No. 20-50012, 20-50036

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee / Cross-Appellant,
v.

Defendant-Appellant / Cross-Appellee.

Appeal from the United States District Court
for the Central District of California
Hon. Andrew J. Guilford, Presiding
D. Ct.

APPELLANT'S FIRST BRIEF ON CROSS-APPEAL

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee / Cross-Appellant, v. Defendant-Appellant / Cross-Appellee.	Case No. 20-50012, 20-50036 D. Ct. No. 8:18-cr-00018-AG **APPELLANT'S FIRST BRIEF ON CROSS-APPEAL**

Introduction and Issues Presented

I. *Skilling* error.

Skilling v. United States held that 18 U.S.C. § 1346 is unconstitutional unless it is read to "criminalize[] *only* bribery and kickback schemes, *not* failures to disclose a conflict of interest."[1] As a result, "honest services fraud theories other than bribery and kickback schemes are invalid."[2] But in its case against Appellant the government relied heavily on a undisclosed conflict-of-

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[1] *United States v. Garrido*, 713 F.3d 985, 993 (9th Cir. 2013) (emphasis in original) (citing *Skilling*, 561 U.S. 358, 412 (2010)).

[2] *United States v. Wilkes*, 662 F.3d 524, 544 (9th Cir. 2011).

interest theory, and the district court refused to instruct the jury that this was not honest-services fraud. The jury instructions also failed to define "bribes" and "kickbacks" at all, they gave a definition of "intent to defraud" that this Court has already held to be plain error,[3] and the instructions did not otherwise prevent the jury from convicting on an unconstitutional conflict-of-interest theory. Should reversal result?

II. Sentencing error.

The United States Sentencing Guidelines are "clear that the sentencing court must select the 'most appropriate' guideline based on the offense charged in the indictment, not the court's perception of the facts of the case presented at trial."[4] Where the indictment charged that Fannie Mae was a "private corporation," never alleged that Ms. [redacted] was a "public official," and the proof at trial did not show action as a "public official" anyway, was it error to sentence Ms. [redacted] under U.S.S.G. § 2C1.1?

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[3] *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020) (instruction that "[a]n intent to defraud is an intent to deceive *or* cheat" was plain error; a "defendant must intend to deceive *and* cheat.") (emphasis in original).

[4] *United States v. Boney*, 769 F.3d 153, 161 (3d Cir. 2014).

Statement of Jurisdiction and Detention Status

appeals her convictions for two counts of honest-services fraud, in violation of 18 U.S.C. §§ 1343, 1346.[5] The district court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on January 14, 2020.[6] Ms. timely filed her notice of appeal on January 16, 2020.[7] This Court has jurisdiction under 28 U.S.C. § 1291.

Ms. is currently in custody serving her 76-month sentence. Her projected release date is August 2025.[8]

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[5] Clerk's Record (hereafter "CR") at 1; Appellant's Excerpts of Record (hereafter "ER") at 1459.

[6] CR 129; ER 30.

[7] CR 134, ER 29.

[8] *See* www.bop.gov/inmateloc (searching for inmate by name).

Statement of the Case

Ms. [redacted] worked for Fannie Mae. The indictment charged two counts of honest-services fraud for conduct stemming from her employment there. But the government presented two different theories, and two distinct manners and means, as to those charges. One theory, based on alleged bribery and kickbacks, is a cognizable federal offense. *See Skilling v. United States.*[9] The other, based on alleged conflicts of interest and self-dealing, is not. *See Garrido*.[10] From indictment through closing arguments, the government pressed both theories of conviction. If anything, the conflict-of-interest and self-dealing theory predominated, at least as measured by the testimony, exhibits, and arguments introduced at trial.[11] In response, Ms. [redacted] asked for a jury instruction explaining that self-dealing and undisclosed conflicts of interest cannot support a conviction under § 1346.[12] The district court rejected the instruction.[13] It also

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[9] 561 U.S. 358, 409 (2010) ("to preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes only the bribe-and-kickback core of [pre-existing] case law.").

[10] 713 F.3d at 993.

[11] *See* Statement of Facts, *infra*.

[12] CR 71, ER 276.

[13] ER 26.

failed to give any instruction defining bribery and kickbacks,[14] and it gave an instruction on specific intent that has since been deemed plain error by this Court.[15] Capitalizing on the errors, the government argued for conviction using both theories.[16] The jury returned guilty verdicts on two counts of honest-services fraud, but used a general verdict form that failed to specify which of the two theories it credited.[17]

At sentencing, the government sought to sentence Ms. [redacted] as a "public official," even though the indictment never alleged that, and in fact had charged her as an employee of a "private corporation." The district court, over objection, used public-official Guidelines to increase her sentence.

Statement of Facts

I. *Skilling* error: conflict-of-interest theory in the district court.

From grand-jury indictment to verdict, the government alleged that the fraud scheme had two objects: 1) obtaining bribes and kickbacks; and 2) self-dealing in violation of Fannie Mae conflict-of-interest rules and policies. It appears that the

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14 ER 330-334.

15 ER 261. *Cf. United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020) (instruction that "[a]n intent to defraud is an intent to deceive *or* cheat" was plain error; a "defendant must intend to deceive *and* cheat.") (emphasis in original).

16 ER 340-341.

17 CR 81, ER 183.

government has only recently begun to appreciate the *Skilling* error that it created. It will likely now claim that self-dealing and conflict-of-interest were *not* in fact a significant part of its case.[18] But the record tells a different tale. Consequently, a survey of the government's pleadings, statements, evidence, and arguments to the contrary follows.

