanes did not appear to oppose and which seems relatively clear-cut, if such partial summary judgment

had been requested. AHB did not request such partial relief in its motion or its reply, however. *See, e.g.,* Deft. AHB's Mot. for Summ. J. at [9] ("Based upon all of the foregoing, Defendant American Home Bank, N.A. is entitled to summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure."). In addition, AHB first raised its claim for reformation in its Second Amended Answer. Although the Lanes state in their opposition that AHB both sought and obtained leave to tile that second amended pleading, there is no indication on the docket that such leave was ever requested or granted.

In addition, it might have been reasonable to grant summary judgment on the Lanes' claim for gross negligence, which AHB styled as a claim for violation of Ohio Revised Code 1311.011. The reasoning and argument of both the Lanes' and AHB's briefs on this issue is frankly quite opaque. However, it appears that AHB's argument—that section 1311.011 does not apply to mortgage liens—is not responsive to the Lanes' claim that AHB was grossly negligent in tailing to ensure that *subcontractors K&L and APW* complied with section 1311.0 II. The strength or weakness of the Lanes' claim aside, AHB simply has not met its burden if it has not shown the absence of a genuine issue of material fact on the claim that the Lanes actually raised. And again, a judge need not grant partial relief that was not requested by the parties.

Finally, for the same reason, there was no inappropriateness in Judge Terry's decision to deny summary judgment on both liability and damages, rather than considering a partial grant on the issue of

liability, because AHB never requested such relief—not even in its reply brief.

In sum, there is no doubt that Judge Terry's decision to deny AHB's motion for summary judgment was entirely reasonable and appropriate.

II. Facts and Data Relied Upon

I have relied only on the record in the consolidated cases comprising the *Lane* litigation, together with my own legal research.

III. Exhibits

Attached to this report as Exhibit A is a transmittal letter from Edward R. La Rue, Esq. to Professor Jessie Hill describing the materials provided to me to assist me in preparing this report.

IV. Qualifications and Publications

I am a full professor of law, with tenure, at Case Western Reserve University. For seven consecutive years, I have taught Civil Procedure, a required first-year, one semester, four-credit course. As a professor of civil procedure, I teach about summary judgment as well as other aspects of federal civil practice. I am also required to keep abreast of changes in the Federal Rules of Civil Procedure and the scholarly literature on civil procedure.

Prior to entering a full-time career in academia, l practiced primarily civil litigation with the law firm of

Berkman, Gordon, Murray & DeVan in Cleveland, Ohio.

I am a 1999 graduate, *magna cum laude,* of Harvard Law School and a former editor of the *Harvard Law Review*. Immediately after law school, from 1999-2000, I served as a law clerk for the Honorable Karen Nelson Moore on the U.S. Court of Appeals tor the Sixth Circuit. In that capacity, I assisted Judge Moore in reviewing numerous summary judgment decisions.

Further details on my publications and other qualifications, may be found on the attached curriculum vitae.

V. Other Cases in Which I Have Testified as an Expert in the Past Four Years

None.

VI. Compensation

For my work on this case, I am being compensated at the rate of $250/hour. As of this writing, I have expended approximately 19.3 hours on this case.

/s/ Jessie Hill
Jessie Hill

* * *

[Attachments Omitted for Purposes of This Appendix]

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:10CR390

[Dated June 6, 2011 and June 7, 2011]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
STEVEN J. TERRY,	)
	)
Defendant.	)
	)

Akron, Ohio
Monday, June 6, 2011

EXCERPT FROM TESTIMONY OF FRANK RUSSO
TRANSCRIPT OF TRIAL
VOLUME 1, PAGES 1 THROUGH 282
BEFORE THE HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE, AND A JURY

* * *

[p. 231]

a diabetic, and I haven't eaten since lunch, and if the trial goes late I'll have to eat a little something because I'll get the shakes. You know, my sugar will become real low. I don't know if anybody in the room has a diabetic member of the family, but I'm a diabetic, so I had to bring this with me just in case I start -- my sugar gets real low.

Q. Is there a particular time of day the sugar tends to get lower than others?

A. Usually right before dinner time.

MS. BACON: Your Honor, with the Court's permission may the witness have a snack if he feels his blood sugar is getting low during testimony?

