No. ________

In The
Supreme Court of the United States

SALVATORE F. DiMASI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the principles underlying the *McCormick* "explicit agreement" requirement in the campaign contribution context apply as well in the context of a part-time citizen legislator's receipt of professional fees or of other funds in anticipation of a future business arrangement.

(2) Whether an elected state legislator can be convicted of violating federal bribery laws without considering the state laws claimed to permit the legislator's conduct.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	8
REASONS FOR GRANTING THE PETITION	12
ARGUMENTS	19
I. THE PRINCIPLES UNDERLYING THE *McCORMICK* “EXPLICIT AGREEMENT” REQUIREMENT IN THE CAMPAIGN CONTRIBUTION CONTEXT APPLY AS WELL IN THE CONTEXT OF A PART-TIME CITIZEN LEGISLATOR’S RECEIPT OF PROFESSIONAL FEES OR OTHER FUNDS IN ANTICIPATION OF A FUTURE BUSINESS ARRANGEMENT	19
II. STATE LAW DEALING WITH CONDUCT THAT CAN BE CONSTRUED AS BRIBERY MUST BE CONSIDERED IN THE PROSECUTION OF STATE LAWMAKERS FOR BRIBERY	26
CONCLUSION	32

TABLE OF CONTENTS – Continued

Page

APPENDIX

United States v. McDonough, United States Court of Appeals for the First Circuit No. 09-1504 (August 21, 2013) .... App. 1

United States v. McDonough, United States Court of Appeals for the First Circuit No. 09-1504, Order Denying Petition For Rehearing (September 19, 2013) .... App. 52

United States v. DiMasi, No. 09-CR-10166-MLW The Relevant Paragraphs of Jury Instructions .... App. 54

United States v. DiMasi, No. 09-CR-10166-MLW Excerpts of Trial Testimony .... App. 67

TABLE OF AUTHORITIES

Page

CASES

Black v. United States, 561 U.S. 465 (2010) 8

Cleveland v. United States, 531 U.S. 12 (2000) 17

Evans v. United States, 504 U.S. 225 (1992) 17

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947) 32

Gregory v. Ashcroft, 501 U.S. 452 (1991) 16, 17

McCormick v. United States, 500 U.S. 257 (1991) .... *passim*

McNally v. United States, 483 U.S. 350 (1987) ... 17, 18

Neder v. United States, 527 U.S. 1 (1999) 12

Opinion of the Justices, 375 Mass. 795 (1978) 12

Rock Island, A. & L.R. Co. v. United States, 254 U.S. 141 (1920) 32

Scaccia v. State Ethics Commission, 431 Mass. 351 (2000) 28

Skilling v. United States, 561 U.S. 358 (2010)...... *passim*

United States v. Abby, 560 F.3d 513 (6th Cir. 2009) 15

United States v. Allen, 10 F.3d 405 (7th Cir. 1993) 15

United States v. Antico, 275 F.3d 245 (3d Cir. 2001) 15

United States v. Bahel, 662 F.3d 610 (2d Cir. 2011) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Ganim, 510 F.3d 134 (2d Cir. 2007) 15

United States v. Kincaid-Chauncey, 556 F.3d 923 (9th Cir. 2009) 15

United States v. Lopez, 514 U.S. 549 (1995) 19

United States v. McDonough, 727 F.3d 143 (1st Cir. 2013) 1, 9, 11, 18

United States v. Ring, 706 F.3d 460 (D.C. Cir. 2013) 14, 15

United States v. Siegelman, 561 F.3d 1215 (11th Cir. 2009) 15

United States v. Siegelman, 640 F.3d 1159 (11th Cir. 2011) 14

United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999) 28

United States v. Terry, 707 F.3d 607 (6th Cir. 2013) ....*passim*

United States v. Terry, 707 F.3d 607 (6th Cir. 2013) 15

United States v. Urcioli, 513 F.3d 290 (1st Cir. 2008), *cert. denied*, 131 S.Ct. 612 (2010) 18

United States v. Urcioli, 613 F.3d 11 (1st Cir. 2010) 18

United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009) 14, 15

United States v. Woodward, 149 F.3d 46 (1st Cir. 1998) 15

TABLE OF AUTHORITIES – Continued

Page

Weyhrauch v. United States, 557 U.S. 934 (2009) 13

Weyhrauch v. United States, 561 U.S. 476 (2010) 8, 12, 13

CONSTITUTIONAL AND STATUTORY PROVISIONS

FEDERAL

Article I, Section 9 of the United States Constitution 1, 23

Article IV, Section 4 of the United States Constitution 2, 23

First Amendment of the United States Constitution 2, 8, 11

Ninth Amendment of the United States Constitution 2, 11

Tenth Amendment of the United States Constitution 3, 11

18 U.S.C. §§ 201 et seq. 25, 27

18 U.S.C. § 201(a)(3) 29

18 U.S.C. § 201(c) 28

18 U.S.C. § 203(a)(1)(A) 29

18 U.S.C. § 208 30

18 U.S.C. § 666 25

18 U.S.C. § 1341 .... 13, 25

18 U.S.C. § 1343 35

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1346 ....3, 13, 25
18 U.S.C. § 1951 ....3, 21, 25
18 U.S.C. § 3231 1
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 1

MASSACHUSETTS

Mass. Const. Pt. 1, Art. 6..23
Mass. Const. Pt. 1, Art. 9..22
M.G.L. c. 268A, § (1)h 29
M.G.L. c. 268A, § 1(i) 29
M.G.L. c. 268A, § 3 28
M.G.L. c. 268A, § 4 ....4, 11, 18, 29, 33
M.G.L. c. 268A, § 6 30
M.G.L. c. 268B, § 5 12
Mass. St. 1986, c. 12 27

OTHER AUTHORITIES

Alschuler, Albert W., *Amicus Curiae Brief in Support of Neither Party, Weyhrauch v. United States* 33

Brown, George D., *Should Federalism Shield Corruption?*, 82 Cornell L. Rev. 225 (1996)...........17

TABLE OF AUTHORITIES – Continued

Page

Brown, George D., *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Contributions?*, 60 Wash. & Lee L. Rev. 417 (2003) 33

Buss, William G., *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299 (1965) 28

Garcia, Lauren, *Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under The Federal Funds Bribery Statute*, 65 Rutgers L. Rev. 229 (2012).....................................15

Gold, Ilissa B., *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s*, 36 Wash. U. J.L. & Pol'y 261 (2011)...........15

Note, *Conflicts of Interest of State Legislators*, 76 Harv. L. Rev. 1209 (1963)..................................28

Paine, Thomas, *Common Sense* (1776)......................22

Perkins, Roswell, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1173 (1963) 27

Ruff, Charles F.C., *Federal Prosecution of Local Corruption*, 65 Geo. L.J. 1171 (1977) 17, 26

OPINION BELOW

The opinion of the First Circuit Court of Appeals was entered on August 21, 2013 and is reported sub nom *United States v. McDonough* at 727 F.3d 143 (1st Cir. 2013). The Court's unpublished September 19, 2013 order denying petitioner's timely Petition for Rehearing and Petition for Rehearing En Banc is reproduced in the Appendix at 52-53.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and the Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction to review the judgment of the First Circuit on a writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

FEDERAL

U.S. Const. Art. I § 9, cl. 8

Section 9, Clause 8. Titles of Nobility; Presents and Emoluments From Foreign States to Officers of United States

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office,

or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. Art. IV § 4

Section 4. Republican Government

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

18 U.S.C. § 1346 (Honest Services)

For the 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.

18 U.S.C. § 1951 (Hobbs Act)

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of

anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

MASSACHUSETTS

M.G.L. c. 268A, § 4
(Legislative Exemption)

Section 4. (a) No state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

(b) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(c) No state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

Neither a member of the general court nor a member of the executive council shall be subject to paragraphs (a) or (c). However, no member of the general court or executive council shall personally appear for any compensation other than his legislative or executive council salary before any state agency, unless:

(1) the particular matter before the state agency is ministerial in nature; or

(2) the appearance is before a court of the commonwealth; or

(3) the appearance is in a quasi-judicial proceeding.

For the purposes of this paragraph, ministerial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents.

For the purposes of this paragraph, a proceeding shall be considered quasi-judicial if:

(1) the action of the state agency is adjudicatory in nature; and

(2) the action of the state agency is appealable to the courts; and

(3) both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding.

A special state employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

This section shall not prevent a state employee from taking uncompensated action, not inconsistent with the faithful performance of his duties, to aid or assist any person who is the subject of disciplinary or other personnel administration proceedings with respect to those proceedings.

This section shall not prevent a state employee, including a special employee, from acting, with or without compensation, as agent or attorney for or

otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the state official responsible for appointment to his position approves.

This section shall not prevent a present or former special state employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the commonwealth; provided, that the head of the special state employee's department or agency has certified in writing that the interest of the commonwealth requires such aid or assistance and the certification has been filed with the state ethics commission.

This section shall not prevent a state employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

This section shall not prevent a state employee, other than an employee in the department of revenue, from requesting or receiving compensation from anyone other than the commonwealth in relation to the filing or amending of state tax returns.

STATEMENT OF THE CASE

This petition is one of two being filed seeking review of the decision of the First Circuit. It is filed by Salvatore F. DiMasi, a former Speaker of the Massachusetts House of Representatives. Speaker DiMasi was indicted on June 9, 2009, along with lobbyist Richard W. McDonough,[1] Richard Vitale, who is DiMasi's long term friend and financial advisor, and Joseph Lally, a former Vice President of Cognos, ULC, a Canadian provider of business intelligence software. The four were originally charged with conspiracy and honest services fraud and the trial proceedings were among the first fully conducted after this Court's decisions in *Skilling*,[2] *Black*[3] *and Weyhrauch*.[4] The essence of the offenses charged in

[1] The second petition is that of Richard McDonough, and it presents the question whether the First Amendment protection afforded lobbying activity required jury instructions regarding the legitimate attributes of lobbying.

[2] *Skilling v. United States*, 561 U.S. 358 (2010) ("*Skilling*").

[3] *Black v. United States*, 561 U.S. 465 (2010) ("*Black*").

[4] *Weyhrauch v. United States*, 561 U.S. 476 (2010) ("*Weyhrauch*").

the superseding indictment, which was amended to add Hobbs Act allegations while that trilogy of cases was pending before this Court, was that payments to DiMasi reflecting fee splits made through his associate in the practice of law and to Vitale and McDonough in anticipation of a future business arrangement with DiMasi were bribes paid in connection with technology contracts awarded Cognos by Massachusetts Executive Branch officials who were influenced by DiMasi's interest.

As trial approached, Lally pleaded guilty and then testified for the government, never testifying that he and the Speaker reached an agreement whereby payments to the law associate or Messrs. Vitale or McDonough were in exchange for official acts to be performed by DiMasi. He spoke instead of "hopes" and "gaining favor," even under pointed questioning by both the prosecution and the defense. *See McDonough*, 727 F.3d at 154.[5] None of the other three

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[5] The Appendices before the First Circuit included approximately 5,000 pages of transcripts. Excerpts are provided here and in the Appendix filed with this petition to counter the First Circuit's statement that DiMasi had "seized upon" a single passage in arguing that there was no testimony of an expressed agreement as opposed to "hopes." The hopes of a lobbyist or employer are not different in kind from those of a campaign contributor.

Lally was asked on direct examination: " . . . what was your reason for hiring Mr. Topazio and have Cognos pay him $5,000 per month?" App. 68. Lally responded: "[t]o funnel money to the Speaker DiMasi." *Id*. The prosecutor then asked: "[a]nd why did you want to do that [funnel money to Speaker DiMasi]?"

(Continued on following page)

defendants testified. DiMasi and McDonough were each convicted of conspiracy and honest services fraud and DiMasi of the Hobbs Act violations, while Vitale was acquitted.

Throughout the proceedings, the defendants pressed the fact that their actions were facially legitimate, permitted, in DiMasi's case, by the state law analogues to the federal bribery laws brought to

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App. 68. Lally's intent was "[t]o *gain favor* with the Speaker, to have him help us close software, cut deals, and obtain funding for us." *Id*.

Lally was asked: "So did you expect something in return eventually from Mr. DiMasi?" *Id*. He answered: "*I was hoping so*." (emphasis added). App. 69.

Lally was asked: Q. I'm asking you – I'm asking you again. I just asked you did you ever tell the prosecutors that you had a conversation with Mr. DiMasi in which you said, "I'll do this for that"? A. (Pause.) "No." App. 71.

During Lally's direct examination he was asked: "Why did you keep paying Topazio in 2005 if he wasn't doing anything?" Lally answered: "*I was hoping to*, you know, keep the whole game going and *eventually* reap some benefits from it [from the Speaker]." (Emphasis added).

Mr. Lally was asked: "My question is related to January of 2006. And I ask you, before January of 2006, did you have a conversation with Mr. DiMasi wherein you said to him, 'I'm paying Steven Topazio. *In exchange* for that, because of that, I want you to request the Governor to put the EDW in the budget for 2006' "? Mr. Lally answered: "No." App. 74. Virtually the same question was posed covering the entire period of the alleged conspiracy. In each formulation of the question, the phrase "in exchange" was used and in each instance Lally's response was unequivocally in the negative. *See, e.g.,* App. 75-78.

bear against him, and protected by the First, Ninth and Tenth Amendments. Having clearly signaled that he would instruct as to the law presented by these defense theories, the trial judge did not adequately do so in his final instructions. The jury was instructed that DiMasi was permitted to practice law and receive fees for doing so, but the instruction did not indicate that state law, specifically the "legislative exemption" in M.G.L. c. 268A, § 4,[6] permitted DiMasi to act as Cognos' agent generally or with respect to the contracts in issue and to be compensated for doing so. And the instruction given emphasized the "sole" permissible reason for the receipt of money originating with Cognos, despite DiMasi's objection that such emphasis reversed the effect of the *Skilling* decision.

Also relevant to the issues presented by this petition was the testimony offered by Massachusetts Governor Patrick and the member of his cabinet who awarded the larger of the two Cognos contracts. Each testified, over objection, that they were unaware of DiMasi's receipt of fees originating with Cognos, would have liked to know of that fact, and, in the case of the Governor, that such knowledge would have caused him to seek advice from the State Ethics Commission. *McDonough*, 727 F.3d at 163. That testimony was admitted ostensibly because of

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[6] *See* pages 5 and 6 above. The exemption begins with the unlabeled paragraph beginning "Neither a member of the general court nor a member of the executive council shall be subject to paragraphs (a) or (c)."

the materiality requirement reflected in *Neder v. United States*, 527 U.S. 1, 20 (1999), but it tilted the case toward the discredited non-disclosure of a conflict theory of honest services prosecution and accentuated the need for instruction on state law relating to disclosures – specifically M.G.L. c. 268B, § 5 as enacted following advice from the Supreme Judicial Court in *Opinion of the Justices*, 375 Mass. 795, 814 (1978) (lawyer disciplinary rules relating to client confidentiality would supersede proposed disclosure law) – which authorized or permitted DiMasi not to disclose what the Governor would have liked knowing.