A. Self-dealing and conflict-of-interest theory in the indictment.

The indictment charged two counts of honest-services fraud under § 1346 and § 1343. Though only three-and-a-half pages long,[19] the indictment included multiple paragraphs alleging conflicts of interest and self-dealing. In the Introductory Allegations, for example, it stated that "Defendant received a salary for her work at Fannie Mae;" and that "*she was not entitled to receive compensation from the sale of Fannie Mae REO properties and was not allowed to purchase those properties for her own personal benefit*."[20] It described "The Fraudulent Scheme" as depriving Fannie Mae of its right to honest services in two ways: [1] "*by approving below-market sales of Fannie Mae REO properties to*

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[18] *See, e.g.*, CR 151; *see also* ER 315 (arguing for the first time in opposing defendant's *Skilling* instruction that bribery and kickbacks were the government's only theory, notwithstanding the indictment, filings, evidence, and previous representations to the court).

[19] Not including forfeiture allegations.

[20] ER 1460 (emphasis provided).

defendant *through intermediaries and alter egos*, and to others, *and by* [2] soliciting and accepting bribes, kickbacks, gifts, payments, and other things of value from real estate brokers and agents, in exchange for official action taken by defendant namely, the assignment of Fannie Mae REO property listings and the sale of Fannie Mae REO properties for below market value."[21]

It then described six alleged manners and means. Fully half of them described self-dealing and conflict-of-interest theories exclusively:

- "Defendant also provided favorable official action at Fannie Mae to herself and other co-schemers by authorizing below-market sales of Fannie Mae REO properties to herself, through intermediaries and alter egos, and to bribing brokers, including at least one property sold to a bribing broker in or about April 2011."[22]

- "Defendant rented the properties that she purchased through intermediaries and alter egos and received the rent payments through those intermediaries and alter egos."[23]

- "In at least one instance, defendant transferred the property that she purchased from Fannie Mae through intermediaries and alter egos to a company that she controlled and received rent payments directly, including rent payments made through at least July 2016."[24]

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21 ER 1460-1461 (emphasis provided).

22 ER 1461.

23 ER 1462.

24 *Id.*

The charging document concluded by alleging two specific wire transfers as Counts 1 and 2, and then included forfeiture allegations for property that Ms. [redacted] allegedly purchased for herself through self-dealing at Fannie Mae.

Thus, while being short for a white-collar indictment (three-and-a-half substantive pages), the charging document was long on allegations of conflict-of-interest and self-dealing. And that was just the beginning.

B. Conflict-of-interest theory: Pretrial filings and statements on the record.

The government's pretrial filings also reflect an undisclosed conflict-of-interest theory.

In its motions in limine, for example, the government wrote:

- "The government alleges that defendant demanded and received bribes and kickbacks from brokers for the opportunity to list Fannie Mae-owned properties. *Additionally, the government alleges that defendant authorized a below-market sale of one Fannie Mae-owned property to herself* and another below-market sale to a broker with whom she demanded bribes."[25]

- "*In addition to receiving these bribes and kickbacks, defendant also purchased for herself (at a below-market price) one of the properties that she was responsible for selling for Fannie Mae, concealing her illegal self-dealing* by using straw buyers and intermediaries (including a broker engaged in the kickback conspiracy and, later, her own sister-in-law)."[26]

- "Defendant was explicitly prohibited from receiving bribes and kickbacks for the work that she did, *and she was also explicitly prohibited from purchasing Fannie Mae-owned properties for herself. She was also*

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[25] ER 1454.

[26] ER 1433.

obligated to disclose any conflicts of interest in her relationships or affiliations with people or entities that did business with Fannie Mae, including any conflicts of interests or affiliations with the brokers to whom she assigned listings and the buyers who submitted offers to purchase the properties that she assigned to brokers to be listed and sold."[27]

- "In violation of these rules and federal law, *defendant engaged in the self-dealing described above* using her position to obtain bribes and kickbacks from brokers to whom she referred real estate listings, *and purchasing at least one Fannie Mae REO property for herself.* Defendant demanded the bribes and kickbacks in exchange for listing assignments and approval of below-market sales, *and she purchased the property that she was responsible for listing through intermediaries and affiliates that she controlled*, selling it first to a Michno-affiliated company and then directing Michno to transfer it to her sister-in-law (who paid with a duffel bag filled with $286,450 in cash from defendant). *The price that defendant paid (through Michno and the sister-in-law) was far less than what other buyers had offered when the property was listed with Fannie Mae*."[28]

The government's trial memo repeated these theories.[29]

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[27] ER 1434.

[28] ER 1435.

[29] *See* ER 1349 ("Between approximately 2011 and 2015, defendant . . . solicited and received hundreds of thousands of dollars in bribes and kickbacks while working as a Fannie Mae foreclosure specialist and . . . 'sales rep.' *Defendant also purchased for herself (at a below-market price) one of the properties that she was responsible for selling for Fannie Mae, concealing her illegal self-dealing by using straw buyers and intermediaries to acquire the property (including a broker engaged in the kickback scheme and, later, her sister-in-law).* *See also* ER 1350 ("Defendant was explicitly prohibited from receiving bribes and kickbacks for the work that she did, *and she was also explicitly prohibited from purchasing Fannie Mae-owned properties for herself. She was also obligated to disclose any conflicts of interest in her relationships or affiliations with people or entities that did business with Fannie Mae, including any conflicts of interests or affiliations with the brokers to whom she assigned listings and the buyers from whom she received offers to purchase the properties*