THE COURT: He may.

THE WITNESS: Thank you.

Q. If we could then turn your attention to some specific ways that you helped Steve Terry during his campaign to become judge.

What are some of the things you did specifically?

A. Some of the things I did for Steve, well, I started out with writing Steve a check for $500. I think that was the limit that you can give back then. I'm not a hundred percent sure, but I think that's the limit. I wrote him a check for $500 just to jump start him with the campaign, to get him a little bit going.

And in the beginning of the campaign, I said, "Steve,

[p. 232]

you got to start doing the parades. People have to know your name." So I bought him some car magnets to put on the side of his car. They were maybe 130, 128 dollars, one for each side.

Then I bought him some stationery because you needed stationery and you needed the envelopes. The total of both came to about $700, the envelopes and the magnets.

I kind of consulted him, told him almost on a daily basis what to do and where to go. And we developed a schedule in our office, and I divided that schedule up in two different ways. I was the county auditor and everybody wanted to come see me about their taxes, about a favor, about this, and about that.

So I would have a schedule of where I would be. When people send me invitations for fundraisers, senior groups were meeting, Democratic clubs were meeting, I put it all on my schedule. But at the same time, on my schedule I put my doctor's appointments, my dentist appointments, so when people would call and want to come and see me in the office, you know, my secretary would know, well, Frank's at the dentist. He has got a noon appointment. He probably won't be back until 1:30. He'll be full of novocaine; won't want to meet with everybody.

So I put a schedule of everywhere I went and everything I did. But what I did is I divided that

[p. 233]

schedule. I took my personal things off the schedule, and I had my scheduler develop a schedule with places to go where a candidate would like to go.

In other words, anybody that was having a fundraiser, you know, go to their fundraiser because if somebody is running -- let's say I'm running for counsel and you're my family, stop in even if you can't buy a ticket because the whole family will love you and think you're supporting me. So go to fundraisers. Go to senior groups. Go to bingos. You know, you find two or three hundred people at a bingo. On your way home at night, stop at bowling alleys. There is always leagues of people bowling. Go to carnivals with T-shirts on and just walk around and let people see the backs of your T-shirt with the name on it.

So these were different things that I would put in the schedule, when the carnivals were, what time, what day, and I would provide that to Steve to give him a base on where to go.

Many times I provided him -- well, I provided him with a person in charge of all the parades. There were two people in the office, a backup and a regular, that were -- provided Steve with where parades were. If you don't have an application, Steve, here is a copy of one. Mail it in. And then we would -- a lot of my employees would join Steve at the parade and walk in the parade with

[p. 234]

him.

We would help him with parades. I would help him with lists of high donors. People that would give me more than a thousand dollars, more than a hundred dollars, I kept a list. And I used to address a lot of envelopes for Steve, and I also gave him the copy of the lists of the donors.

Also the names and addresses of all the ward leaders because you've got to keep the ward leaders happy. They're the head of their city and you've got to show them that you care about them so they care about you.

So anywhere there was an event, I gave him the schedule. I gave him lists of political people and their phone numbers, and call them up and who to see.

I gave him copies of people that would donate.

I had a person in charge of the parades.

I also got him a west side -- one of my employees again -- a west side campaign coordinator. Steve was basically from the east side. And like I said, we have 1.4 million people in our county. So it was really hard for Steve to know and meet people on the west side.

So I had the mayor of Parma -- has everybody heard of Parma? Well, Parma is the largest city outside of the City of Cleveland itself in the whole county. And the mayor of Parma's sister worked for me. So I asked her,

I asked -- her name is Lisa. I said, "Lisa, would you work

[p. 235]

with Steve Terry and be in charge of his west side campaign as well as his -- trying to raise him money on the west side." And she said, sure, she would love to do it, and she would work with Steve.

So we helped him as very, very, very much as we humanly could.

On Columbus Day, I rented a Lolly the Trolley. And it goes down a place in Cleveland, if you ever heard of it, it's called Murray Hill. It's a little Italian community. So the parade was there.