REASONS FOR GRANTING THE PETITION

The nature of the agreement, type of evidence required, and instructions necessary to support a federal bribery conviction, when the recipient of the alleged bribe is a part-time state legislator and the things given him are fees or other remuneration permissibly provided under state law, present important questions implicating the core concepts of federalism and thus how federal corruption laws should be interpreted in relation to state law.

This case presents an opportunity for a clear statement on the issue of the application and consideration of state law in the prosecution of an elected state legislator that was lost when *Weyhrauch* was remanded in light of this Court's decision in *Skilling*. Because *Skilling* limited honest services to bribes and

kickbacks and excluded cases predicated on the non-disclosure of conflicts of interest, the question presented in *Weyhrauch*[7] may have been mooted, but the underlying issues remain every bit as important today as they were three years ago.

All the same factors that led to the grant of certiorari in *Weyhrauch* still exist and this Court, even more than Congress, needs to make a clear statement with respect to federal anti-corruption statutes and their application to elected state and local officials. That is because the lower courts, which are divided on critical issues, take their direct guidance from this Court.

The conflict among the Circuits can only be resolved by this Court. It grows out of this Court's holding in *McCormick v. United States*, 500 U.S. 257 (1991) ("*McCormick*") that campaign donations to a public official would cross the line into illegal bribery or extortion only if made in return for an explicit *quid pro quo* agreement from an official to perform or not perform a specific act. *Id.* at 273.

The divergence revolves around the term "explicit" and extends to the nature of the *quid pro quo*

[7] This Court limited certiorari to the following question: "Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law." *Weyhrauch v. United States*, 557 U.S. 934 (2009).

necessary for conviction, whether a *quid pro quo* agreement is necessary only under the Hobbs Act or all bribery based statutes, and whether state law should or must factor into the calculus of determining the propriety of a state official's acts in relation to federal corruption laws.

The divergence was noted earlier this year in *United States v. Terry*, 707 F.3d 607 (6th Cir. 2013), where the Sixth Circuit panel observed this Court has made clear certain principles regarding political corruption cases, but has not spelled 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*, 706 F.3d 460, 466 (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).

Terry, 707 F.3d at 612-613.

The conflict among the circuits has been thoughtfully discussed in contemporary scholarly works,[8] and is manifested in the sampling of cases set forth in the margin.[9]

The seeds for that divergence grow out of *McCormick* itself. Footnote 10 of the majority opinion states that "McCormick's sole contention . . . is that the payments made to him were campaign contributions. Therefore, we do not decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value." 500 U.S. at 274, n.10.

The conflict in the circuits is largely a function of the way our judicial system works. The circuit and

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[8] *See* Lauren Garcia, *Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under The Federal Funds Bribery Statute*, 65 Rutgers L. Rev. 229, 230-259 (2012); and 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. J.L. & Pol'y 261, 262-288 (2011).

[9] *United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998); *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007); *United States v. Antico*, 275 F.3d 245, 254 (3d Cir. 2001); *United States v. Whitfield*, 590 F.3d 325, 349 (5th Cir. 2009); *United States v. Abby*, 560 F.3d 513 (6th Cir. 2009); *United States v. Terry*, 707 F.3d 607, 612 (6th Cir. 2013); *United States v. Allen*, 10 F.3d 405, 411-412 (7th Cir. 1993); *United States v. Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009); *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009); *United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013).

district courts use a top-*down* methodology when deciding cases. Employing the concept of *stare decisis*, the lower courts properly accept as correct the holdings of this Court and apply the holding(s) to the facts of the cases under consideration. In turn, the trial courts use the determinations of this Court as well as the decisions made by the appellate courts in their respective circuits.

The normal paradigm has not worked in this area because rather than using the wording of the statute(s) to drive its reasoning, *McCormick* used a bottoms-*up*, principle-based method of reasoning. Instead of reasoning from the words of the statute down to its decision, it identified a set of constitutionally based values and worked up to a balance protecting them. Respecting the holding in *McCormick* and the limitations on its scope set forth in note 10, the lower courts await this Court striking a similar balance in the areas reserved by note 10 rather than striking it themselves.

The overarching question this case presents is whether the outcome reached in *McCormick* rested on the nature of campaign contributions or, alternatively, on the bedrock of cherished rights and our democratic form of government. The answer to the question should come in the form of a "clear statement." As a matter of principle, this Court requires "unmistakably clear" language from Congress before adopting a statutory interpretation that would "upset the usual constitutional balance" between the states and the federal government. *Gregory v. Ashcroft*,

501 U.S. 452, 460 (1991). The clear statement rule protects the states' "substantial sovereign powers." *Id*. at 461. It has been observed that the prosecution of state officeholders "is perhaps the most sensitive area of potential federal-state conflict." Charles F.C. Ruff, *Federal Prosecution of Local Corruption*, 65 Geo. L.J. 1171, 1216 (1977). *See also* George D. Brown, *Should Federalism Shield Corruption?* 82 Cornell L. Rev. 225, 228 (1996) ("Constitutional and policy issues concerning the proper scope of federal criminal law – substantial ones to begin with – are particularly sensitive when the defendants are state and local officials"). Prosecuting public corruption by state and local officials is "a field traditionally policed by state and local laws." *Evans v. United States*, 504 U.S. 225, 290 (1992) (Thomas, J., dissenting).

In the mail fraud context, *Skilling* is but the latest in a series of cases invoking the clear statement rule to limit the otherwise elastic reach of the federal statutes. *See*, *e.g.*, *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (declining to construe "property" to include issuance of licenses, which was thought to be within a wide range of conduct traditionally regulated by the states, and noting the Louisiana law imposing criminal penalties for false statements on license applications) and *McNally v. United States*, 483 U.S. 350, 360 (1987). The final footnote to the majority opinion in *McNally* punctuates the argument DiMasi makes in this petition, seeking a clear statement from this Court, too. It reads in part:

> It may well be that Congress could criminalize using the mails to further a state officer's efforts to profit from governmental decisions he is empowered to make or over which he has some statutory authority, even if there is no state law proscribing his profiteering or even if state law expressly authorized it. But if state law permitted or did not forbid a state officer such as Gray to have an ownership interest in an insurance agency handling the state's insurance, it would take a much clearer indication than the mail fraud statute evidences to convince us that having such an interest defrauds the state and is forbidden under state law.

McNally, 483 U.S. at 361, n.9.

DiMasi's key contention was that his substantive conduct was permitted by M.G.L. c. 268A, § 4 and that it had to be explained to the jury, lest they convict him based on unfounded assumptions about what he could and could not do as Speaker of the Massachusetts House of Representatives. A "no state law immunizes bribery" position (based, in this instance,[10] on earlier First Circuit decisions involving Rhode

[10] *McDonough*, 727 F.3d at 162 (citing *United States v. Urcioli*, 513 F.3d 290, 298-299 (1st Cir. 2008) and its sequel *United States v. Urcioli*, 613 F.3d 11, 13 (1st Cir. 2010), *cert. denied*, 131 S.Ct. 612 (2010) which dealt with a Rhode Island law creating a "class exemption" dealing with laws of general application and not a law like M.G.L. c. 268A, § 4 exempting legislators from the prohibition against representing entities doing business with the Commonwealth.).

Island law) presupposes that Congress has indeed prohibited that which Massachusetts permits. Such a presupposition "foreclose[s]" Massachusetts from experimenting and exercising its own judgment in an area to which states lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). It upsets "the federal balance the Framers designed and that this Court is obliged to enforce." *Id*. Enforcing that balance means adherence to the principles underlying *McCormick*, not just its holding.

ARGUMENTS

I. THE PRINCIPLES UNDERLYING THE *MCCORMICK* "EXPLICIT AGREEMENT" REQUIREMENT IN THE CAMPAIGN CONTRIBUTION CONTEXT APPLY AS WELL IN THE CONTEXT OF A PART-TIME CITIZEN LEGISLATOR'S RECEIPT OF PROFESSIONAL FEES OR OTHER FUNDS IN ANTICIPATION OF A FUTURE BUSINESS ARRANGEMENT.

The explicit agreement requirement in *McCormick* resulted from a "grounds-*up*" analysis in which the Court set as its operating hypothesis that: "[m]oney is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done." *McCormick*, 500 U.S. at

272. Accepting this empirical observation as truth, this Court cautioned 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."

Id.

Expressing further concern with this confluence of events, *McCormick* concluded that:

> 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.

In balancing the need to protect the Nation's political system for citizens seeking elected public office with the need to root out corruption, the Court deduced that when a campaign contribution is the *res* in the financial transaction, the prosecution must

prove an *explicit agreement* to exchange the thing received for the performance of an official act. *McCormick*, 500 U.S. at 273 (" . . . if the payments are made in return for an *explicit promise* or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.").

Such a construct is a practical necessity. It does not flow down from the words in 18 U.S.C. § 1951 nor from its legislative history. It is necessary because an outsider viewing a political contribution after the fact can perceive it as either a legitimate contribution or a bribe. The giving and receiving aspects of the transaction are exactly the same in either situation. What distinguishes one situation from the other is the intent of the parties, and in the absence of direct testimony from the participants, that intent needs to be inferred. The campaign finance system would collapse if every contribution were open to cynical, after the fact review by non-contributors. Requiring proof of an explicit promise protects that system.

A similar construct is also a practical necessity when dealing with payments of wages or fees to citizen legislators. Just as a donor may support a candidate for any manner of reasons, *United States v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013), so too may an entity wish to engage a part-time lawmaker for a myriad of reasons. Again, the act of giving and receiving are identical. Whether the reasons for them are lawful or unlawful, as recognized by the courts below,

lies in the parties' intent and an explicit agreement is the right barometer to measure that intent because of the importance of the role citizen lawmakers play in state and local government.

The role of the citizen legislator has a historical and constitutional pedigree in this country at least as strong as that of campaign contributions. The realities of personal finance, no less than those of campaign finance, necessarily shape the activities of part-time state legislators, and those realities implicate the federal balance struck by the Framers even more directly than does campaign finance law.

Before the United States was constituted as a nation, Thomas Paine called for a representative form of government for the colonies operating under a written constitution. *Common Sense* (1776). That same year, the "inestimable right of representation in the legislature" and the King's insistence that the colonists relinquish it, was among the grievances enumerated in the Declaration of Independence. When John Adams penned the Declaration of Rights to the Massachusetts Constitution, he memorialized the right of all inhabitants of the Commonwealth to seek election and to hold public office. Mass. Const. Pt. 1, Art. 9. The United States Constitution, which followed and was (at least as understood in Massachusetts) modeled on Adams' work, reflects the same themes of republicanism inhering in the work of Paine, Jefferson and Adams.

Though the language may be vague, the authors of the Constitution clearly intended to prevent the rise to power of either a monarchy or a hereditary aristocracy and substituted a model of representative government with office holders being drawn from private life and rotating in office. *See United States Constitution*, Article I, Section 9, cl. 8, which states, "No Title of Nobility shall be granted by the United States" and Mass. Const. Pt. 1, Art. 6. In this vein, Article IV, Section 4 of the United States Constitution guarantee[s] "to every State in this Union a Republican Form of Government." By a republic, James Madison meant a system in which representatives are chosen by the citizens from the citizenry to exercise the powers of government. That republican form of government has remained a constant in this Nation from its beginning.

Reasoning from this lofty foundation, DiMasi asserts the extra-legislative income he received from Lally, which he was permitted to earn under state law as argued in Part II below, must be analyzed analogously with campaign contributions. Without an option to earn income from non-legislative endeavors, only the wealthy could seek election to a legislative position. If that were allowed to happen, it is a short step from the republicanism guaranteed to the states to the hereditary system against which the Framers rebelled.

Could the Congress directly prohibit state legislators from receiving outside income consistently with

the federal balance struck by the Framers? Probably not, but if so, only with a clear statement the likes of which this Court has yet to find in the statutes pursuant to which DiMasi was prosecuted. Could Congress prohibit political contributions to state legislative candidates? Again, probably not. Today's citizen legislator is at the same risk, however, as was Robert L. McCormick when he accepted funds from lobbyist John Vandegraft. Because the principles on which the explicit agreement requirement of *McCormick* is grounded apply equally in the context of employment related payments to such citizen lawmakers, so should its explicit agreement standard. Because *McCormick* was decided based on those principles rather than the words of the Hobbs Act, the explicit agreement requirement should apply to all federal corruption laws.

The First Circuit's holding that an explicit agreement was not required and the government only had to prove an implicit, silent understanding between the elected official and the alleged bribe payer misconstrues the *McCormick* reasoning and its underlying principles.

The essential elements of all bribes are the same – "I'll give you this if you do that." DiMasi argued in his trial and appeal that what was needed at the moment of his alleged "corrupt acceptance" was an agreement, meeting of the minds, bargain, or exchange trading otherwise permitted extra-legislative income for actions performed (or not performed) by him. Therefore, for the purpose of analyzing a series

of actions to determine whether a bribe has occurred, the necessary elements are the same whether considered in relation to the Hobbs Act under 18 U.S.C. § 1951, honest services mail and wire fraud under 18 U.S.C. §§ 1341, 1343 and 1346, bribery under 18 U.S.C. § 201 or federal program bribery under 18 U.S.C. § 666.

Just as obvious, in the abstract, and considering the presumption of innocence, a payment to a part-time state legislator permitted by state law is a permissible payment. Trying to discern its legitimacy must be the same as when a campaign contribution is the "thing" provided as the alleged bribe. Because a bribe, a campaign contribution, and a permissible payment made in accordance with state law to a part-time state legislator are all intrinsically the same irrespective of the statute under which the alleged bribe is charged, it naturally and logically follows that the same analytical process must be used to differentiate the legality, or illegality, of the interaction between the giving and receiving parties.

II. STATE LAW DEALING WITH CONDUCT THAT CAN BE CONSTRUED AS BRIBERY MUST BE CONSIDERED IN THE PROSECUTION OF STATE LAWMAKERS FOR BRIBERY

If the commentators are correct and the prosecution of state officeholders is the most sensitive area of federal-state conflict, Ruff, 65 Geo. L.J. at 1216, then any working model of federalism must take into account both state and federal laws dealing with the conduct being prosecuted. That is a matter of basic principle which emerges in any bottoms-up analysis starting from the bedrock of the Constitution.

Even under the hide-bound, top-down analysis that proliferates in the nation's lower courts, however, there is a reason state law relating to the conduct being prosecuted should always be considered in a federal bribery prosecution of a state law matter; it bears directly on the intent of the state law maker who is immersed on a day to day basis in state rather than federal law. Ex-Speaker DiMasi's case is illustrative, but not unique.