The joint statement of the case, drafted for the jury in lieu of the indictment, was more of the same:

> According to the allegations in the indictment, the scheme involved bribes and kickbacks that brokers paid, often in cash, to defendant for the performance of her official duties, including the assignment of real estate listings and the approval of below-market sales of Fannie Mae-owned property. *The indictment further alleges that, in at least one instance, defendant purchased a property from herself for herself, at a price that was below market value for the property, and that she used intermediaries to hide her involvement in the transaction.*[30]

The government further clarified the nature of its case during discussion and argument on the record before trial. At a pretrial motions hearing, the government argued that its case was about *both* bribery/kickbacks *and* self-dealing, and it resisted defense efforts to limit it to only the first (proper) theory of prosecution.[31]

At another hearing, the government told the Court that "the defendant is charged with essentially *self-dealing* honest services fraud. She -- part of the crime

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that she assigned to brokers."). "In violation of these rules and federal law, defendant engaged *in the self-dealing described above and* used her position to obtain bribes and kickbacks from brokers in exchange for referring real estate listings and approving below-market sales." *Id.*

[30] ER 1372.

[31] *See* ER 1383 (Government: "There's a schedule from Fannie Mae, the defense objects on relevance and 403 grounds. *I think wants to limit the government's evidence to bribes and kickbacks.* I think Your Honor is aware of what the case is about . . .") (emphasis provided).

was signing up all her relatives to get the commissions. That's part of the crime."[32] The government argued that evidence "is relevant to the government's proof that she was *self-dealing* by purchasing this property for herself at a far below-market price."[33] The government also framed the crime as "undisclosed conflicts of interest"—which again, is different from a bribe or a kickback: "Approximately 200 properties to her cousin. Again, the conflict of interest was not disclosed. Her cousin earned approximately $1.3 million on those properties."[34]

Thus, in arguing for the admission of evidence, the government repeatedly argued that "the crime" included "self-dealing." It never proposed limiting instructions nor denied that its theory of the case included self-dealing and undisclosed conflicts-of-interest as an object, or the manners and means, of the charged conspiracy.

C. Opening statement and conflict-of-interest theory.

The case proceeded to trial. The government's opening, again, described both facets of its case: alleged bribes/kickbacks on the one hand, and self-dealing on the other. "Between 2010 and 2015, defendant worked as a sales representative

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[32] ER 1394.

[33] ER 1404.

[34] ER 1390.

at Fannie Mae. During that time, defendant solicited and received hundreds of thousands of dollars in kickbacks and bribes from real estate brokers, *and she also sold at least one Fannie Mae-owned property to herself*."[35] It continued: "You will hear that Fannie Mae employees, including the defendant, were not permitted to take gifts or cash in exchange for doing their job. *They were also prohibited from purchasing properties from Fannie Mae*."[36] The opening did also preview supposed evidence that two cooperating witnesses provided bribes and kickbacks to defendant.[37] But it also continued to describe conflicts of interest: "Defendant assigned many of her own Fannie Mae properties to those same relatives. She -- she never told Fannie Mae that she was assigning hundreds of properties to family members. Now over the course of this trial, you will also hear evidence that defendant used her position at Fannie Mae to approve the sale of a Fannie Mae-owned property to herself, and that she concealed that she was the purchaser. That is the Vailetti property located in Sonoma, California."[38]

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35 ER 1021 (emphasis provided).

36 *Id*.

37 ER 1022-1023.

38 ER 1023-1024. *See also* ER 1025 ("And the charges related to defendant violating that trust by engaging in a scheme to take bribes and kickbacks *and to sell the property to herself*.") (emphasis provided).

The government summed it up thusly: "Based on this conduct, defendant is charged with two counts of honest services wire fraud. As a Fannie Mae employee, defendant owed Fannie Mae a duty to act in a trustworthy and honest manner. *And the charges related to defendant violating that trust* by engaging in a scheme to take bribes and kickbacks *and to sell the property to herself*."[39]

D. Witnesses and conflict-of-interest theory.

Witness testimony also demonstrated the importance of self-dealing and conflict-of-interest theories in the government's case.

1. Fannie Mae Supervisor Brandon Lawler.

The government's first witness was Brandon Lawler, a Fannie Mae supervisor.[40] He explained that part of Ms. [redacted] job was to select the brokers to whom Fannie Mae REO listings would be assigned,[41] and he offered the conclusion that "brokers [including Ms. [redacted] . . have fiduciary duties to Fannie Mae."[42]

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[39] ER 1025 (emphasis provided).

[40] ER 1033.

[41] ER 1053.

[42] ER 1056.

Lawler introduced evidence, including government's exhibit 201, showing that Ms. [redacted] had been trained by Fannie Mae on various internal rules and restrictions.[43] He specifically highlighted portions of a code of conduct that dealt not with bribery or kickbacks, but with *conflicts of interest.*[44]

Similar testimony followed, explaining that self-dealing or dealings benefitting family was forbidden:

> Q. What about the first bullet point, what does that communicate to Fannie Mae employees?
>
> A. That you're not able to use your Fannie Mae position for personal gain or to, you know, kind of further your own business.
>
> Q. And the second bullet point?
>
> A. Similar to the first, that you can't use Fannie Mae property or information for personal benefit or benefit of family.[45]

He continued:

> Q. And can you give us examples of the concerns that Fannie Mae had about a Fannie Mae employee using his or her position for personal gain or the benefit of the family member?
>
> A. Well, it's a potential conflict of interest. For example, if you're -- if you have a family member that does repair work and they're a Fannie Mae vendor, then you may be

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[43] ER 1058.