So I rented Lolly the Trolley, and I probably had about 50 to 75 employees show up. And you know, we would tell Steve, "Steve, make sure you bring a box of T-shirts." So half my employees would take my T-shirts off or put over, if it was cold, they put Steve's T-shirt over mine. So we had an equal amount of walkers in the parade. Steve's T-shirts were, I think, brown and orange, and mine were red and white. And I let him put his magnetic signs on Lolly the Trolley to help him out, and that was a very, very productive day.

So I kind of helped him in every aspect: Trying to help him raise funds, go to events, know who to talk to, and even make connections. I networked a lot for him also.

Q. You talked about a lot of different things here, and if we can kind of take them one at a time by categories.

Akron, Ohio
Tuesday, June 7, 2011

EXCERPT OF TRANSCRIPT OF TRIAL,
TESTIMONY OF FRANK RUSSO,
VOLUME 2 OF 2, PAGES 73 THROUGH 263
BEFORE THE HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE, AND A JURY

* * *

[p. 78]

Q. Yesterday, in addition to listing those things, you discussed magnets and purchasing magnets for Judge Terry for the side of his parade cars.

Do you remember talking about that?

A. Yes, I do.

Q. Can we please pull up Government's Exhibit Number 11.

THE COURT: Sorry for the delay. We're trying to make sure the connections are working relative to the video -- or figure out why they're not working, I should say.

Okay.

MS. BACON: Thank you.

Q. If you could just zoom in on -- thank you very much. If you see, Mr. Russo, on Government's Exhibit 11, the

invoice was sent to Friends of Frank Russo directly from Brothers Printing?

A. Correct.

Q. Was Judge Terry aware that Friends of Frank Russo purchased the magnets for the side of his car?

A. Yes, he was.

Q. How did he know that you purchased the magnets for him?

A. Because we told him that the parades were about to begin. He didn't have anything available, so we thought we would jump-start him and buy a few magnets to put on the

[p. 79]

side of the car to at least give him a head start.

Q. Did you tell him that you were going to buy the magnets for his campaign?

A. Pardon me? Did I tell him?

Q. Yeah, did you tell Judge Terry that you were going to purchase the magnets for him?

A. Yes.

Q. You mentioned a few times, Mr. Russo, that part of the things that you did for Judge Terry were to let your

supporters know that you were supporting Judge Terry's campaign?

A. Correct.

Q. How is it that you communicated to other people that you were supporting Judge Terry's campaign beyond just you in general supporting a Democratic candidate?

A. I had a lot of workers from the office go out for Steve. I had somebody from my office be his west side coordinator. I had an employee from my office do all his parades. And the parades, a lot of times we would walk together, the Frank Russo T-shirts that were red and white and the Steve Terry shirts that I believe were brown and gold. We walked together. And everybody knew we were instrumental in helping Steve get the appointment. So they even know harder that we were going to be instrumental in getting him reelected to the campaign, because if we didn't

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:10CR390

EXCERPT OF JURY INSTRUCTIONS

UNITED STATES OF AMERICA,	)
	)
PLAINTIFF,	)
	)
vs.	)
	)
STEVEN J. TERRY,	)
	)
DEFENDANT.	)
	)

JUDGE SARA LIOI
JURY INSTRUCTIONS

INTRODUCTION

Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case. I will start by explaining your duties and the general rules that apply in every criminal case. Then I will explain the elements of the crimes that the

defendant is accused of committing. Then I will explain some rules that you must use in evaluating particular testimony and evidence. And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

Please listen very carefully to everything I say.

* * *

Honest Services Mail Fraud- The Nature of the Offense Charged in Counts 3-5

Counts 3 through 5 of the superseding indictment charges the defendant STEVEN J. TERRY with honest services mail fraud in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Specifically Counts 3 through 5 charge:

> From on or about February 23, 2007, and continuing through on or about November 17, 2008, in the Northern District of Ohio, Eastern Division, STEVEN J. TERRY, Defendant herein, having devised and intended to devise a scheme and artifice to defraud and deprive Cuyahoga County, its citizens and taxpayers, Common Pleas Court and certain litigants, including AHB, of their right to the honest and faithful services of TERRY, through bribery and kickbacks and the concealment of material information, knowingly caused to be delivered by mail according to the direction thereon, mail matter as set forth below.