Mr. DiMasi entered the legislature in January 1979, virtually simultaneously with the creation of the Massachusetts State Ethics Commission as the primary civil enforcement agency for M.G.L. c. 268A, the state conflict of interest law. He served continuously in the House of Representatives until his retirement in 2009. Over that thirty year span the Ethics Commission's role grew and the conflict of interest

law was repeatedly amended, always reflecting the role of the citizen legislator.[11] In determining what he could do in his private employment, DiMasi naturally looked to state law. Any state legislator would do so.

For that reason, to intelligently determine what DiMasi's lawful or illegitimate purposes were or whether he had a good faith belief in the lawfulness of his conduct, the jury needed to be instructed on the state conflict of interest law. That law, M.G.L. c. 268A, has common roots with the contemporaneously enacted federal conflict law codified at 18 U.S.C. §§ 201 *et seq.*; each deals explicitly with bribery and each deals with other forms of conflict; each grew out of a report by the Association of the Bar of New York City, prepared by a group chaired by Roswell Perkins, author of *The New Federal Conflict of Interest Law*, 76 Harv.

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[11] Most pointedly in 1986, the legislature expanded the Commission's powers and amended M.G.L. c. 268A, Mass. St. 1986, c. 12. Section 1 of the amending act provides:

> **SECTION 1.** The general court recognizes that in connection with standards for the conduct of public officials it should be recognized that under our democratic form of government, public officials and employees should be drawn from all of our society; that citizens who serve in government cannot and should not be expected to be without any personal interest in the decisions and policies of government; that citizens who are government officials and employees have a right to private interests of a personal, financial and economic nature; that such standards of conduct should separate those situations of conflicting interest which are inherent in a free society from those which are unacceptable.

L. Rev. 1173 (1963). These and other parallels in the two statutes are noted both in case law[12] and scholarly commentary.[13]

While state and federal law have common roots and many similar provisions, Chapter 268A branches in multiple directions, covering public employees at the state, county and local levels and reflecting through different exclusions at successive governmental layers that one set of rules does not fit all public employees. Conflict provisions that make sense in Washington, D.C., make little sense in Washington, Massachusetts, where the vicissitudes of town governance require part-time work and extensive private citizen involvement. So it is with Massachusetts legislators, who are quintessential citizen-legislators permitted outside employment, including the right to appear as an agent or attorney for private parties in matters involving the Commonwealth, unlike members of Congress in analogous situations. Speaker DiMasi had a private law practice that Speaker Boehner may not have, and in that practice it was lawful for him to pursue state government contracts for Cognos. The genius of our federalism is that it

[12] *See, e.g., Scaccia v. State Ethics Commission*, 431 Mass. 351, 354 (2000) (interpreting M.G.L. c. 268A, § 3, the state gratuity law consistently with the interpretation of 18 U.S.C. § 201(c) in *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999) in light of shared history of statutes).

[13] *See* Note, *Conflicts of Interest of State Legislators*, 76 Harv. L. Rev. 1209 (1963); William G. Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299 (1965).

leaves to the states the ability to deal with their own governance.

The state law contains numerous special provisions for legislators, reflecting the unique role citizen legislators play in a representative body. Foremost among them is the legislative exemption in M.G.L. c. 268A, § 4,[14] pursuant to which Mr. DiMasi was expressly permitted to represent clients like Cognos on matters involving the Commonwealth as a party. In contrast, the federal analogue to § 4 would prohibit a federal lawmaker from receiving compensation for representational services involving a federal contract. 18 U.S.C. § 203(a)(1)(A). Because it may have been counterintuitive to believe that such activity was permitted, instruction specifically addressing the exemption, and not merely referencing the right of the Speaker to practice law, was critical. It was the theory of the defense, and refusing to instruct on it and substituting the sole purpose instruction eviscerated it.

Among the differences between federal and state conflict of interest laws is their treatment of "official acts," a specifically defined term in M.G.L. c. 268A, § 1(h) and distinguished throughout state law from "official responsibility" as defined in M.G.L. c. 268A, § 1(i). In contrast, the term "official act" as defined in 18 U.S.C. § 201(a)(3) cuts broadly to cover matters which may be brought by law before a public official in his official

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[14] *See* pages 5 and 6 above.

capacity – and hence merges the concepts of official act and official responsibility. The self-dealing provisions applicable to Speaker DiMasi appearing in M.G.L. c. 268A, § 6 would not foreclose financial interests within his area of official responsibility. The federal analogue codified at 18 U.S.C. § 208 would not.

In this case the court instructed with respect to official acts without any reference to the actual duties of Speaker DiMasi or the state conflict law imposing limitations on their exercise.

Immediately after giving its first mixed motive instruction, the court told the jury what "official acts" meant. App. 62-63. Those instructions again inappropriately conjured the testimony of Secretary Kirwan and Governor Patrick. In pertinent part, the Court instructed:

> In addition, DiMasi's official acts include any act intentionally, explicitly or – any act that intentionally, explicitly or implicitly, threatened or promised to use his power concerning the legislative process to take or withhold legislative action in order to persuade the person he was seeking to influence. Mere statements by DiMasi to members of the executive branch are not generally official acts. However, a statement by DiMasi to the Governor or a member of the executive branch, or by others acting at DiMasi's direction and on his behalf as Speaker, would be an official act if you find it was intended to influence what would be included in any legislation proposed by the Governor or that it was

> intended to convey a threat or a promise that DiMasi would use his powers concerning legislation in an effort to persuade the person he was seeking to influence. In essence, an official act of DiMasi would be an act that either involved the legislative process or intentionally exploited his influence concerning it.

Id.

As a practical matter, that shifted the burden of proof to DiMasi, requiring him to convince the jurors that all his motive(s) were "lawful" or "legitimate." The defendants objected to that feature of the instructions at both places it existed in the Court's proposed instructions during the charge conference on June 9, emphasizing the need to delete words like "only" and "solely" and focus instead on *quid pro quo*. The objections notwithstanding, the Court provided "only" and "solely" ladened motive instructions twice, first in describing the elements of mail and wire fraud, App. 60-61, and later on the issues of knowledge, willfulness and intent. App. 64-65.

These instructions failed to heed *Skilling*'s narrowing of the permissible range of honest services mail and wire fraud prosecution to the core of bribery and kickback cases. The universe of conduct outside that core is far broader than the subjects identified in the instruction. The implication of any sole purpose instruction is to exclude particular types of activity from the reach of a particular statute. Conversely, the

narrow construction adopted by the *Skilling* majority to avoid unconstitutional vagueness included only particular types of activity within the reach of the honest services statute. There is a wide gap, encompassing both legal and illegal conduct, between core bribery and kickbacks and receiving payments solely for providing legal services. Included in that chasm would be conduct that offended the state's conflict of interest law applicable to DiMasi as a state employee or the ethics rules of the House of Representatives applicable to him as a legislator – precisely the type of conduct that would have caused the Governor to seek the advice of the State Ethics Commission.

CONCLUSION

Justice Oliver Wendell Holmes, in *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920), said: "Men must turn square corners when they deal with the Government."[15] Inherent in this statement is that if one turns square corners, his conduct will comport with the law. DiMasi's defense was that he had turned square corners in his dealing with Joseph Lally in accordance with the Commonwealth's

[15] Paraphrasing Justice Holmes' statement, Justice Jackson wrote in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 387-388 (1947) (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.").

paradigm developed under state law – M.G.L. c. 268A § 4. DiMasi, however, was prosecuted using a different, federally drafted, standard that did not have clear lines establishing the boundaries to determine the corners. The First Circuit opinion challenged by this petition reasons that no state law existed that would permit bribery, thus dismissing DiMasi's square corner's defense and effectively finding that portions of the state's part-time legislative paradigm *ipso facto* established the elements for a federal bribery prosecution. It brushes aside more than 250 years of creating and living under the representational republicanism eloquently set down in the Massachusetts Declaration of Rights and guaranteed to Massachusetts by the United States Constitution.

There is "[a] serious tension [ ] between the Supreme Court's desire to elevate state and local governments to sovereign status and the federal government's continued practice of prosecuting their officials for corruption." George D. Brown, in *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruptions?*, 60 Wash. & Lee L. Rev. 417, 511 (2003). Professor Albert W. Alschuler, in his *Amicus Curiae Brief in Support of Neither Party*, in *Weyhrauch v. United States*, On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 08-1196, pp. 2-3, cautioned that "[b]ootstrapping state regulatory violations and minor criminal offenses into twenty-year federal felonies and placing both public officials and private individuals on trial for these

offenses in the federal courts unmistakably transform the federal-state balance." The petition should be granted to reduce the serious tension noted by Professor Brown and to restore the appropriate balance cited by Professor Alschuler.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

Nos. 11-2130
11-2163

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD W. MCDONOUGH
and SALVATORE F. DIMASI,

Defendants, Appellants.

APPEALS FROM THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
[Hon. Mark L. Wolf, *U.S. District Judge*]

Before

Howard, *Circuit Judge*,
Souter,* *Associate Justice*,
and Lipez, *Circuit Judge*.

Martin G. Weinberg, with whom Kimberly Homan was on brief, for appellant Richard W. McDonough.

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

Thomas R. Kiley, with whom William J. Cintolo and Cosgrove, Eisenberg & Kiley, P.C. were on brief, for appellant Salvatore F. DiMasi.

John-Alex Romano, Attorney, Appellate Section Criminal Division, United States Department of Justice, with whom Carmen M. Ortiz, United States Attorney, S. Theodore Merritt, Kristina E. Barclay, Assistant United States Attorneys, Lanny A. Breuer, Assistant Attorney General and John D. Buretta, Deputy Assistant Attorney General, were on brief, for appellee.

August 21, 2013

HOWARD, ***Circuit Judge*****.** After a six-week trial, a jury in the District of Massachusetts convicted Salvatore F. DiMasi, the former Speaker of the Massachusetts House of Representatives, and Richard W. McDonough, a lobbyist, of numerous crimes resulting from a scheme to funnel money to DiMasi in exchange for political favors. A third alleged participant, DiMasi's friend and financial advisor Richard Vitale, was acquitted. A fourth, Joseph Lally, pled guilty and cooperated with the government. The basic contours of the scheme saw Lally, as an employee of one company and later as a principal in another, make payments to DiMasi, who in return took official actions in his role as House Speaker to benefit Lally's business concerns. The money was funneled to DiMasi through McDonough, Vitale and Steven Topazio, an

attorney who shared a law practice with DiMasi and who was not criminally charged.

The district court denied DiMasi's and McDonough's post-trial motions and subsequently sentenced them to ninety-six and eighty-four months' imprisonment, respectively. On appeal, each of them advances a panoply of arguments that fall into four general categories: 1) sufficiency of the evidence; 2) jury instructions; 3) evidentiary issues; and 4) sentencing. After considering the extensive arguments of able counsel, we affirm the convictions and sentences.

I. FACTUAL BACKGROUND

To the extent that the appellants assert claims of insufficient evidence, we describe the facts in the light most favorable to the jury's verdict. *United States* v. *Urciuoli*, 613 F.3d 11, 13 (1st Cir. 2010) ("*Urciuoli II*"). We first outline the salient facts underlying the convictions, adding more details later as necessary.

A state representative since 1979, DiMasi was elected Speaker of the Massachusetts House of Representatives in September 2004. He was also a practicing attorney, but as his legislative and political responsibilities increased, his income from his law practice declined and his personal debt grew. Both McDonough and Vitale were long-standing friends of DiMasi.

Until February 2006, Lally was a Vice President of Cognos Corporation, an international software

company. Lally was the head of Cognos's lobbying arm, the aim of which was to boost the sale of Cognos software to state and local governments. After leaving Cognos in 2006, Lally formed Montvale Solutions, a reseller of Cognos software, for which Montvale was paid a twenty percent commission. Lally and DiMasi were not strangers, as DiMasi had previously represented Lally in a criminal matter and also attended his wedding. Cognos was one of McDonough's lobbying clients. He assisted Lally in gaining access to the government officials who would make decisions about software purchases and funding.

In December 2004, McDonough told Lally that he was looking for a way to supplement DiMasi's income. He suggested that Lally have Cognos hire DiMasi's law partner Topazio and pay him a monthly retainer, a portion of which would be transferred to DiMasi under the auspices of the lawyers' existing fee-sharing arrangement. DiMasi subsequently told Topazio that McDonough would soon be referring a new client to him. Later in December, McDonough and Lally met with Topazio, whereupon they agreed that Cognos would retain Topazio for six months at a rate of $5000 per month. Although Topazio's legal practice was focused on real estate matters and criminal and personal injury cases, McDonough explained that Cognos would be hiring him for contract work related to Cognos software. Lally testified that he agreed to the "sham" contract in order to "funnel money" to DiMasi and that he was trying to "gain favor with the

Speaker, to have him help us close software, cut deals, and obtain funding for us."

After the deal was struck, McDonough told Lally that it was important for Lally and Cognos to "find something for [ ] Topazio to do to sort of cover [their] ass if something ever[ ] blew up." As Lally had authority only to hire lobbyists, he told McDonough that he would hire Topazio for that function, rather than lawyering, in order to ensure that the hire would be approved by Cognos. Topazio received a six-month contract from Cognos in March 2005, but was surprised to see that it was a lobbying contract, not one for legal services as had been discussed at their earlier meeting. When Topazio made further inquiries, Lally presented it to him as a "take it or leave it" proposition. Topazio also called DiMasi, who instructed him to sign the contract, rather than "screw up" the arrangement by attempting to negotiate terms with Lally. Topazio complied.

As provided by the contract, Topazio received the first $5000 payment from Cognos in early April 2005. Complying with DiMasi's demand, Topazio paid $4000 to DiMasi as a referral fee, a figure that was higher than their typical fee-sharing arrangement, although Topazio subsequently reverted to splitting the payment evenly with DiMasi. The contract was renewed three times, with Topazio receiving $125,000 from Cognos and transferring $65,000 to DiMasi. At one point in time, Cognos failed to make several of the $5000 payments to Topazio and "caught up" with one payment of $25,000, which DiMasi demanded

from Topazio in its entirety. DiMasi returned Topazio's $25,000 check, however, and requested that he send four smaller checks, which Topazio did. At no point during the time that Topazio was under contract did Cognos, Lally, or McDonough ask him to perform any work.

In 2005, at roughly the same time as the Lally-McDonough-Topazio deal was being finalized, the Massachusetts Department of Education ("DOE") requested proposals for a pilot program known as Education Data Warehouse ("EDW"), that would employ software to aggregate DOE data from multiple databases into a single format. The DOE's plan was to spread the EDW project statewide, eventually. Cognos wanted to procure both the pilot and statewide contracts, from which Lally would receive commissions on payments to Cognos.