[44] *See, e.g.,* ER 1060 ("Q: What does . . . Section 6 discuss? A. *Avoid conflicts of interest.*")

[45] ER 1061-1062.

in a position where you approve repair bids on a property that may be a conflict if the family member owns that business or works for that business.

Q. And the last bullet point, the sixth bullet point mentions vendors. So the same, giving one Fannie Mae vendor an inappropriate advantage, so was the circumstance you just discussed, would that be also violating that last bullet point?

A. Right. If you give a repair contractor more work than somebody else because they were somehow affiliated or related.

Q. And what about brokers? Are brokers also vendors?

A. Yes.

Q. So giving listings to a broker because they're your cousin, would that be prohibited?

A Yes.[46]

Time and again, the government elicited specific testimony about conflicts of interest, rather than bribery or kickbacks:

Q. . . . . What were the rules at Fannie Mae regarding conflicts of interest?

A. The rules of conflict of interest where you were to avoid conflict of interest or potential conflicts of interest or appearance of conflicts of interest and had an obligation to, you know, raise potential conflicts of interest for ethics groups to review.

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[46] ER 1062.

Q. And employees were allowed to have undisclosed conflicts of interest with the vendors including the brokers they work with?

A. No.[47]

While there was some testimony about policies addressing bribes and kickbacks,[48] the discussion overwhelmingly centered on conflicts of interest and self-dealing:

A. *There's a kind of direct conflict of interest*. I mean, as a sales rep you're managing and making decisions to approve the terms of the sale with the express intent to maximize the sales price for Fannie Mae. And if you're the purchaser of the property, *your interest is in conflict with that*.

Q. This part -- just briefly, I want to stop on Page 3 of this document and blow up the portion below the part that says "Our code of conduct provides guidance and avoiding conflicts as follows." This statement about "We make business decisions based on the best interest of Fannie Mae" and then the rest that follows, what kind of ethic is this trying to communicate to Fannie Mae employees?

A. *That they're to put Fannie Mae's interest first and kind of their work and their decisions.*

Q. And by the way, why have these kinds of code of conduct and policies for sales reps, for example?

A. To protect Fannie Mae. You know, there's risks of those *direct conflicts of interest. There's also the risks of*

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47 ER 1063.

48 ER 1067.

> *possible conflicts of interest or appearances of conflicts of interest.*[49]

Through Lawler, the government moved in a host of exhibits reflecting Fannie Mae conflict-of-interest and self-dealing policies.[50]

The drumbeat continued, with questions about steering business to family members described in conflict-of-interest terms as well.[51] And even when

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[49] ER 1068.

[50] *See, e.g.,* ER 1059 (Ex. 203 code of conduct, highlighting conflict of interest provisions); ER 1064 (Ex. 204, same); ER 1065 (Ex. 205, same); ER 1066 (Ex. 206 (2012 conflict-of-interest policy); ER 1069 (Ex. 207, 2013 conflict of interest policy). *See also* ER 1074 (discussing Ex. 216, Training Manual ("Q. What does it say about whether Fannie Mae employees were able to purchase the properties? A. They're not able to purchase Fannie Mae REO properties")); ER 1075-1076 (discussing Ex. 210, REO Sales Guide ("Q. . . . what kinds of conflicts of interest are being discussed here? A. A broker agent representing the related property – party that they may be affiliated with either family relationship or business relationship. A broker agent allowing a related party to perform services, like repairs or maintenance items on a property or participating in flipping Fannie Mae REO properties")); ER 1078 ("Q. One last part of this one, Page 5. Were brokers allowed to themselves buy properties from Fannie Mae without disclosing that it was them purchasing the property? A. No. . . . if you're a listing broker, and if you had interest in purchasing a property that you were assigned to, that you had to inform Fannie Mae, so that Fannie Mae can make the determination, you know, from there"); ER 1080 ("Q. And then Page 6, this prohibition or special rules applying to purchases of Fannie Mae REO properties by brokers, did that change? A. No.").

[51] *See* ER 1112-1113 (describing failure to disclose family relationship on broker application, and that "those questions are asked to identify a potential *conflict of interest*. And then it would have been the business process to review that *potential conflict*. And then from there decide whether or not to proceed or to

discussing bribes and kickbacks, the government's questions revealed a clear distinction between "bribes and kickbacks" on one hand, and "conflicts of interest" on the other.[52]

Again and again, the evidence came down to conflicts of interest more than bribery or kickbacks.[53] And substantively, Lawler testified that Ms. [redacted] purchased a property through an intermediary (her sister-in-law) without disclosing her interest in it.[54]

On redirect, the government went back to the well once more:

> Q. So in there, there's the suggestion that defendant was allowed to sell Fannie Mae property to her brother. Was defendant allowed to sell Fannie Mae property to her brother without disclosing the conflict?
>
> A. Without disclosure, no.
>
> Q. In other words, is it a conflict of interest for defendant to sell a Fannie Mae property to her brother?

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potentially put in some restrictions or other acts to try to eliminate or mitigate or resolve any *potential conflict*.") (emphasis provided).

[52] *See* ER 1112-1113; *see also* ER 1116.

[53] ER 922-923 ("Q. I think we went over this this morning, but was defendant allowed to purchase Fannie Mae REO properties for herself? A. No. Q. Was she allowed to purchase properties through family members? A. No. Q. Any particular concerns with her purchasing properties that she was actually responsible for listing? A. Yes. Q. Why? A. It's a conflict of interest.").