It was part of the scheme and artifice that TERRY secretly used his official position to enrich himself, by soliciting and accepting gifts, payments, and other things of value from Russo and others in exchange for favorable official action, and for Russo to enrich himself and his designees by secretly obtaining favorable official action for himself and his designees through corrupt means.

As part of the scheme and artifice that TERRY failed to disclose to the public and the parties of pending civil cases (including the parties to the American Home Bank Case) his financial relationship including gifts, payments, and other things of value received from Frank Russo and further failed to disclose his "communications" with Frank Russo.

On or about the dates set forth below, for the purpose of executing and attempting to execute such scheme and artifice, STEVEN J. TERRY, the Defendant, did place and cause to be placed in an authorized depository for mail matter any matter and thing whatever to be sent and delivered by the U.S. Postal Service, and knowingly caused to be delivered by mail or such carrier according to the direction thereon, with each mailing constituting a separate count of Mail Fraud:

COUNT	DATE	DOCUMENT MAILED
3	7/11/07	Friends of Frank Russo Check #5692
4	7/17/07	Friends of Frank Russo Check #5707
5	12/26/07	Letter from Judge Steven J. Terry to Friends of Frank Russo

Honest Services Mail Fraud,
Elements of the Offense

The indictment charges that the defendant committed honest services mail fraud, in violation of sections 1341 and 1346 of Title 18 of the United States Code. For you to fmd the defendant guilty of this offense, the government must prove beyond a reasonable doubt:

First, the defendant knowingly devised or participated in a scheme to defraud the public of its right to the honest services of the defendant through bribery or kickbacks;

Second, the defendant did so knowingly and with an intent to defraud;

Third, the scheme or artifice to defraud involved a material misrepresentation, false statement, false pretense, or concealment of fact; and

Fourth, that the defendant used the mail or caused another to use the mail in furtherance of the scheme.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should fmd the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Now I will give you more detailed instructions on some of these terms.

The first element that the government must prove is that the defendant knowingly devised or participated in a scheme or artifice to defraud the public and the government of their right to his honest services through bribes or kickbacks. A "scheme" is any plan or course of action formed with the intent to accomplish some purpose. Thus, to find the defendant guilty of this offense, you must find that the defendant devised or participated in a plan or course of action involving bribes or kickbacks given or offered to himself.

Public officials owe a fiduciary duty to the public. To owe a fiduciary duty to the public means that the official has a duty of honesty and loyalty to act in the public's interest, not for his or her own enrichment. When a public official devises or participates in a bribery or kickback scheme, that official violates the public's right to his or her honest services. This is because the official outwardly purports to be exercising independent judgment in official work, but instead has

received benefits for the outcome or deed. The public is defrauded because the public is not receiving what it expects and is entitled to, namely, the public official's honest services.

Bribery and kickbacks involve the exchange of a thing or things of value for official action by a public official, in other words, a *quid pro quo* (a Latin phrase meaning "this for that" or "these for those"). Bribery and kickbacks also include offers and solicitations of things of value in exchange for official action. That is, for the payor, bribery and kickbacks include the offer or agreement to provide a thing of value to a public official in exchange for official action. For the public official, bribery and kickbacks include the public official's solicitation or agreement to accept a thing of value in exchange for official action.

The public official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. Rather, the intent to exchange may be established by circumstantial evidence, based upon the defendant's words, conduct, acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

Bribery and kickbacks require the intent to effect an exchange of money or other thing of value for official action, but each payment need not be correlated with a specific official act. The requirement that there be payment of a thing of value in return for the performance of an official act is satisfied so long as the evidence shows a "course of conduct" of things of value

flowing to a public official in exchange for a pattern of official actions favorable to the donor. In other words, the intended exchange in bribery can be "this for these" or "these for these," not just "this for that." Further, it is not necessary for the government to prove that the defendant intended to perform a set number of official acts in return for the payments. Thus, all that must be shown is that payments were made with the intent of securing a specific type of official action in return. For example, payments may be made with the intent to retain the official's services on an "as needed" basis, so that whenever the opportunity presents itself the public official will take specific official actions on the giver's behalf.