Cognos submitted a $5 million bid, with $500,000 for the software relating to the pilot program and the remaining $4.5 million targeted at the statewide project if the pilot program proved successful. Cognos was awarded the pilot project in August 2005, but the statewide project would require legislative funding. Lally then impressed upon McDonough the importance of "get[ting] to the Speaker [to] get funding for this project that DOE wanted." Lally also "reminded" McDonough of the relationship with Topazio, telling him that "it was time for it to pay off." McDonough responded with a promise to contact DiMasi.

Prior to the award of the pilot contract, DiMasi and McDonough discussed with Lally the prospect of DiMasi speaking with DOE Commissioner David Driscoll on Cognos's behalf. Among the issues that Lally wanted DiMasi to raise with Driscoll was the claim that a Cognos competitor had provided a poor software product for the state trial court system. In October 2005, after the pilot project award, Driscoll spoke with DiMasi about legislation to fund the statewide project. DiMasi cautioned Driscoll not to choose "the company that screwed up the courts." When Driscoll told DiMasi that he thought that Cognos would be selected, DiMasi expressed that he "was fine with that" and said, "if we can help, let us know." DiMasi also contacted House Majority Whip Linda Hawkins regarding the EDW project, instructing her to inform Driscoll that DiMasi would ensure that any data collection enterprise that DOE proposed would be included in the state budget.

In fact, Massachusetts Governor Romney did not include the funding in his proposed 2007 budget. Lally conferred with McDonough about speaking with DiMasi; McDonough told him that he would "take care of it." DiMasi subsequently had his legal counsel draft a budget amendment providing $5.2 million for the overall EDW project, $4.5 million of which was specifically earmarked for software. The draft amendment was shared with McDonough and Lally.

By this time, Lally had already left Cognos for Montvale. Before doing so, however, he negotiated a deal with Cognos that provided him a 20%

commission on software deals that he had arranged, but had not yet closed. EDW was one such deal. Lally also advised his successor at Cognos, Christopher Quinter, never to cancel a contract "for a lobbyist named Topazio." He said that Topazio was a "friend to Sal" and would be helping Lally. Fearing that an inquisitive Quinter would uncover the details of the scheme involving McDonough, Topazio and DiMasi, Lally also told Quinter not to tell McDonough about the Topazio deal, even though, obviously, McDonough was privy to it. Lally explained that he wanted Quinter "to stay as far away from [the deal] as possible."

As the legislative process moved forward, State Representative Robert Coughlin sponsored the EDW amendment – with the software earmark – because he was "honored" to make a proposal that was of such importance to the Speaker. DiMasi's staff also informed the House Ways and Means Committee of the Speaker's support for the EDW project, and the staff was kept in the informational loop regarding the legislative progress. At some point while the legislation was pending, DOE asked that the earmark be removed from the legislation out of fear that the $4.5 million designated for software would not leave enough money for implementation and deployment. Lally voiced objection to DiMasi because such a move would reduce his commission. DiMasi ensured that the earmark remained in the legislation.

In May 2006, as the budget – including the EDW amendment and software earmark – neared enactment, McDonough told Lally that he would have to

pay $100,000 each to McDonough and to DiMasi's friend and financial advisor Vitale after the deal closed. McDonough told Lally that the money paid to Vitale was to be shifted to DiMasi through a line of credit that Vitale would extend to him. Lally received his commission when the budget was signed into law. He testified that he paid the money because he was "told that's what I need to do in order to get the deal and the funding through the Speaker." DiMasi thanked Lally when the latter informed him that he had given Vitale a check for $100,000. In June 2006, a company that Vitale controlled extended a $250,000 line of credit to DiMasi in exchange for a third mortgage on his home. DiMasi drew on the line of credit, repaying it only after the media began looking into his relationship with Cognos. Also in June, but before the budget was passed, Lally played golf with McDonough and DiMasi. At one point, the Speaker said to the other two men, "I am only going to be Speaker for so long, so it is important that we make as much hay as possible." After giving Lally a "high five," McDonough said, "How about that. You got the speaker telling you something like that."

As the EDW machinations were concluding, DiMasi, McDonough and Lally charted a course designed to legislate another Cognos contract, which would in turn generate a commission for Lally and payments to McDonough and DiMasi. The plan centered around obtaining a software licence for Cognos software known as Performance Management ("PM"),

which was designed to improve the performance of state agencies through substantial data collection.

In Massachusetts, responsibility for statewide technology matters rests with the Information Technology Division ("ITD") of the Office of Administration and Finance. Lally began the process by telling the acting head of ITD, Bethann Pepoli, that DiMasi wanted to discuss PM. At Lally's urging, Pepoli met with DiMasi and his chief of staff. Despite his own lack of computer sophistication, DiMasi, armed with talking points that Lally had provided, said that he wanted software on his computer to track state spending. Despite Pepoli's protests that existing software could accomplish the task, DiMasi instructed her to work with his staff to develop a bond bill for the project. Later in 2006, McDonough received draft legislation from Lally and his partner at Montvale, Bruce Major, that described the PM software in a way that helped ensure Cognos's selection for the project. The legislation also proposed $15 million in funding, $5 million more than ITD's estimate.

After Governor Patrick took office in early 2007, DiMasi urged him to include the $15 million in funding in the state's emergency bond bill, which was usually targeted at immediate needs. The Governor's office initially balked, since the Governor did not want the emergency bill laden with non-essential items and because a general bond bill would be proposed within a short time. The measure was eventually included in the emergency bill, which was passed into law in March 2007. State officials testified that

the $15 million would not have remained in the emergency bond bill if the Speaker had not expressed his interest.

Even after the bond bill passed, Cognos faced competition from other vendors to win the contract award. Once again DiMasi got involved, meeting with various state officials and the Governor, and recommending that Cognos be selected as the PM vendor. Phone records also showed calls between Lally, Vitale, DiMasi and McDonough on one particularly important day of meetings. Although Administration and Finance Secretary Leslie Kirwan's concerns over the cost of the contract led her to negotiate a $2 million reduction from the proposed $15 million, Cognos was awarded the contract. Kirwan expressed to a colleague her hopes that "the big guy down the hall" – meaning DiMasi – was happy. Despite his expressed interest in funding the project, neither DiMasi nor his staff ever followed up with state officials about the project or its implementation after the bill's passage.

Prior to the PM bill's passage, Vitale told Lally that he would have to be paid $500,000 to ensure the legislation's success. Upon receiving a $2.8 million commission from Cognos after the bill passed, Lally paid $500,000 to an entity controlled by Vitale from which DiMasi would draw funds, as well as $200,000 to McDonough, who then returned $50,000 to Lally, unbeknownst to Lally's partner.

After the PM contract was signed in August 2007, an unsuccessful bidder lodged a formal protest,

claiming that the bid was the product of irregularities in the process. After a review, the contract was voided, and Cognos's successor in interest had to return the $13 million to the Commonwealth. No replacement project was sought or funded.

In March 2008, *Boston Globe* reporters began raising questions about the cancelled Cognos contract, eventually publishing a story on March 10. Before the story ran, each of the participants involved in securing the deal began covering his tracks. For example, DiMasi told his press secretary that he did not know Lally and was unaware of payments to Topazio or of the Topazio-Cognos contract. He also remarked to Topazio that certain check register entries reflecting payments to DiMasi should get "lost." McDonough was present when the *Globe* called Lally for comment before publishing the first story.[1] McDonough responded, "Oh, the shit's going to hit the fan now." After the story ran, McDonough and Lally frisked each other whenever they met to ensure that neither was "wearing a wire" to record the other. DiMasi also telephoned a meeting attended by McDonough, Lally and Vitale and admonished the trio, "If one of us breaks, we all fall." Two months after the first *Globe* story, DiMasi withdrew funds from his retirement account to pay off roughly $179,000 drawn on his line of credit.

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[1] The *Globe* subsequently published stories addressing DiMasi's line of credit with Vitale's company and the Cognos-Topazio contract.

In October 2009, a grand jury returned a superseding indictment charging DiMasi, McDonough, Vitale and Lally with conspiring to commit honest-services mail fraud, honest-services wire fraud, and extortion, in violation of 18 U.S.C. § 371 (Count 1); three counts of honest-services mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346 (Counts 2-4); and four counts of honest-services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 (Counts 5-8). DiMasi was also charged with extortion under color of official right, in violation of 18 U.S.C. § 1951 (Count 9), and Lally was charged with money laundering, in violation of 18 U.S.C. § 1957. As noted, Lally entered into a plea agreement and Vitale was found not guilty. The jury convicted DiMasi and McDonough on the counts that applied to them.

II. LEGAL ISSUES

A. Sufficiency of the Evidence

Both DiMasi and McDonough claim that the evidence was legally insufficient to support their convictions. We review their claims de novo, considering the evidence in the light most favorable to the verdict. *United States* v. *Rios-Ortiz*, 708 F.3d 310, 315 (1st Cir. 2013). "[R]eversal is warranted only where no rational factfinder could have concluded that the evidence presented at trial, together with all reasonable inferences, established each element of the crime beyond a reasonable doubt." *Id.* (quoting *United States* v. *Symonevich*, 688 F.3d 12, 23 (1st Cir. 2012)). We need

not conclude "that no verdict other than a guilty verdict could sensibly be reached," but must only be satisfied that the verdict finds support in a "plausible rendition of the record." *United States* v. *Hatch*, 434 F.3d 1, 4 (1st Cir. 2006).

We first address the substantive counts leveled against both appellants.

1. Honest Services Fraud

Federal law proscribes using the mail or wires in connection with a "scheme or artifice" to defraud. *See* 18 U.S.C. §§ 1341, 1343. As relevant here, a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. In construing this definition, however, the Supreme Court in *Skilling* v. *United States* held that section 1346 reaches only those schemes that involve bribes or kickbacks, 130 S. Ct. 2896, 2931-34 (2010), and "draws content" from, *inter alia*, federal statutes proscribing bribery of public officials and witnesses, *see* 18 U.S.C. § 201, and kickbacks, *see* 41 U.S.C. § 8701.

In the context of public officials, a bribe is the receipt of "anything of value . . . in return for . . . being influenced in the performance of any official act." 18 U.S.C. § 201. In addition, because "[t]he illegal conduct is taking or agreeing to take money for a promise to act in a certain way," *United States* v. *Brewster*, 408 U.S. 501, 526 (1972), the government must prove that an agreement for a *quid pro quo* existed; that is, 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). Such an agreement need not be tied to a specific act by the recipient. *See United States* v. *Terry*, 707 F.3d 607, 612 (6th Cir. 2013); *United States* v. *Ganim*, 510 F.3d 134, 148 (2d Cir. 2007). "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." *Terry*, 707 F.3d at 612 (quoting *United States* v. *Abbey*, 560 F.3d 513, 518 (6th Cir. 2009). Ultimately, "[w]hat is needed is an agreement . . . 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." *Id.* at 613; *see also Evans* v. *United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he 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."). As there is no dispute that the transactions at issue used both mail and wire, we focus on the appellants' contentions regarding the alleged scheme to defraud.

We start by noting that "evidence of a corrupt agreement in bribery cases is usually circumstantial, because bribes are seldom accompanied by written contracts, receipts or public declarations of intentions." *United States* v. *Friedman*, 854 F.2d 535, 554 (2d Cir.

1988). Accordingly, "the best evidence of [DiMasi's] intent to perform official acts to favor [Lally's] and [Cognos's] interests is the evidence of [DiMasi's] actions on bills that were important to [Lally]." *United States* v. *Woodward*, 149 F.3d 46, 60 (1st Cir. 1998) (internal quotation marks omitted). We conclude that a rational jury could easily find beyond a reasonable doubt that DiMasi and McDonough took part in a scheme that saw DiMasi exchange his official acts for money. These actions fit comfortably into what the Supreme Court has described as a "classic kickback scheme," in which a public official uses a middleman to help another entity – here Lally and Cognos – generate revenue or commissions and the proceeds are shared with the official and the middleman. *See Skilling*, 130 S. Ct. at 2932 (citing *McNally* v. *United States*, 483 U.S. 350, 352-53 (1987)).

Here, the jury was instructed to consider only the payments to Topazio and Vitale – but not the payments to McDonough – for purposes of the honest services fraud charges. A reasonable jury could have concluded that the contract with Topazio constituted a stream of payments intended for DiMasi in exchange for DiMasi providing benefits to Cognos and Lally. *See Ganim*, 510 F.3d at 148. Moreover, the payments that McDonough steered from Lally to Vitale also supported the existence of a scheme, and were especially close in time to the actions that DiMasi took on behalf of Lally with respect to the PM project. Finally, the jury could have drawn inferences of guilt from the defendants' behavior before and after

their arrangements came under scrutiny, including DiMasi's instructions to Topazio to deliver smaller checks and his "suggestion" that a checkbook register should become "lost," as well as Lally and McDonough's habit of frisking each other for recording devices and DiMasi's admonition that one of them "breaking" would result in a "fall" for all of them.

The appellants generally attack Lally's credibility, referring to him – with record support – as a "self-admitted liar who was proven to have a reputation within Cognos as a liar." They also highlight the many benefits that he received as a result of his plea agreement, including a relatively short prison sentence and avoidance of the forfeiture of his home. The attempt to base their sufficiency argument on Lally's unsavoriness, however, necessarily fails. To be sure, as a witness testifying pursuant to a plea agreement, Lally had incentive to lie. But whatever his evidentiary warts may have been, Lally's credibility was for the jury to weigh. *United States* v. *Appolon*, 695 F.3d 44, 55 (1st Cir. 2012); *see United States* v. *Rosario-Diaz*, 202 F.3d 54, 67 (1st Cir. 2000) (noting that uncorroborated testimony of a cooperating witness is sufficient to sustain a conviction unless the testimony is "facially incredible"). Moreover, Lally was subject to extensive cross-examination, and the jury was instructed to regard his testimony with caution.

The appellants next argue that the payments to Topazio cannot support their convictions. They first seize upon one sentence in Lally's testimony, in which he said that he made the payments to Topazio

"hoping . . . to reap some benefits." Such a blind "hope," according to the appellants, cannot form the basis of the required quid pro quo arrangement. This argument, however, does little more than isolate a single sentence out of Lally's testimony – and a single word within that sentence – devoid of the context of his testimony writ large that *does* suggest such an arrangement. *See*, *e.g.*, *United States* v. *Turner*, 684 F.3d 244, 258 (1st Cir.) (holding that in light of other evidence, payor's use of the term "gratitude" did not prevent the jury from finding that payment was a bribe, rather than a legal gratuity), *cert. denied*, 133 S. Ct. 629 (2012). For example, the jury could have found that DiMasi's comment about "making as much hay as possible" was an expression of his intent to keep the money flowing. Moreover, Lally's testimony that he was told that he had to pay the money to get the deals done also supports the jury's verdicts.