[54] ER 930-931.

A. It's a conflict of interest, yes. It should have been disclosed for review.

Q. And what about her sister-in-law? Is that also a conflict of interest for defendant to sell Fannie Mae property to her sister-in-law?

A. Yes.[55]

2. *Cooperator Kris Saenz.*

Cooperating witness Kris Saenz—a Fannie Mae employee who had pleaded guilty and was testifying hoping for sentencing benefits[56]—testified that he was part of a bribery scheme, and that the scheme involved Ms. [redacted] But he, too, introduced significant evidence on a conflict-of-interest and self-dealing theory.

Saenz testified that he worked with Ms. [redacted] that they began spending time together outside of work as friends, and that they discussed receiving bribes and kickbacks from listing agents on properties.[57] He claimed that he and Ms. [redacted] discussed that certain agents would pay cash for listings; that they discussed an REO Sales rep who went to prison for kickbacks and

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55 ER 983-984.

56 *See, e.g.,* ER 882-884 (admitting that the government spared Saenz from a host of 10- to 30-year offenses with his cooperator agreement).

57 ER 1007.

bribes;[58] and ultimately that Ms. personally facilitated bribes and collected money for him.[59] But in terms of objective evidence, Saenz introduced deposit slips for bribe money that *he—not Ms.* had received from another cooperating witness.[60] The testimony about receiving bribes was thus essentially out-of-court statements that were otherwise uncorroborated.[61]

But the government used Saenz as a quasi-expert witness on conflicts of interest as well. He discussed how one could buy Fannie Mae properties at a discount and "flip" them for profit,[62] and the mechanics of driving down price or manipulating deals to fall out of escrow.[63] And he explicitly described certain conduct as "conflict[s] of interest":

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[58] ER 1011. He also testified that he received bribes from Ms. brother-in-law. ER 841.

[59] ER 855.

[60] *See, e.g.,* ER 831 (introducing Exhibit 320, deposit slips for Saenz's bank account). *See also* ER 835 (Exhibit 254, same).

[61] *See* ER 842 (admitting that there was no text or email evidence to corroborate the defendant's role in any bribes). *See also* ER 843 ("Q. Okay. And I just want to make sure that you don't – do you have any text messages with the defendant that . . . relate to your testimony? A. No. Q. Or any e-mails? A. No.")

[62] ER 846-847.

[63] ER 848-855.

Q. By the way, were Fannie Mae sales reps allowed to purchase Fannie Mae properties?

A. No.

Q. In terms of levels of prohibition, how prohibited was this?

A. It was the cardinal sin of working at Fannie Mae. They told you not to buy properties and flip them. They had trainings about it, and you were not to purchase properties yourself. *That was a huge conflict of interest.*[64]

Thus, self-dealing and conflict-of-interest evidence was the stronger evidence that this witness offered.

Moreover, cross-examination revealed that testimony about Ms. [redacted] providing bribe money was newly minted for trial. He was repeatedly impeached by omission:[65]

Q. During none of those phone calls did you say that [redacted] [redacted] brought you cash in a floral bag like you told us today, correct?

A. Correct.

Q. During none of those phone calls did you say that [redacted] [redacted] gave you the phone number to her brother-in-law in order to receive kickbacks, right?

A. Correct.

Q. During none of those phone calls did you tell Special Agent Shields and Ms. Quinn that [redacted] [redacted] had demanded a 30 percent referral fee from you for a property that she had referred to you, right?

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[64] ER 858.

[65] ER 868, 872-873.

A. Correct.[66]

3. Witnesses Regarding the Vailetti Property.

After calling a witness who was aware that one of the government's main witness was engaged in bribery (but otherwise had no information about Ms. █████ herself),[67] the government called several witnesses related to the property charged in Count 1, described at trial as the "Vailetti property." Essentially, the government alleged that Ms. █████ sold this property to herself in violation of Fannie Mae's rules against conflicts-of-interest and self-dealing.

David Dikinis testified that he had been interested in the Vailetti property as a buyer, and that he complained to Fannie Mae about improprieties in the sales process when his bid was not accepted.[68] On cross, he acknowledged that his offer

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[66] ER 880.

[67] Douglas Clark testified that he worked for cooperator Peter Michno, handling initial maintenance and such for his listed properties. ER 729. He testified that Michno told him directly that he obtained listings from Fannie Mae by paying kickbacks, cash and gifts, to sales managers. ER 731. While he remembered being given an envelope containing about $10,000 in cash, and meeting someone who worked for an asset manager in Fresno, ER 732, he did not identify Ms. █████ in court, or a photo lineup, as that person. ER 737-738. In a prior statement, he stated only that the woman was of Asian descent. ER 741. Later testimony demonstrated that this person was not in fact Ms. █████ *See* ER 657 (cooperator identifying that woman as a different Fannie Mae employee).

[68] ER 749-757.

was $67,000 under the asking price,[69] and that while his offer was supposed to be submitted through the website, he later learned that it never was.[70]

Jocelyn Olario was Ms. [redacted] sister-in-law.[71] She identified various brokers and agents as relatives of hers and of Ms. [redacted][72] She testified that her name was listed on the Vailetti property as a favor to Ms. [redacted][73] that Ms. [redacted] had described Vailetti as an investment property for herself;[74] and that Ms. [redacted] brought approximately $286,000 in a duffel bag to the bank to obtain a cashier's check for the down payment on the property.[75] Ms. Olario also testified that the property was not for her benefit, but was essentially Ms. [redacted] own self-dealing. Specifically, she received rental money from the property and then passed it on by check.[76]

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69 ER 762.