It is not a defense to claim that a public official (in this case, the judge) would have lawfully performed the official action in question even without having accepted a thing of value. In other words, it is not a defense that the offer or promise of anything of value was made to the judge in exchange for an official action that is actually lawful, desirable, or even beneficial to the public. You are instructed to further consider whether the rulings performed by the judge were accompanied by the judge's honest belief in the law and facts of a particular case rather than a corrupt purpose. The offense of "honest services" fraud is not concerned with the wisdom or results of the judge's decisions, but rather with the process by which the judge made his decisions.

Also, it is not necessary for the government to prove that the scheme actually succeeded. What the government must prove is that the defendant knowingly devised or participated in a scheme or

artifice to defraud the public and the government of their right to his honest services through bribes or kickbacks.

Also, because people rarely act for a single purpose, the giver need not have offered or provided the thing of value only in exchange for specific official actions, and the public official need not have solicited or accepted the thing of value only in exchange for the performance of official action. If you find beyond a reasonable doubt that the giver offered or provided a thing of value in exchange for the performance of official action, then it makes no difference that the giver may also have had another lawful motive for providing a thing of value. Likewise, if you find beyond a reasonable doubt that a public official solicited or received a thing of value in exchange for the performance of official action, then it makes no difference that the public official may also have had another lawful motive for soliciting or accepting the thing of value.

Public officials may lawfully receive a campaign contribution so long as it is not solicited or received in exchange for official acts.

The term "official act" includes any act within the range of official duty of a public official, and any decision, recommendation, or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official's official capacity. Official acts include the decisions or actions generally expected of the public official.

"Anything of value" includes things possessing intrinsic value, whether tangible or intangible, that the person giving or offering or the person soliciting or receiving considers to be worth something. This includes a sum of money, shares of stock, percentage of revenue, commissions, favorable treatment, or a job or job offer. It also includes things of value given not to the public official but to a family member or third party for the benefit of the public official and at the official's knowing direction.

An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

To "cause" the mail to be used is to do an act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can reasonably be foreseen.

Aiding and Abetting

For you to find the defendant guilty of Mail Fraud as charged in Count 2, and Honest Services Mail Fraud as charged in Counts 3 through 5, it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped someone else to commit the crime. A person who does this is called an aider and abettor.

But for you to find the defendant guilty of Mail Fraud as charged in Count 2 and Honest Services Mail Fraud as charged in Counts 3 through 5 as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

First, that the crimes of Mail Fraud as charged in Count 2, and Honest Services Mail Fraud as charged in Counts 3 through 5 were committed.

Second, that the defendant helped to commit the crimes.

And third, that the defendant intended to help commit the crimes.

Proof that the defendant may have known about the crimes, even if he was there when they were committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

What the government must prove is that the defendant did something to help the crimes with the intent that the crimes be committed.

If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of Mail Fraud as charged in Count 2, and Honest Services Mail Fraud as charged in Counts 3 through 5 as an aider and abettor.

ON OR ABOUT

Next, I want to say a word about the dates mentioned in the superseding indictment.

The superseding indictment charges that the crimes occurred "on or about" and "in and about" specific dates. The government does not have to prove that the crimes happened on those exact dates. But the government must prove that the crimes happened reasonably close to those dates.

INTRODUCTION REGARDING EVALUATION OF THE EVIDENCE

That concludes the part of my instructions explaining the elements of the crimes. Next I will explain some rules that you must use in considering some of the testimony and evidence.

INFERRING REQUIRED MENTAL STATE

I want to explain something about proving a defendant's state of mind.

Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other

facts or circumstances in evidence that show what was in the defendant's mind.

You may also consider the natural and probable results of any acts that the defendant knowingly did or did not do, and whether it is reasonable to conclude that the defendant intended those results. This, of course, is all for you to decide.

UNINDICTED, UNNAMED OR SEPARATELY TRIED COCONSIRATORS

Now some of the people or entities who may have been involved in these events are not on trial in this case. This does not matter. There is no requirement that all the members of a conspiracy be charged and prosecuted, or tried together in one proceeding or in one place.

Nor is there any requirement that the names of the other conspirators be known.