And there was more. There can be little doubt that the Topazio contract was a sham. It first called for the performance of services that Topazio ordinarily did not render and then ultimately paid him for doing no work. McDonough set up the contract and Topazio also made DiMasi – who knew where Topazio's legal expertise lay – aware of it. Additionally, DiMasi at first took a higher-than-normal referral fee and later told Topazio to structure the lump-sum payment into smaller amounts, an act which the jury could have viewed as an attempt to conceal his misdeeds. *See Urciuoli II*, 613 F.3d at 14 n.2 (noting that defendant's effort to hide a business relationship

could be evidence to support honest-services fraud conviction).

The appellants also argue that the timing of DiMasi's official acts in support of Cognos, as compared to the timing of payments to DiMasi, should have precluded the jury from finding a connection between the payments and the acts. They also point to the period of time during which no payments were made to Topazio and the period between the lapse of one contract and the signing of the next as fatal evidentiary defects. We disagree. "[B]ribery can be accomplished through an ongoing course of conduct, so long as the evidence shows that the 'favors and gifts flowing to a public official [are] *in exchange for* a pattern of official actions favorable to the donor.'" *Ganim*, 510 F.3d at 149 (quoting *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998)). Here, the evidence shows a chain of events that began with the 2004 discussion between McDonough and Lally and continued with Cognos's first payment to Topazio in April 2005 and Topazio's first "referral" payment to DiMasi shortly thereafter. Lally and McDonough subsequently spoke with DiMasi about contacting DOE Commissioner Driscoll before the pilot project was awarded to Cognos. DiMasi spoke with Driscoll, and had Representative Hawkins to do the same, about obtaining legislative funding for EDW after the pilot project was awarded. Against this backdrop, we have little trouble concluding that a reasonable jury could have found that the Topazio payments supported the guilty verdicts.

We reach the same conclusion concerning the payments to Vitale.[2] The appellants argue that the evidence could not support a finding that the payments to Vitale supported the convictions, as there was a lack of any nexus between the payments and any benefit to DiMasi. McDonough also specifically argues that there was no evidence that he was aware of the putative benefit to DiMasi. As to the latter, Lally testified that McDonough said that the $100,000 payment on the EDW deal would inure to DiMasi through the line of credit.[3] As to the former, the evidence established that Vitale still had control over the $500,000 received from Cognos's successor Montvale, and that DiMasi planned to join Vitale's lobbying firm

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[2] The payments to *either* Vitale or Topazio would be sufficient to support the verdicts. We address both for the sake of completeness. And to the extent that appellants seek succor from Vitale's acquittal, there is none to be had. *See United States* v. *Rogers*, 121 F.3d 12, 16 (1st Cir. 1997) ("A not guilty verdict against one co-conspirator is not the equivalent of a finding that the evidence was insufficient to sustain the conspiracy conviction of a second co-conspirator." (citing *United States* v. *Bucuvalas*, 909 F.2d 593, 595-97 (1st Cir. 1990))). If the evidence is "sufficient to support the verdict against the convicted defendant, the conviction must stand despite the co-conspirator's acquittal." *Id.*

[3] McDonough argues that Lally's testimony was uncorroborated. We disagree. The evidence showed that Vitale directed one of his companies – Washington North – to extend a $250,000 line of credit to DiMasi and his wife; that Montvale paid $100,000 to an entity controlled by Washington North, and that entity – WN Advisors – was created the same day as the line of credit was ordered; and that Montvale and WN Advisors entered into what could have been seen as a sham consulting agreement to legitimize the $100,000 payment.

where, the jury could have found, DiMasi would have access to the money: Lally testified that Vitale said that he wouldn't be getting any of the money, but that "it all goes to Sal." The record evidence sufficiently ties the Vitale payments to DiMasi and supports McDonough's guilt on the honest services charge.

2. Extortion

The jury convicted DiMasi of extortion under color of official right, in violation of 18 U.S.C. § 1951. To secure a conviction, the government must prove "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." *Turner*, 684 F.3d at 253 (citing *Evans*, 504 U.S. at 268). "[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the quid pro quo is not an element of the offense." *Id.* (quoting *Evans*, 504 U.S. at 268). Finally, as we observed in *Turner*, some courts have held that a quid pro quo or reciprocity is necessary to support the conviction, "but that the agreement may be implied from the official's words and actions." *Id.* at 253-54 (quoting *Ganim*, 510 F.3d at 143); *see also Evans*, 504 U.S. at 274 (Kennedy, J., concurring) (observing that official and 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").[4]

Here, for the same reasons that we found the evidence sufficient to support the honest-services fraud convictions, we hold that the jury was presented with enough evidence to support DiMasi's extortion conviction. There is no need to repetitively recite that evidence.

3. Conspiracy

In addition to the substantive honest-services fraud counts, McDonough and DiMasi were convicted of conspiracy to commit honest-services fraud. A conspiracy conviction under 18 U.S.C. § 371 requires proof that the defendant agreed to commit an unlawful act and voluntarily participated in the conspiracy, and that an overt act was committed in furtherance of the conspiracy. *United States* v. *Gonzalez*, 570 F.3d 16, 24 (1st Cir. 2009). Where, as here, the indictment alleges a conspiracy to commit multiple offenses, the conviction may be upheld as long as the evidence

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[4] With respect to both the honest-services and extortion counts, the appellants urge us to follow *McCormick* v. *United States* and require proof that "the payments [were] made in return for *an explicit promise* or undertaking by the official to perform or not to perform an official act." 500 U.S. 257, 273 (1991) (emphasis added). We decline to do so, however, as we have held that *McCormick* applies only in the context of campaign contributions. *See United States* v. *Turner*, 684 F.3d 244, 253-54 (1st Cir.), *cert. denied*, 133 S. Ct. 629 (2012).

supports a conspiracy to commit any one of the offenses. *United States* v. *Muñoz-Franco*, 487 F.3d 25, 46 (1st Cir. 2007). Further, an agreement to join a conspiracy "may be express or tacit . . . and may be proved by direct or circumstantial evidence." *United States* v. *Rivera Calderón*, 578 F.3d 78, 88 (1st Cir. 2009). Such evidence may include the defendants' acts that furthered the conspiracy's purposes. *United States* v. *Rodriguez-Reyes*, 714 F.3d 1, 7 (1st Cir. 2013).

We have little trouble concluding that the evidence was sufficient to support the jury's finding of the required agreement and participation. The jury was instructed on the conspiracy count that it must find that a defendant, *inter alia*, agreed to commit a crime involving payments to DiMasi or payments to another person that were caused by DiMasi. The appellants argue that the evidence failed to prove that Dimasi "caused" Lally or Cognos to make the payments to Vitale or McDonough.[5] This argument, however, rests on a cramped reading of "cause", *viz.*, that term must be considered literally, i.e., that DiMasi "made it happen." We decline such a narrow construction. One can "cause" something to happen by "bring[ing] it about," or by "produc[ing] an effect or result." *Black's Law Dictionary* 251 (9th ed. 2009).

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[5] On the substantive counts the instruction required a finding that the scheme involved a thing of value given to DiMasi or caused by DiMasi to be given to Vitale. The extortion instruction required that DiMasi caused the payments to Vitale or McDonough.

Under any definition, however, the evidence that we have already outlined was sufficient to support a finding that DiMasi caused the payments by agreeing to perform official acts in exchange for the payments.

In the end, the appellants' sufficiency arguments fail with respect to their convictions for honest-services mail and wire fraud, conspiracy to commit honest-services fraud, and DiMasi's extortion conviction.

B. Jury Instructions

DiMasi and McDonough also assert a host of instructional errors. We review the preserved errors under a "bifurcated framework." *DeCaro* v. *Hasbro, Inc.*, 580 F.3d 55, 61 (1st Cir. 2009). We review de novo whether the instructions "conveyed the essence of the applicable law and review for abuse of discretion questions about whether the court's choice of language was unfairly prejudicial." *United States* v. *Sasso*, 695 F.3d 25, 29 (1st Cir. 2012). Withal, an incorrect instruction does not require reversal if the error was harmless. *Id.* In the case of an error of "constitutional dimension," the government is required to establish beyond a reasonable doubt that the error did not influence the verdict. *Id.* Other errors will not warrant reversal "as long as it can be said 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Id.* (quoting *Kotteakos* v. *United States*, 328

U.S. 750, 765 (1946)). Regardless of the nature of the error, we analyze the challenged instruction "in light of the evidence, and determine whether, taken as a whole, the court's instructions fairly and adequately submitted the issues in the case to the jury." *United States* v. *Tom*, 330 F.3d 83, 91 (1st Cir. 2003) (internal quotations and citations omitted).

Here, the appellants challenge the trial court's refusal to give particular instructions, which, as noted, is reviewed for abuse of discretion. We will reverse only if the requested instruction was: 1) substantively correct; 2) not substantially covered in the charge as delivered; and 3) integral to an important point such that the failure to give the instruction seriously undermined the defendant's ability to present a particular defense. *See United States* v. *De La Cruz*, 514 F.3d 121, 139 (1st Cir. 2008). When an instruction is refused, reversal is not warranted unless the defendant suffers substantial prejudice. *Id.* We address the appellants' ten instructional plaints in turn.

1. Distinguishing Between Bribes and Gratuities

McDonough argues that the trial court's instructions did not sufficiently differentiate between illegal bribes and legal gratuities. *See Ganim*, 510 F.3d at 146 (describing a legal gratuity as something "given to curry favor because of an official's position"). As relevant here, the district court instructed the jury that the government must do more than prove that

"Cognos and/or Lally made a payment to DiMasi or Vitale only to cultivate a business or political relationship with DiMasi or only to express gratitude for something DiMasi had done." McDonough does not contend that this instruction was incorrect. Instead, he argues that the jury should have been given clearer guidance as to what constituted legal behavior. He requested the jury be instructed that:

> providing money to a public official merely as a reward for some future act that the public official will take (or may have already determined to take), or to build a reservoir of good will, or to curry favor, hoping it would affect future performance, or for a past act that he has already taken, does not constitute honest services fraud.

This requested instruction was "substantially covered in the charge actually given." *De La Cruz*, 514 F.3d at 139. In our view, the charge's exclusion from illegal conduct efforts to "cultivate a business relationship" or "express gratitude" sufficiently encompasses McDonough's specific references so as to pass muster. The district court was not required to provide an exhaustive list of conduct that would *not* be illegal. There was no abuse of discretion.[6]

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[6] McDonough places great weight on the changes *Skilling* brought to bear on honest-services cases. Essentially, McDonough argues that the jury should have been instructed on the actions that, post-*Skilling*, no longer fit within the ambit of an honest-services conviction. We disagree. Contrary to McDonough's

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2. Theory of Defense

McDonough next argues that the district court failed to adequately instruct the jury on his main theory of defense – that he was at all relevant times acting as a lobbyist engaged in legal behavior central to his job. As to this argument, the district court first instructed the jury that "any payment to Vitale only to lobby public officials, meaning to advocate positions to public officials or to provide strategic advice to clients seeking public contracts or for business advice is not a basis for a mail or wire charge." The court also charged the jury that, "[i]t is also not unlawful for a person to receive a payment he genuinely believes was made only to compensate him for lobbying public officials or for providing strategic advice to clients seeking public contracts or for providing business advice."[7]

As with the previous instruction, McDonough does not claim that the court's instruction was legally incorrect. Instead, he asserts that a more complete instruction describing more aspects of lobbying, including its protection by the First Amendment, was

argument, the jury *was* instructed on the nature of a gratuity consistent with his defense, and McDonough argued the point to the jury. No more was required.

[7] Since the district court did not allow the jury to consider the payments to McDonough as part of the honest-services fraud counts, those payments were not included in the first instruction quoted above. Nevertheless, McDonough could have been found guilty if the jury believed that he participated in a scheme to provide money either to Topazio or Vitale for DiMasi's benefit.

required in order for him to assert his defense. We disagree. Read as a whole, the instructions adequately conveyed to the jury the lawfulness of the activities that McDonough stressed to the jury through witnesses and arguments, specifically his having referred Lally to Vitale and his role in the relationship between Lally and Topazio. Nothing in the instructions prevented the jury from concluding that McDonough's conduct with respect to the payments made to Topazio or Vitale fell within the confines of lawful lobbying. By the same token, however, the jury was also free to reject the defense.

3. The "Sole Purpose" Instruction

Both McDonough and DiMasi take aim at the court's instructing the jury, after giving some examples, that "[i]n essence, any payment made or received by a defendant solely for one or more lawful purposes is not a basis for a mail or wire fraud charge." They argue that because this instruction did not mention the government's burden of proof, the burden was effectively placed on them to prove that the sole purpose of the payments was a lawful one. The very next words spoken by the trial judge are fatal to this argument: "However . . . people at times act with a mixture of motives. If the government proves beyond a reasonable doubt a payment made in exchange for an official act, it is not required to prove that this was the only reason for the payment." The government's burden was also repeated numerous times throughout the charge. There was no error.

McDonough also argues that the definition of honest-services fraud neither sufficiently described what was *not* illegal nor specifically named McDonough such that a jury would be able to apply his defensive arguments. We rejected these arguments in connection with other instructions and do so again here.

4. Silent Understanding

McDonough's next argument relates to the conspiracy count. The court instructed the jury, in relevant part, that "the evidence to establish the existence of a conspiracy need not show that the conspirators entered into an express agreement. . . . It is sufficient if an agreement is shown by conduct evidencing a silent understanding to share a purpose to violate the law." McDonough argues that the term "silent understanding" invited the jury to find an agreement where none existed.[8] We disagree. The court provided the instruction in recognition of the defense's argument that Lally's testimony was entirely unreliable and the government's fallback position that a conspiracy could be proved by circumstantial evidence.

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[8] We reject McDonough's argument that the phrase has been "resurrected . . . from obscurity." It is well-settled that an agreement can be based on a tacit understanding. *See*, *e.g.*, *United States* v. *Maryea*, 704 F.3d 55, 76 (1st Cir. 2013) (observing that a tacit understanding between conspirators can support a conviction). We see no meaningful difference between a "tacit" agreement and a "silent" one.

McDonough's argument that the jury would use the instruction improperly to tie DiMasi's actions to a non-existent agreement falls short because, as previously noted, the court thoroughly instructed the jury both on the nature of lawful payments and, with great specificity, on the requirement that the evidence prove "that the members [of the conspiracy] in some manner came to a mutual understanding to try to accomplish their unlawful purpose" and that it was "not sufficient for the government to prove that a person merely acted in a way that happened to further some purpose of the conspiracy." Finally, any loose ends were tied up with the instruction that a conspiracy conviction could not be based on "mere[ ] associat[ion] with someone committing a crime[,] . . . [or] mere[ ] kn[owledge] of illegal activity by other people." Viewed in the context of the whole, there was no error in the "silent understanding" instruction.