70 ER 763.

71 ER 803.

72 ER 805.

73 *Id.*

74 *Id.*

75 ER 807-808.

76 ER 607. She also testified that she did not pay taxes, handle any of the management, or perform maintenance on the property. ER 610.

4. Cooperator Peter Michno.

Cooperator Peter Michno testified that he worked in real estate, and learned that to get listings for Fannie Mae, he needed to be part of an approved broker network.[77] He claimed that Ms. [redacted] began to accept bribes from him,[78] and he moved in a spreadsheet that he claimed to have maintained to track those payments,[79] though there was no extrinsic evidence corroborating those payments or the timing of when the spreadsheet was created. Ultimately, he stated that he paid Ms. [redacted] several hundred thousand dollars in kickbacks and bribes,[80] and that he paid others, including Kris Saenz.[81]

But he provided at least as much conflict-of-interest evidence. He testified that Ms. [redacted] began sending business to another broker, and that he was upset when he learned that she was [redacted] cousin.[82] He testified at length about the Vailetti property, which again, was a conflict-of-interest theory.[83] Once

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77 ER 625.

78 ER 633-637.

79 ER 639.

80 ER 646.

81 *Id.*

82 ER 667.

again, the government introduced extensive testimony about the propriety of self-dealing at Fannie Mae:

> Q. And so you said this was a property that the defendant wanted to purchase for herself. But who was the Fannie Mae sales rep responsible for this property?
>
> A. [redacted]
>
> Q. And so were sales reps at Fannie Mae allowed to buy properties for themselves?
>
> A. Not at all, no.[84]

He described his involvement with that property simply as "a favor" to facilitate [redacted] own self-dealing:

> Q. So why did you make up fake people and put them into the listing history to submit offers on HomePath for them?
>
> A. I did that because [redacted] asked me as a favor to do that for her so she could purchase that home.[85]

The evidence also suggested that Michno's testimony should be taken with caution. In addition to being a cooperator testifying for benefits, Michno was also suffering from financial problems, marital problems, alcoholism, and opioid

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[83] *See, e.g.*, ER 687-688 ("She called me and asked for my help in putting in another kind of ghost offer on that property because she wanted to purchase it for herself.").

[84] ER 688.

[85] ER 692. Michno continued to describe the Vailetti property in his testimony the following afternoon. *See* ER 506-516.

addiction during the relevant period of time.[86] He was forced to admit sending threatening and extortionate emails to witnesses, stating things like: "I have this angle and also Fannie Mae. You both ignore me so it creates a mission for me to destroy you both for acting like I'm crazy."[87] Indeed, he admitted that he repeatedly tried to extort Fannie Mae employees,[88] and that he threatened them by phone and text.[89] He also demanded immunity and time-served deals from the government—threating that otherwise, he was "going to the press."[90]

Cross-examination revealed even more impeachment. He admitted that he had perjured himself at a superior court hearing on a restraining order.[91] He acknowledged that he was disgruntled about being discontinued from the Fannie Mae broker network.[92] And he admitted that he extorted a subsequent employer, Peach State roofing, to pay him cash or that he would expose them for using illegal

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86 ER 669-670.

87 ER 672.

88 ER 676.

89 ER 675.

90 ER 678.

91 ER 532.

92 ER 540.

labor.[93] Ultimately, as with cooperator Saenz, the evidence showed that Michno avoided prosecution on a variety of crimes with higher statutory maximums when he agreed to be a government witness.[94]

5. *Case agent James Shields.*

The government's last witness was agent James Shields. After testifying about Fannie Mae generally, his testimony related almost entirely to the Vailetti property—the conflict-of-interest purchase—including a currency transaction report for cash used for the down payment,[95] corporate documents reflecting Ms. [redacted] ultimate interest in the property,[96] and the fact that Ms. [redacted] appeared on documents in the property-manger's file[97] and property taxes for the property.[98]

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[93] ER 543.

[94] ER 559.

[95] ER 402.

[96] ER 403.

[97] ER 414.

[98] ER 415-416.

E. Exhibits and conflict-of-interest theory.

The government's exhibit list[99] also demonstrates that its documentary evidence overwhelmingly addressed a conflict-of-interest / self-dealing theory, as opposed to bribery and kickbacks.

The exhibits were organized into nine categories: summary exhibits; corporate documents; "property 1"; "property 2"; Fannie Mae records; "Peter Michno" exhibits; "Rowena Frick Exhibits"; "Aileen Pila" exhibits; and miscellaneous.

There were three summary exhibits, and two of those three (Ex's 1 and 3) dealt exclusively with the Vailetti property that Ms. [redacted] bought for herself in violation of self-dealing rules.[100]

"Corporate documents" were comprised of the statements of information for three companies, "Kini Lani, LLC," which owned the Vailenti property; LAH, LLC, which bought the Vailenti property initially; and Sanctify Inc., which was in the chain of title for the other property.[101]

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[99] CR 76, ER 184.

[100] ER 189.

[101] *Id.*

"Property 1" documents all pertained, by definition, to the Vailetti Drive property that Ms. [redacted] allegedly self-dealt to herself. Twenty-four different exhibits fell into this category.[102]

The Fannie Mae documents included evidence of codes of conduct and conflict-of-interest policies and REO Sales Guide—all of which dealt heavily with conflicts of interest and self-dealing.[103]

And finally, the government also introduced seven "Peter Michno" documents,[104], two "Rowena Frick" exhibits,[105], two Aileen Pila exhibits,[106], and five miscellaneous exhibits.[107] At best, those documents pertained to both conflicts-of-interest and bribery simultaneously.

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[102] ER 190-193. In contrast, the government admitted five exhibits for the other property. ER 194-195.

[103] *See* Argument, *infra*, at I.B *et seq*.

[104] ER 197-202.

[105] ER 202.

[106] ER 203.

[107] ER 204-205.

F. Jury Instructions: the district court denies a *Skilling* instruction that conflicts of interest and self-dealing alone cannot support honest-services fraud.

In light of all of this evidence, the defense proposed a jury instruction consistent with *Skilling v. United States.* "This is regarding honest services fraud," the defense attorney explained, "the jury should be told that honest services fraud does not include liability for conflict of interest or undisclosed self-dealing. It only involves [bribery and] kickbacks."[108] Ms. offered the following instruction:

CONFLICT OF INTEREST AND/OR SELF-DEALING IS NOT HONEST SERVICES FRAUD

> Alleged evidence [of] a conflict of interest and/or self-dealing is not honest services fraud. Honest services fraud, in addition to other elements, must involve a bribe or a kickback.
>
> In addition to the other elements of the charges, if the jury is not unanimous as to whether the government proved beyond a reasonable doubt that the defendant received or sought a bribe or kickback as to each count, then it is your duty to find the defendant not guilty as to that count.[109]

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108 ER 498.

109 ER 276.

Counsel explained that the language proposed was an "accurate and correct" statement of law.[110] He asked for the jury to be instructed that "conflict of interest and undisclosed self-dealing are not sufficient [to prove] honest services fraud."[111] Trial counsel observed that the language in the proposed jury instruction came directly from the commentary in the Ninth Circuit's model jury instructions.[112]

Ms. attorney explained that because the government had presented evidence at trial tending to show both conflict of interest and self-dealing, the jurors needed to be told these did not constitute honest services wire fraud.[113] The government opposed this instruction.

In arguing against it, the government claimed that the language was an incorrect statement of law. When the trial court pushed back on that plainly

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110 *See* ER 313.

111 *Id*.

112 *Id*. And counsel was correct. The Comment to 8.124 WIRE FRAUD (18 U.S.C. § 1343) states, "Undisclosed conflicts of interest, or undisclosed self-dealing, is not sufficient." *See* Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, 2010 ed.

113 *See* ER 314 ("And so in the particular circumstances of this case, given the numerous exhibits and testimony that the government has put forward, this needs to be clarified to the jury. Because otherwise, they're going to think that conflict of interest and undisclosed self-dealing is enough to convict her.").

incorrect premise,[114] the government argued—for the first time ever—that conflicts of interest and self-dealing were somehow *not* part of its theory of prosecution.[115]

Ultimately, the trial court sided with the government, stating that "I believe the Instruction 8.123 provides more than enough ammunition to make the argument in closing argument that the defense is now asserting."[116] The district court did not appear to consider, however, that it was also leaving the government with "more than enough ammunition" to make arguments that the Supreme Court held to be unconstitutional in *Skilling*.

Ultimately, the Court gave the following instruction on the elements of the offense:

> "The defendant is charged in the Indictment with two counts of wire fraud involving the deprivation of the right to honest services in violation of 18 United States Code '—which we call U.S.C. —' Sections 1334 [sic] and 1346. In order for a defendant to be found guilty of these charges, the government must prove each of the following elements beyond a reasonable doubt:

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[114] ER 315.

[115] *Id.* ("Well, here I submit the government's case is not based on undisclosed conflicts of interest . . ."). *See also id*. ("The government's case here is that defendant did take bribes and kickbacks in exchange for the performance of her services . . . .").

[116] ER 26.

> First, the defendant devised or knowingly participated in a scheme or plan to deprive Fannie Mae of its right of honest services;
>
> Second, the scheme or plan consists of a bribe or kickback in exchange for the defendant's services. The exchange may be express or may be implied from all the surrounding circumstances;
>
> Third, the defendant owed a fiduciary duty to Fannie Mae;
>
> Fourth, the defendant acted with the intent to defraud by depriving Fannie Mae of its right of honest services;
>
> Fifth, the defendant's act was material; that is, it had a natural tendency to influence or was capable of influencing a person's or entity's acts."[117]

And other instructions exacerbated the problem. They also:

- stated that the countless Fannie Mae policies brimming from the government's exhibit binders "*may or may not* also violate federal criminal law, which is what applies here and what I am instructing you about now."[118]
- failed to give any definition of "bribe" or "kickback," and did not explain that "in exchange for defendant's services" required at least an implied *quid pro qu*o arrangement in this context;[119] and,

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[117] ER 331-332. The elements also included the interstate wire element and a definition of fiduciary that are not at issue in this appeal and thus not reproduced here.

[118] ER 257.

[119] *Id.*

- instructed that "[a]n intent to defraud is an intent to deceive *or* cheat"[120]—a definition that this Court has already squarely held to be plain error.[121]

G. Closing argument regarding conflict-of-interest theory and a general verdict.

Unfettered by a *Skilling* instruction, the government argued—more than a dozen times—that self-dealing or violating conflict-of-interest policy were proof of guilt of honest-services fraud. The following are excerpts from the government's closing and rebuttal arguments:

- "She was not allowed to use her position for her own personal gain. You saw policies and procedures on this, conflict of interest policies that Fannie Mae had . . . ."[122]
- "She allowed her greed and her desire for personal profit to take precedence and priority over her duty of loyalty to Fannie Mae."[123]
- "she owed a duty of loyalty and a fiduciary duty to Fannie Mae."[124]
- "she sold a property to herself as part of the bribery scheme."[125]

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120 ER 261.