5. Intent to Alter

McDonough next argues that the district court erroneously refused to instruct the jury that, in order to find quid pro quo bribery, it must find that a payment was made "with the specific intent of causing Mr. DiMasi to alter his official acts, to change his official position that he otherwise would not have taken or to take official actions that he would not

have taken but for the payment."[9] The district court's actual instruction was that

> the government must prove beyond a reasonable doubt a scheme to exchange one or more payments for one or more official acts by DiMasi on behalf of Lally or Cognos. . . . [T]he government does not have to establish that DiMasi would not have taken official action as Speaker to promote the acquisition of an Educational Data Warehouse, business intelligence software or performance management software, including Cognos software, without [the charged] payments.

McDonough argues that the instruction conflicts with our precedent, as set forth in *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996). There, after noting that the jury must be adequately informed that "cultivation of business or political friendship" is not bribery, we observed that

> [o]nly if instead or in addition, there is an intent to cause the recipient to alter her official acts may the jury find a theft of honest services or the bribery predicate of the Travel Act. Absent some explicit explanation of this

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[9] This language essentially quotes the instruction that was given in *Urciuoli II*. 613 F.3d at 118. There, however, we did not hold that such an instruction was required, and reiterated that the government must establish that payments were made "with the specific purpose of influencing [the official's] actions on official matters." *Id.*

> kind, the conventional charge will be slanted in favor of conviction.

Id. at 741. Nowhere in *Sawyer*, however, did we equate "alter" with "doing something the official would not have otherwise done." *See also City of Columbia* v. *Omni Outdoor Adver.*, 499 U.S. 365, 378 (1991) (observing, in dicta, that "[a] mayor is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid"). Indeed, elsewhere in *Sawyer* we noted that the jury had to find an "intent to otherwise influence or improperly affect the official's performance of duties," *id.* at 729, which tracks the instructions given in this case, in which the court defined "intent to defraud" as "to act with an intent to deprive the public of DiMasi's honest services by exchanging a payment for an official act. In other words, the defendant must have intended that a payment would be made to influence an official act and would be received with the intent to influenced [sic]. . . ."[10] We find

[10] McDonough directs us to the Third Circuit's decision in *United States* v. *Wright*, 665 F.3d 560 (3d Cir. 2012), in which the court ruled that an honest services bribery conviction required the jury to conclude, *inter alia*, that "the payor provided a benefit to a public official intending that he will thereby take favorable official acts that he would not otherwise take." *Id.* at 568. As support for that proposition, *Wright*, in turn, cited *United States* v. *Bryant*, 655 F.3d 232, 240-41 (3d Cir. 2011). But in *Bryant*, the court explicitly rejected the appellants' argument that a jury instruction was erroneous because it failed to require a finding that the payor intended to "'alter' the conduct of the public official . . . " *Id.* at 244. Instead, the court held that instructions

(Continued on following page)

no error in the court's refusal to give the requested instruction.

6. Series of Payments

With respect to the honest-services fraud charges, the jury was instructed as follows:

> [I]t is not necessary for the government to prove that the scheme involved making a specific payment for a specific official act. Rather it would be sufficient if the government proves beyond a reasonable doubt a scheme to make a series of payments in exchange for DiMasi performing official actions benefitting Lally and Cognos as opportunities arose or when DiMasi was called upon to do so.

McDonough argues that this instruction "diluted" the distinction between bribes and gratuities. This argument is a branch from the same tree as the earlier claim that the evidence of the Topazio payments was insufficient to support the conviction. As we have already held that the evidence was sufficient to support the convictions and that the instructions as a

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which "made clear that an intent to influence was required for a finding of guilt" were sufficient. *Id.* at 245. As especially relevant here, the court noted that "there is no meaningful difference between an intent to 'alter,' and an intent to 'influence,' official acts." *Id.* at 245 n.14. Here, as in *Bryant*, the instructions adequately conveyed that an intent to influence/alter was required, and thus the district court did not err in refusing to give the requested instruction.

whole adequately differentiated between bribes and gratuities, we need go no further with this particular argument.

7. Merits of Cognos's Products

At trial, the defendants requested that the court instruct the jury that "[t]he quality of the Cognos product" and the "merits of the idea of Performance Management" were a "circumstance to be considered in the case." While the court permitted the defense to argue that DiMasi "had a legitimate motive for anything and everything he did that resulted in Cognos getting the contract," it refused to explicitly instruct the jury as the defense requested. McDonough, without citing any supporting authority, argues that the jury was thus deprived of guidance on taking into account information that could have led them to conclude that the defendants were acting in good faith rather than with criminal intent. We do not find an abuse of discretion.

As the district court correctly instructed, the charges related to a "scheme to deprive the citizens of Massachusetts of DiMasi's honest services, rather than a scheme to deprive the Commonwealth of Massachusetts of money." The issue in this case is not whether the defendants truly thought the software was a benefit to the Commonwealth; instead it is whether they intended to exchange payments to DiMasi for assistance to Cognos. *See United States* v. *Shields*, 999 F.2d 1090, 1096 (7th Cir. 1993) (observing, in a

judicial bribery case, that issuing a legally correct judgment is not a defense to a bribery charge and that because a party with a good case still "buys certainty," a legally correct decision conveys no useful information about the likelihood of a bribe).

The district court correctly instructed the jury on the charged offenses. And the appellants were not precluded from arguing to the jury that the merits of the Cognos products was a mark in their favor. But they were not "entitled to an instruction 'on every particular that conceivably might be of interest to the jury.'" *United States* v. *Duval*, 496 F.3d 64, 78 (1st Cir. 2007) (quoting *United States* v. *Rosario-Peralta*, 199 F.3d 552, 567 (1st Cir. 1999)).

8. Benefit to DiMasi

DiMasi claims that the district court committed prejudicial error when it refused to instruct the jury, with respect to the extortion charge, that the payments to Vitale or McDonough must have been a "benefit" to him.[11] The district court relied on *United States* v. *Green*, 350 U.S. 415 (1956), in which the Court stated that extortion "in no way depends on having a direct benefit conferred on the person who

[11] By contrast, the district court ruled that a benefit to DiMasi *was* required to prove the honest services fraud counts, and because evidence of benefit to DiMasi was lacking with respect to the payments to McDonough – as opposed to those made to Topazio and Vitale – the payments to McDonough were only considered for the extortion count.

obtains the property." *Id.* at 420. DiMasi argues that *Green* leaves open the requirement for at least an indirect benefit. The Third and Fifth Circuits have rejected this argument. *See United States* v. *Jacobs*, 451 F.2d 530, 535 (5th Cir. 1971) ("Under § 1951 . . . it is not necessary to show that a person charged with extortion or attempted extortion actually received any benefit."); *United States* v. *Provenzano*, 334 F.2d 678, 685-86 (3d Cir. 1964) ("We hold that it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefits therefrom."). On the other hand, the Eighth Circuit has indicated that at least indirect payments may be required. *See United States* v. *Evans*, 30 F.3d 1015, 1019 (8th Cir. 1994) ("The Hobbs Act requires proof, among other elements, that the defendant received a benefit in exchange for the performance or nonperformance of an official act.").

We need not resolve this issue, however, as any error is ultimately harmless. *See Neder* v. *United States*, 527 U.S. 1, 9 (1999) (noting that an instruction that omits an element of the offense "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (emphasis in original)). "Harmless error review requires ascertaining 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *United States* v. *Newell*, 658 F.3d 1, 17, n.19 (1st Cir. 2011) (quoting *Neder*, 527 U.S. at 15). Here, assuming that a benefit to DiMasi was a required element, the

evidence was "more than sufficient to support the convictions." *Id.* First, the payments through Topazio – which are not claimed to be subject to the referred "benefit" instruction – indisputably benefitted DiMasi. Second, given that the jury had to find that payments were "given to Vitale for DiMasi's benefit" to sustain the convictions on the honest services fraud counts, we are confident that the same result would have obtained if they were so instructed on the extortion charge.

9. McCormick Instruction

DiMasi resurrects the argument that *McCormick* requires an explicit agreement between him and Lally, and that the jury should therefore have been so instructed. Having already rejected the argument that an explicit agreement is required, we must also conclude that the jury instruction claim necessarily fails.

10. State Law

DiMasi next argues that the district court should have instructed the jury on Massachusetts law concerning conflict of interest and attorney-client confidentiality. This issue came to the fore as a result of testimony from Governor Patrick and Secretary Kirwan that they would have handled the PM contract differently had they known of the payments to DiMasi and Vitale. DiMasi maintains that state law permits him to represent clients – like Cognos – on

matters where the state is a party. He also suggests that he is not required by state law to disclose his private law practice clients. Thus, he argues that a "full explication of Massachusetts law was required to allow the jury to distinguish between bribery and other permissible and impermissible acts, to understand Dimasi's disclosure requirements and to differentiate DiMasi's official acts from his private acts."

Specifically, DiMasi requested an instruction noting that Massachusetts law allows legislators to "represent clients in their dealings with the state pursuant to a provision of the state's conflict of interest law." *See* Mass. Gen. Laws. ch. 268A, § 4. We conclude, however, that the outcome here is controlled by *Urciuoli II*, in which the appellant claimed that the jury should have been instructed on Rhode Island law that allows, *inter alia*, a state legislator to engage in private employment without creating a conflict of interest. *Urciuoli II*, 613 F.3d at 15. The appellant there further argued that state law might outline the contours of a state legislator's duties such that the jury could better analyze whether the legislator had failed to perform them. *Id.* We concluded that the instruction was unnecessary because the appellant was charged with quid pro quo bribery, not for failing to disclose a conflict, and that "[n]othing in Rhode Island law purports to authorize or protect such conduct." *Id.* (quoting *United States* v. *Urciuoli*, 513 F.3d 290, 298-99 (1st Cir. 2008) ("*Urciuoli I*")). Moreover, we observed that such an instruction could have

"misled the jury into thinking [the state law] could excuse bribery." *Id.* at 16.

The same result obtains here. As we have already determined, the jury was properly instructed on the bribery and extortion charges. The concern that the jury could have been misled into concluding that state law insulated DiMasi's conduct is just as apparent here as it was in *Urciuoli II*. In addition, the jury was instructed that payments to DiMasi for providing legal services or referrals could not form the basis for a conviction. To the extent that failure to disclose a conflict of interest was an issue, it arose only in the context of the government's burden of proving that the putative scheme to defraud involved a material falsehood, which includes non-disclosures. *See Neder*, 527 U.S. at 25. While DiMasi argues that the court's instruction could have resulted in the jury convicting him for an undisclosed conflict – a result which could run afoul of *Skilling* – the record shows that the jury was instructed to consider the undisclosed conflict *only* for purposes of materiality and, most importantly, *after* it had found that DiMasi had participated in a scheme involving payments exchanged for official acts. There being no indication that Massachusetts law would allow DiMasi not to disclose bribes ("payments made for official acts"), there was no error in refusing to instruct the jury on the Massachusetts law as DiMasi requested.

C. Evidentiary Issues

We review the district court's admission of evidence for abuse of discretion.[12] *United States* v. *Tavares*, 705 F.3d 4, 15 (1st Cir.), *cert. denied*, 133 S. Ct. 2371 (2013). Two evidentiary claims are presented.

1. Testimony by Patrick and Kirwan

As previously noted, both Secretary Kirwan and Governor Patrick testified that the Patrick administration would not have executed the PM contract if they had known that DiMasi was receiving referral fees that originated from Cognos in exchange for his work in steering the contract to Cognos or if they knew that Vitale was receiving a $500,000 payment from the deal. The Governor also testified that he would have obtained advice from the state Ethics Commission regarding the $500,000 payment. Each official's testimony was admitted over defense objections.

DiMasi argues that the testimony should not have been admitted because he had no obligation to disclose the relationship among himself, Cognos, and Topazio. He further contends that the reference to the Ethics Commission created a risk that he would be

[12] The parties clash over whether certain of DiMasi's evidentiary claims are unpreserved and should therefore be reviewed only for plain error. Because the arguments fail under even the less deferential abuse of discretion standard, we decline to resolve the dispute.

convicted for an ethics violation such as an improper conflict of interest. We disagree. There is no dispute that materiality is an element of honest services fraud, and the reactions of two state officials integral to the contract process were relevant to that issue. And at the risk of repetition, we again note that the jury was charged with assessing whether DiMasi had been involved in a quid pro quo bribery scheme, not whether he had failed to disclose a conflict of interest. There was no reversible error in the admission of the testimony. To the extent that DiMasi argues that the court improperly balanced the testimony's probative value against any unfair prejudice, it suffices to observe that "Only rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *United States* v. *Pires*, 642 F.3d 1, 12 (1st Cir. 2011). This is not one of those rare occasions.

2. Post-Conspiracy Statements

DiMasi argues that his post-conspiracy statements to Topazio, his Communications Director David Guarino and his Chief of Staff Maryann Calia after the March 2008 press inquiries began should not have been admitted as either proof of the conspiracy or to show consciousness of guilt. Topazio testified that after media accounts were published about the Cognos contract, DiMasi said to him that it "would have been nice if [Topazio] had lost" the portion of his

check register that showed the $25,000 payment to DiMasi and also that Topazio should insert case names into the register to, in effect, legitimize the transactions after the fact. Guarino testified that during discussions in the aftermath of the newspaper articles, DiMasi did not reveal his involvement with state officials in the PM procurement, denied speaking with Pepoli, denied knowledge of Lally's involvement with Cognos, and said that he was unaware of a relationship or payments between Topazio and Cognos. During cross-examination by the government, Calia confirmed her grand jury testimony that DiMasi had denied knowledge of the Cognos matter or Topazio's connection to it. The court's general instructions included the following:

> With regard to the allegedly false statements, you should first decide whether the statement was made and whether it was false. Similarly, you should decide whether a defendant did something to conceal information. If so, you should decide whether any false statement or action to conceal is evidence of consciousness of guilt concerning any or all of the crimes charged in this case. You should consider that there may be reasons for a person's actions that are fully consistent with innocence of the crimes charged in this case. In addition, feelings of guilt may exist in innocent people and false statements do not necessarily reflect actual guilt of particular crimes. It is up to you to decide if there is proof of false statements or acts of concealment and if so whether they show a consciousness of guilt

> concerning the crimes charged here. If these facts are proven, you must decide what weight or significance to give them.

DiMasi first argues that the district court erred in denying his request for a so-called *Anderson-Munson* limiting instruction that would have cabined the jury's consideration of such evidence to the individual whose statement or actions were in dispute. *See Anderson* v. *United States*, 417 U.S. 211 (1974); *United States* v. *Munson*, 819 F.2d 337 (1st Cir. 1987). We reject the argument for the fundamental reason that DiMasi fails to explain how this instruction would apply in this case, since the statements at issue were made by him.[13]

Aside from the instruction, DiMasi argues that the statements were inadmissible because the government's case lacked a sufficient foundation of extrinsic evidence to support an inference of guilt of the crimes with which he was charged. He draws this requirement from cases involving flight evidence. *See*, *e.g.*, *United States* v. *Otero-Méndez*, 273 F.3d 46, 53 (1st Cir. 2001). But to the extent that such a requirement may apply here, we refer back to our discussion of the sufficiency of the evidence and find a sufficient predicate to support the inference. DiMasi further argues that his statements to Guarino and Calia were "possibly overly narrow, but literally true." This argument

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[13] The government argues that this shortcoming constitutes waiver. *See United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). Regardless of the reason, it is a fatal defect.

misses the mark, as the jury was instructed to determine first the falsity of the statements before determining what, if any, weight to give them. By acknowledging that he was at least being cagey with his close associates, DiMasi essentially concedes, as he must, that the matter was worthy of the jury's consideration.

Regarding the comments to Topazio about the check register, even if, as DiMasi points out, Topazio said he thought DiMasi was being sarcastic, not literal, the jury was fully capable of assessing the import of the comment. And while there are multiple possible interpretations of DiMasi's request that Topazio add the client names, we believe that the jury instructions ameliorated any possibility of improper use of the testimony.

D. Sentencing

DiMasi was sentenced to ninety-six months' imprisonment, and McDonough received an eighty-four month sentence. Both men challenge the substantive reasonableness of their sentences.[14] We review the

[14] DiMasi's Sentencing Guideline range was 235 to 293 months; McDonough's totaled 188 to 235 months. The calculation for each was identical, save for the application of a lower base offense level to McDonough because he was not a public official. We include this information for context, as neither appellant challenges his respective Guidelines calculation. DiMasi and McDonough had requested sentences of 36 and 24 months, respectively, while the government sought sentences of 151 and 120 months.

sentences for abuse of discretion, taking into account the totality of the circumstances. *United States* v. *Zavala-Martí*, 715 F.3d 44, 50 (1st Cir. 2013). "When it comes to substantive reasonableness, 'a sentencing court's ultimate responsibility is to articulate a plausible rationale and arrive at a sensible result.'" *Rodriguez-Reyes*, 714 F.3d at 11 (quoting *United States* v. *Carrasco-de-Jesús*, 589 F.3d 22, 30 (1st Cir. 2009)). The appellants face a heavy burden to "adduce fairly powerful mitigating reasons and persuade us that the district court was unreasonable in balancing pros and cons despite the latitude implicit in saying that a sentence must be 'reasonable.'" *United States* v. *Madera-Ortiz*, 637 F.3d 26, 30 (1st Cir. 2011).

1. DiMasi

Although his arguments contain scant detail, DiMasi asserts several basic points. First, he argues that his eight-year prison term is a significant increase over other sentences imposed in the District of Massachusetts for what he describes as "similar crimes."[15] Relatedly, he argues that Lally's 18-month sentence is evidence that DiMasi was punished for going to trial. Neither argument persuades us. As to

[15] Sentencing disparity is a factor a district court is to consider under 18 U.S.C. § 3553(a). Ordinarily, section 3553 factors are part of the analysis for claims of procedural error. *See, e.g.*, *United States* v. *Flores-Machicote*, 706 F.3d 16, 20 (1st Cir. 2013). Even though DiMasi has eschewed any claim of procedural error here, we will consider the issue to the extent that it bears on the reasonableness of his sentence.

the first, we have observed that consideration of sentencing disparity primarily targets disparities among defendants nationally. *United States* v. *Dávila-Gonzalez*, 595 F.3d 42, 49-50 (1st Cir. 2010). As to the second, the fact that Lally pleaded guilty and testified in accordance with a negotiated agreement places the two men in distinctly different legal postures. *Id.* at 50; *see also United States* v. *Rodríguez-Lozada*, 558 F.3d 29, 45 (1st Cir. 2009) (observing that a "material difference" between defendants who plead guilty pursuant to a plea agreement and those who do not undercuts a claim of sentencing disparity).

DiMasi also argues that he was punished for post-verdict public statements expressing his disagreement with the verdict against him. But as the district court explained, DiMasi's protestations of innocence had no bearing on the sentence. Instead, the court noted DiMasi's insistence that his conduct was permitted by state law, a claim that the district court permissibly found had "nothing to do" with the crimes for which he was convicted, and which, the court observed, demonstrated that DiMasi did not appreciate the gravity of his conduct.

Next, DiMasi argues that the district court impermissibly considered the fact that he was the third consecutive Massachusetts House speaker to be convicted of a federal crime. In the context of deterrence, however, the district court observed that the shorter sentences received by his predecessors might have actually emboldened DiMasi. The court also referred specifically to Providence, Rhode Island Mayor Vincent

"Buddy" Cianci, who received a five-year sentence after an extortion conviction. *See United States* v. *Cianci*, 378 F.3d 71 (1st Cir. 2004).[16] The district court observed that both DiMasi and McDonough were likely aware of Cianci's sentence but were apparently undeterred, a consideration that in the court's view called for a "materially higher sentence." Indeed, the district court indicated that it thought that the government's twelve-and-a-half year recommendation was reasonable, but concluded that eight years was more in line with prior public corruption sentences elsewhere. We see no abuse of discretion in either the district court's approach or its sentence.[17]

2. McDonough

McDonough's sole sentencing argument repeats the disparity claim as it relates to Lally's sentence. For the same reasons that we rejected the argument as advanced by DiMasi, we reject it here.

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[16] The court also considered, *inter alia*, the six-and-a-half year sentence given to former Illinois Governor George Ryan, and the nine-year sentence meted out to former Bridgeport, Connecticut Mayor Joseph Ganim. *See Ganim*, 510 F.3d at 136.

[17] On appeal, DiMasi asserts that "all the harsh sentences in the world will not deter conduct state legislators think lawful." We agree with the district court's outright rejection of a similar argument made below, noting that there are no state laws that allow officials to take bribes, and that DiMasi's behavior, "from start to end, showed that he knew" his actions were illegal.

III. CONCLUSION

The issues presented at trial and on appeal were myriad and complex. The evidence was sufficient to support the appellants' convictions. The district court ably dispatched the evidentiary, instructional and sentencing issues well within the latitude properly afforded trial judges. Accordingly, the appellants' convictions and sentences are ***affirmed***.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. SALVATORE F. DIMASI, RICHARD W. MCDONOUGH, and RICHARD D. VITALE, Defendants.	))))))))	Cr. No. 09-10166-MLW

ORDER

WOLF, D.J. June 15, 2011

The lengthy trial of this highly-publicized case was completed today. *The Boston Globe* has requested that the names and addresses of the jurors now be made public. After the verdicts were returned, the court heard from the parties and members of the media concerning this request.

During the trial, the interests of justice required that the jurors not be identified in order to minimize the risk that other individuals would expose them to extra-judicial information or influences that would injure the rights of the parties to a fair trial. *See United States v. Hurley (In re Globe Newspaper Co.),* 920 F.2d 88, 90 (1st Cir. 1990) ("*Hurley*"). This is no longer a concern. *Id.* at 93.

At this point:

> "[A]bsen[t] . . . particularized findings reasonably justifying non-disclosure, the juror

> names and addresses must be made public." *United States v. Hurley (In re Globe Newspaper Co.),* 920 F.2d 88, 98 (1st Cir. 1990) (citing *United States v. Doherty,* 675 F.Supp. 719 (D. Mass. 1987)). As the First Circuit noted in *Hurley,* in *Doherty* the district court held that the "First Amendment requires disclosure of juror identities, but postpon[ed] disclosure for one week to protect juror privacy." *Id.* Thus, following *Hurley,* judges in this District have held that it is permissible to defer releasing the names of jurors to the media in particular, appropriate cases. *See United States v. Butt,* 753 F. Supp. 44 (D. Mass. 1990) (postponing disclosure for seven days); *Sullivan v. Nat'l Football League,* 839 F. Supp. 6, 7 (D. Mass. 1993) (postponing disclosure for ten days); *see also United States v. Espy,* 31 F. Supp. 2d 1, 2-3 (D.D.C. 1998) (postponing disclosure for seven days).

United States v. Sampson, 297 F. Supp. 2d 348, 348-49 (D. Mass. 2003) (deferring disclosure for seven days).

In the instant case, after a seven-week trial and three days of deliberations, the jurors found the former Speaker of the Massachusetts House of Representatives and a co-defendant guilty of crimes involving public corruption. Jurors have a legitimate interest in having their privacy protected. *In re Globe Newspaper Co.*, 920 F.2d at 93 (citing *Press Enterprise Co. v. Superior Court,* 464 U.S. 501, 510-13 (1984)). When consulted briefly, the jurors expressed a desire to have a short period of time to decompress and to

reflect on whether they wish to say anything to the media.

The media, however, has a countervailing First Amendment interest in access to criminal proceedings, including the identities of the jurors who decided the case. *Id.* This interest is especially strong where, as here, the conduct of public officials is at issue. The court, therefore, must strike a balance between the legitimate competing interests of the jurors and the media. *Id.* at 98.

The convicted defendants have urged the court to delay disclosure of the jurors' identities for five days, until Monday, June 20, 2011. The media requests immediate access to the information. The court concludes that it is most reasonable to give the jurors a single day to begin recovering from the stress of the trial and to think about what, if anything, they wish to say if contacted by the media.

Accordingly, it is hereby ORDERED that:

1. *The Boston Globe*'s request for the names and addresses of the jurors (Docket No. 595) is ALLOWED.

2. A list of the names and addresses of each juror shall be made part of the public record in this case on June 16, 2011, at 11:00 a.m.

/s/ Mark L. Wolf
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 11-2163

UNITED STATES

Appellee

v.

SALVATORE F. DIMASI

Defendant-Appellant

Before

Lynch, *Chief Judge,*
Souter*, *Associate Justice,* Torruella, Lipez, Howard, Thompson and Kayatta, *Circuit Judges.*

ORDER OF COURT

Entered: September 19, 2013

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en

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* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

/s/ Margaret Carter, Clerk

cc: Thomas R. Kiley
William J. Cintolo
Salvatore F. DiMasi
Dina M. Chaitowitz
Kristina E. Barclay
S. Theodore Merritt
John A. Romano
Deirdre A. Roney

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 1:09-cr-10166-MLW-ALL

THE UNITED STATES OF AMERICA

vs.

SALVATORE F. DiMASI, et al

For Jury Trial Before:
Chief Judge Mark L. Wolf

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Monday, June 13, 2011

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5200, Boston, MA 02210
bulldog@richromanow.com

* * *

[31] on them not having numbers, but there is an objection based on a prior objection we made to a witness stipulation signed by defendants going to the jury on the grounds it gives that piece of evidence more weight than all of the other evidence in this case.

THE COURT: I'll check. But didn't I tell you they were going to go back and that's why we

were going to take the signature page off of some of them or one of them?

MR. WEINBERG: Your Honor certainly said you were considering that. I don't know that you made a final ruling. I do think it's a discretionary thing. I don't see any reason for the jury to get the stipulations –

THE COURT: Well, they need the phone numbers, for example, and that's why I thought I said they were going to go back. I'll check and see what I said.

Go ahead.

MR. MERRITT: Well, our position is that we don't care about the defendants' signatures on there, but, we do think the stipulations should go back.

THE COURT: Well, I thought I ruled on this. We'll check.

And one of the exhibits is a DVD, right, so I'll – what's the DVD? Oh, the wedding.

[32] All right. All right. So the DVD player, the government's going to supply a DVD player to them. Okay.

Is there anything else before I take a little time to figure out what my instructions are going to be?

MR. MERRITT: I don't think so.

THE COURT: All right. I'll probably need at least 15 or 20 minutes and then we'll get the jury and see where we go from there.

All right. The Court is in recess.

(Recess, 9:45 a.m.)

(Resumed, 10:35 a.m.)

THE COURT: All right. We've checked the record. On May 10th, I ruled that the telephone stipulation would go back to the jury room as an exhibit with a number, without the signatures, and the rest would only be read to the jury.

So what's the next number?

(Pause.)

THE COURT: So the telephone record stipulation will be 323 and the others will not go back to the jury room. So you'll have to work with Mr. Hohler to make sure he's sending the right one back.

(Exhibit 323, marked.)

[33] THE COURT: Then I've made some revisions along the lines we've discussed in Count 9, the extortion count. I have removed the references to Mr. McDonough as someone who could have received payments for the benefit of Mr. DiMasi with regard to honest services fraud. I'm going to adjust the unanimity requirement for conspiracy to talk about payments to Mr. DiMasi through Topazio or payments to others for his benefit without there trying to sort out – and

I'll tell them that I'll tell them who the others are for the specific substantive counts or goals of the conspiracy. Because Paragraph 14, for example, says it's an object of the conspiracy, that Mr. McDonough can be counted for the Hobbs Act object, but not the honest services fraud object, in my current conception. It will be clear when I get to the substantive counts.

MR. WEINBERG: Would your Honor consider, given the fact that you're narrowing it to Vitale, um, to remind the jury that there is the option of an acquittal if they don't find the evidence beyond a reasonable doubt?

THE COURT: Um, this – I know you'd like me to tell them 50 times instead of 45 times –

MR. WEINBERG: I would.

THE COURT: But it's in there about 45 – I [34] mean, I haven't counted, but it's in there about 45 times.

MR. WEINBERG: Well, it's an important subliminal message, your Honor.

THE COURT: All right. So I'm going to start instructing the jury. I think it's going to take a good amount of time. It's possible I'm going to take a break at some point before I get through it. But we'll start and see how far we get.

All right. Can we get the jury.

(Jury enters, 10:40 a.m.)

THE COURT: Ladies and gentlemen, good morning.

THE JURY: Good morning. (In unison.)

THE COURT: Sorry to have kept you waiting. I've been working all weekend on the jury instructions. There have been messages flying back and forth to the lawyers and we've been discussing them further this morning because I want to try to assure that I give you an accurate and completely balanced view of the law. I'm ready to embark on that. It's going to take a while. And it's possible we'll take a break before I finish instructing you. I'll be trying to mentally take your temperature and also thinking about myself.

I'm going to give you these instructions in three [35] parts. The first part are general instructions essentially along the lines that I would give a jury in any criminal case. The second part will be specific to the charges in this case relating to conspiracy, honest services fraud, and extortion under color of official right. The third part will relate to your deliberations, about how you'll conduct them.

I'm not letting you take any notes. It would be impossible for you to write down everything I'm going to tell you and I want you to listen to it carefully. I can't, at this point, give you a written version of it because I've been changing it as recently as about five minutes ago, but you'll come back and ask me if you have some disagreement or uncertainty about that I told you. You'll write me a note, you'll tell me what

you'd like me to repeat or explain further and I'll do that. I'll tell you that again at the end of the instructions.

With regard to the instructions that apply generally to all criminal cases, for the most part, you should not consider anything I say now – you should not misinterpret anything I say now as a suggestion of what I think your verdict should be. That's entirely up to you. The law permits me to comment on the evidence, but I've chosen not to do that, although I've tailored the case-specific part of the instructions and some of these [36] preliminary instructions to particular evidence or issues in this case.

Your job will be to decide whether the government has proven a defendant guilty on a particular charge beyond a reasonable doubt. You are going to make that decision based on the evidence and the law as I describe it and decide whether the government has satisfied that burden with regard to a particular defendant on each count. You have to know the law to do this. This is what I've been explaining to you. It defines the relevant questions and gives you the standards you need to use to answer the questions.

It's my duty to explain the law to you. I've had a lot of discussion with the lawyers about the law, but if anything they said, in their closing arguments or any other time, sounds different to you than what I'm telling you now, you have to follow the law as I describe it.

You shouldn't single out any one line or one instruction. I'm trying to give you, particularly when we get to the charges in this case, an accurate, complete and balanced view of the law. Consider everything I said. And if there's anything I said to you in my preliminary instructions at the beginning of the case that sounds different than what I'm telling you

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[73] official act. Rather it would be sufficient if the government proves beyond a reasonable doubt a scheme to make a series of payments in exchange for DiMasi performing official actions benefitting Lally and Cognos as opportunities arose or when DiMasi was called upon to do so.

The government also does not have to prove that DiMasi originated the scheme or personally developed every detail of it, nor must the Government prove that the scheme succeeded. It only has to be proven that the defendant you are considering participated in the alleged scheme with the required state of mind.

As a member and Speaker of the House of Representatives, DiMasi was permitted to practice law and to receive fees for referring clients to other lawyers. A payment made or received – I'm sorry. A payment to DiMasi made or received solely for providing legal services or solely as a payment genuinely made for referring a client to another lawyer for legal services is not a basis for a mail or wire fraud charge. Similarly, in this case, it would not be enough if the

government only proves that Cognos and/or Lally made a payment to DiMasi or Vitale only to cultivate a business or political relationship with DiMasi or only to express gratitude for something DiMasi had done.

[74] In addition, any payment to Vitale only to lobby public officials, meaning to advocate positions to public officials or to provide strategic advice to clients seeking public contracts or for business advice, is not a basis for a mail or wire fraud charge. In essence any payment made or received by a defendant solely for one or more lawful purposes is not a basis for a mail or wire fraud charge.

However, people at times work with a mixture of motives. To be more precise, people at times act with a mixture of motives. If the government proves beyond a reasonable doubt a payment made in exchange for an official act, it is not required to prove that this was the only reason for the payment. If the government proves there was a scheme to make and receive one or more payments in exchange for official acts, then it makes no difference if there was also some other lawful motive for giving the payment – giving or receiving the payment such as an expression of friendship or cultivation of goodwill. As long as one purpose motivating the payment was unlawful, a defendant may be convicted of mail or wire fraud.

Official acts are acts by DiMasi personally or through others acting at his direction that used his official powers as a legislator or a Speaker. As a

[75] legislator, DiMasi used his official powers when he cast a vote on a particular piece of legislation. However, a legislator's official acts include more than just his votes, they also include his informal and behind-the-scenes influence on legislation such as any request by DiMasi or by others acting at his direction and on his behalf as Speaker to influence the content of bills and the timing of legislative action.

In addition, DiMasi's official acts include any act intentionally, explicitly or – any act that intentionally, explicitly or implicitly, threatened or promised to use his power concerning the legislative process to take or withhold legislative action in order to persuade the person he was seeking to influence. Mere statements by DiMasi to members of the executive branch are not generally official acts. However, a statement by DiMasi to the Governor or a member of the executive branch, or by others acting at DiMasi's direction and on his behalf as Speaker, would be an official act if you find it was intended to influence what would be included in any legislation proposed by the Governor or that it was intended to convey a threat or a promise that DiMasi would use his powers concerning legislation in an effort to persuade the person he was seeking to influence. In essence, an official act of [76] DiMasi would be an act that either involved the legislative process or intentionally exploited his influence concerning it.

Although McDonough and Vitale are not public officials and do not themselves owe a duty of honest

services to the public, the law prohibits them from devising or participating in a scheme to deprive the public of its right to DiMasi's honest services. If you find that the government has proven beyond a reasonable doubt that McDonough or Vitale devised or participated in a scheme to have one or more payments exchanged for the performance of one or more official acts by DiMasi, McDonough or Vitale may be found guilty.

The government does not have to prove that any scheme actually succeeded or that DiMasi actually took any official act or any payment was actually made to him or for his benefit. What the government must prove beyond a reasonable doubt was that a particular defendant devised or participated in a scheme to exchange one or more payments for DiMasi's performance of one or more official acts.

As I have said, the government must prove beyond a reasonable doubt a scheme to exchange one or more payments for one or more official acts by DiMasi on behalf of Lally or Cognos. To prove such a scheme, the [77] government does not have to establish that DiMasi would not have taken official action as Speaker to promote the acquisition of an Educational Data Warehouse, business intelligence software or performance management software, including Cognos software, without such payments. Nor must the government prove that the executive branch would not have purchased Cognos software in the absence of official acts by DiMasi or that the executive branch paid too much for it and therefore lost money. The

essence of the crimes charged in Counts 2 through 8 is a scheme to deprive the citizens of Massachusetts of DiMasi's honest services rather than a scheme to deprive the Commonwealth of Massachusetts of money. As I explained earlier, the public had a right to DiMasi's honest services and any scheme involving payments made in exchange for his official acts would deprive the citizens of that right and therefore be an element, of mail or wire fraud.

In order to convict a defendant of honest services fraud, you must unanimously agree that the defendant participated in a scheme involving payments to DiMasi through Topazio in exchange for official acts, or involving payments to Vitale in exchange for official acts, or involving both types of payments. You must all agree that the defendant participated in a scheme

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[81] However, the necessary intent must be proven in some fashion for you to find a defendant guilty of mail or wire fraud. As I have stated, the government must not only prove that a particular defendant participated in a scheme to defraud, but also that he did so knowingly, willfully and with intent to defraud the public of DiMasi's honest services and to deceive the public. Even if you find that a scheme to defraud existed, a defendant's participation in it would not be unlawful if he participated without the required intent.

As I said earlier, it's not unlawful for an elected official to practice law and to receive a payment that he genuinely believes is being made only for referring a client to another lawyer. It is also not unlawful for a person to receive a payment he genuinely believes was made only to compensate him for lobbying public officials or for providing strategic advice to clients seeking public contracts or for providing business advice.

In addition, in this case it would not be enough if the government proves only that a defendant genuinely believed that Cognos and/or Lally made the payments at issue only to cultivate a business or political relationship with DiMasi or to express gratitude for [82] something DiMasi had done. In other words, if the defendant knew of any of the payments at issue and had a sincere good faith belief that they were being made only for one or more of these legitimate purposes, he would not be guilty of mail or wire fraud even if that belief was erroneous. A defendant does not have the burden to establish his good faith. The burden to prove both intent to defraud and to deceive the public and therefore lack of good faith as well as the other elements of the crimes charged rests with the government to prove beyond a reasonable doubt.

For Counts 2 and 4, which charge the defendants with honest services mail fraud, the fourth element the government must prove beyond a reasonable doubt is that on or about the date alleged in the indictment, for each particular count, one of the

participants in this scheme either received something in the mail or by private or commercial interstate carrier in furtherance of the scheme or caused something to be mailed or sent by private or commercial interstate carrier in furtherance of the scheme. The mailing does not have to be essential to the scheme or itself be fraudulent. However it must be made as part of an attempt to execute or accomplish the scheme. The defendant you are considering does not have to be personally responsible

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 1:09-cr-10166-MLW-ALL

THE UNITED STATES OF AMERICA

vs.

SALVATORE F. DiMASI, ET AL

For Jury Trial Before:
Chief Judge Mark L. Wolf

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, May 18, 2011

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
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* * *

[32] Mr. McDonough anything?

A. I did.

Q. What?

A. I told him that I was going to have to send him a lobbying agreement because that's the only way I could get this through Cognos legal.

Q. And what did he say?

A. He said, "That's okay. You know, since Mr. DiMasi became Speaker, my client base has grown and having someone else in the Speaker's ear about Cognos doesn't hurt us."

Q. Do you remember him saying anything else about work?

MR. WEINBERG: Once again, your Honor, may I have a continuing objection to this line of questioning?

THE COURT: Yes.

MR. CINTOLO: The same thing for Mr. DiMasi, your Honor.

THE COURT: Yes.

A. Yes, Mr. McDonough said it was imperative that I find something for Mr. Topazio to do to sort of cover our ass if something every [sic] blew up.

Q. Now, Mr. Lally, what was your reason for hiring Mr. Topazio and have Cognos pay him $5,000 per month?

A. To funnel money to the Speaker DiMasi.

[33] Q. And why did you want to do that?

A. To gain favor with the Speaker, to have him help us close software, cut deals, and obtain funding for us.

Q. So did you expect something in return eventually from Mr. DiMasi?

A. I was hoping so.

Q. Did you have any discussions with Mr. McDonough about trying to make software sales in Massachusetts around this time?

A. Yes, I did.

Q. And he was aware of it?

A. Yes.

Q. What steps did you take then to get Topazio on the Cognos payroll?

A. I called up to legal, had them – to Mr. Shone, had them put together a contract that, um, had Mr. Topazio doing some government affairs consulting for us and I tweaked the contract a little bit to include some of the New England states.

Q. Well, let me ask you this. Mr. Shone, he was the vice-president of legal person there?

A. Yes, he was, he was the head of the legal department.

Q. And what did you tell Mr. Shone the – you were hiring Topazio for?

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Chief Judge Mark L. Wolf

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Thursday, May 19, 2011

REPORTER: RICHARD H. ROMANOW, RPR
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[266] Topazio could be another voice in DiMasi's ear and could help on RFPs and contracts." Do you remember saying that?

A. Yes.

Q. Okay. In that meeting with Mr. Talouse, did you say to him that you – strike that.

You understood, did you not, that it was important for the prosecution to know whether or not you ever had a conversation with Mr. DiMasi in which you said to him, "I'm doing this for that." You understand that, right?

A. Yes.

Q. Okay. And do you know whether or not you ever told the prosecutors that?

A. I don't recall.

Q. Now, when you say you don't recall do you mean by that you don't recall having said it or you don't recall whether you did or you did not say it?

A. Neither one.

Q. You will agree with me, will you not, that that is a relatively – not relatively, but that's an important position, correct, that's an important conversation?

A. If I had a conversation with Mr. DiMasi about Topazio?

Q. Yes.

A. Only afterwards.

[267] Q. I'm asking you – I'm asking you again. I just asked you did you ever tell the prosecutors that you had a conversation with Mr. DiMasi in which you said, "I'll do this for that"?

A. (Pause.) No.

Q. Okay. I'm now after December of 2004 and I'm right around the March period, the whole month of March, including the end of March.

In that intervening time did you ever indicate to Mr. DiMasi that you had engaged Steven Topazio?

A. I believe so.

THE COURT: I'm sorry. In March of what year, please?

MR. CINTOLO: 2000 – no, December 2004 to March of 2005.

A. I don't have the dates square in front of me, but I don't know if it was 2004 or 2005, but I had conversations with the Speaker about paying Topazio and getting the check.

Q. I'm trying to be as specific as I can, Mr. Lally, okay?

A. Do you have a document I can refer to?

Q. I'm talking about the first meeting is December of 2004 – will you only agree to something you've seen in a document?

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For Jury Trial Before:
Chief Judge Mark L. Wolf

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Friday, May 20, 2011

REPORTER: RICHARD H. ROMANOW, RPR
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[15] immediately before the Governor puts out House I, okay?

A. I don't know when that time is, but okay.

Q. Okay.

A. When does the Governor put out –

Q. About January of 2006.

A. Okay.

Q. Okay. My question is related to January of 2006. And I ask you, before January of 2006, did you have a conversation with Mr. DiMasi wherein you said to him, "I'm paying Steven Topazio. In exchange for that, because of that, I want you to request the Governor to put the EDW in the budget for 2006"?

A. No.

Q. Thank you. Now, you know, do you not, that the EDW money did not go into the Governor's budget, correct?

A. That's correct.

Q. And you know, do you not, that after that the DOE began to lobby the legislature, meaning the House and the Senate, to see if they could get the funds put in the legislative budget, correct?

A. Yes, I met with the DOE –

Q. Correct, sir?

THE COURT: No, just say what's –

A. Correct.

THE COURT: I suspect that you'd like your [16] testimony to end, right?

(Laughter.)

THE WITNESS: You have no idea.

THE COURT: So it will facilitate that if you listen to the question, say what's necessary to answer it, but don't add anything to explain it, um, that you haven't been asked to explain.

A. Yes.

Q. Okay. Now, I'm directing your attention to that time after the Governor's budget comes out, in or around January, in or around January, until the time that the House budget comes out, that time period, okay?

A. (Nods.)

Q. During that time period did you have a conversation with Mr. DiMasi wherein you said to him, "Mr. DiMasi, I'm paying Steven Topazio. In exchange for that or because of that, I want you to put money in the House budget"?

A. No.

Q. Thank you. And you know the money didn't go in the House budget, the line item didn't go in the House budget at that time, right?

A. No, it didn't.

Q. Okay. Now, you knew, did you not, that after it didn't make the Governor's budget, after it didn't make

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[20] Q. Now I ask you, after you became aware of the earmark, did you have a conversation with Mr.

DiMasi in which you said to him, "Mr. DiMasi, I am paying Steven Topazio. And in exchange for that or because of that I want you to vote down on the request to pass the earmark"?

A. No.

THE COURT: I'm sorry. The request to pass the earmark?

Q. No, the request to remove the earmark.

MR. CINTOLO: Thank you, your Honor.

A. No.

Q. Okay. At the same time that the DOE was working for the continuation of the 5.2 million, the roll-out, the enterprise roll-out of the EDW, you were also working on the enterprise license agreement, correct?

A. We put a plan in place, yes.

Q. Now, the initial – putting that initial plan in place, am I correct in saying that the original – strike that.

You were aware, were you not, that there was an IT bond bill that had been proposed under the Romney administration?

A. Yes, I was.

Q. And you were aware, were you not, that that was for

* * *

[22] but I may have.

Q. Okay. And at the time Bethann Pepoli was the CIO, is that what they called her?

A. The Chief Information Officer, I think. She may have been the deputy at that point. I don't know when she switched over. As a matter of fact I think she was the deputy because Mr. Gutierrez didn't leave until that bond bill didn't pass.

Q. Okay. And while that – while the consideration of that bond bill, the IT bond bill under the Romney administration, while that was under consideration – and it ended in January, correct?

A. I don't know.

Q. The new administration came in, right?

A. I guess so.

Q. And that bond bill didn't pass, did it?

A. Not that I'm aware of.

Q. Prior to January of 2007, did you have a conversation with Salvatore DiMasi in which you said to him, "I'm paying Steven Topazio. As a result of that, in exchange for that, because of that I want you to push to get the IT bond bill under the Romney administration passed"?

A. I never said that because I was paying Topazio, no.

Q. Now, in January of 2007, the Romney administration

* * *