121 *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020).

122 ER 341.

123 ER 342.

124 ER 343.

125 ER 340-341.

- "she was not allowed to use her Fannie Mae position to further her own personal business activities."[126]

- "She's not allowed to use Fannie Mae property or information for her own personal benefit or the benefit of a family member."[127]

- "to be able to get properties for themselves"[128]

- "She approved below-market deals for herself"[129]

- "And she was entrusted with these duties and responsibilities to exercise and perform them, as *you saw in all of the conflict of interest policies and codes of conduct*, to perform them with the utmost honesty, forthrightness."[130]

- "She abused her position as a Fannie Mae sales rep when she decided to purchase a property for herself for less than it was worth and reject those offers by real investors who are trying to purchase the property for much more and then concealing the fact that it was really her who was buying the property."[131]

- "The evidence shows that defendant received training on Fannie Mae policies. She knew she couldn't sell properties to herself."[132]

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126 *Id.*

127 ER 343-344.

128 ER 348.

129 ER 361.

130 ER 363 (emphasis added).

131 ER 380.

132 *Id.*

Thus, even when government tacked on the words "bribery scheme,"[133] it argued unmistakably that conflicts of interest or self-dealing also conferred liability under § 1346.

The jury received a general verdict form. It did not differentiate between the allegations of bribery and undisclosed self-dealings.[134] After the government's arguments, and in absence of *Skilling* jury instructions, the jury returned general guilty verdicts on both counts.[135]

II. Sentencing.

At sentencing, the government recommended that Ms. [redacted] be sentenced under U.S.S.G. § 2C1.1 as if Fannie Mae was a "government agency or program," and that Ms. [redacted] sentence should be increased for being a "public official."[136] Neither allegation was pleaded in the indictment nor reflected in the verdict form. Ms. [redacted] objected to both characterizations, and maintained that the regular fraud guidelines, § 2B1.1, should apply instead.

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133 *See e.g.* ER 366 (arguing that Ms. [redacted] "sold the property to herself for way below market value in connection with this bribery scheme.").

134 *See* ER 183.

135 *Id.*

136 CR 121; ER 149.

The district court disagreed, sentencing Ms. [redacted] to 76 months custody.[137]

Summary of the Argument

Both counts of conviction should be reversed and remanded for a new trial. *Skilling v. United States* "held that § 1346 criminalizes *only* bribery and kickback schemes, *not* failures to disclose a conflict of interest."[138] After this watershed holding, "honest services fraud theories other than bribery and kickback schemes are invalid."[139] But the indictment, the pretrial pleadings, and the evidence and argument at trial revealed heavy reliance on an alleged theory of undisclosed self-dealing and conflicts of interest. Despite a requested jury instruction that accurately stated the law, the district court refused to tell the jury that self-dealing and conflict-of-interest were *not* honest-services fraud, and it allowed the government to argue vigorously that they *were.*

Reversal is the only appropriate remedy for three related reasons. First, the jury might well have convicted on an unconstitutional theory of prosecution, and it

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[137] *See* ER 30.

[138] *United States v. Garrido*, 713 F.3d 985, 993 (9th Cir. 2013) (emphasis in original) (citing *Skilling*, 561 U.S. 358, 412 (2010)).

[139] *United States v. Wilkes*, 662 F.3d 524, 544 (9th Cir. 2011).

is impossible to prove harmless error given the general verdict form.[140] Second, where there is a "wholesale failure to give an instruction," the Court "must reverse if the evidence supports giving the instruction," meaning that "a criminal defendant is entitled to jury instructions related to a defense theory so long as there is any foundation in the evidence."[141] And third, the instructions as a whole did not remedy these errors: the specific-intent instruction has since been deemed plain error by *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020); the instructions failed to define either "bribes," "kickbacks," or the requirement of a "quid pro quo;" and the government retained the unfettered ability to argue a theory of the case that is unconstitutional as a matter of law.

Alternatively, Ms. [redacted] sentence should be reversed, and her case remanded for resentencing. The Guidelines are "clear that the sentencing court must select the 'most appropriate' guideline based on the offense charged in the indictment, not the court's perception of the facts of the case presented at trial."[142] Here, the indictment charged that Fannie Mae was a "private corporation," it never

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140 *See United States v. Garrido*, 713 F.3d 985, 993 (9th Cir. 2013) (reversing on similar facts); *Yates v. United States*, 354 U.S. 298 (1957) (reversal necessary where it is impossible to tell that conviction was not based on unlawful theory).

141 *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014) (internal quotations and citations omitted).

142 *United States v. Boney*, 769 F.3d 153, 161 (3d Cir. 2014).

alleged that Ms. [redacted] was a "public official," and the proof at trial did not show action as a "public official" anyway. For these reasons, it was error to sentence Ms. [redacted] under public-official Guidelines. A remand for resentencing is thus appropriate even if the convictions stand.

Argument

I. The jury instructions, evidence, and argument permitted Ms. [redacted] to be convicted on a theory of honest-services fraud that is unconstitutional after *Skilling v. United States.*

A. Standard of review.

This Court reviews *de novo* whether jury instructions omit or misstate elements of a statutory crime.[143] Whether instructions adequately cover a defendant's proffered defense is also reviewed *de novo*.[144]

B. On these facts, it was reversible error to fail to instruct the jury that self-dealing and undisclosed conflicts of interest do not constitute honest-services fraud under § 1346.

1. *A conviction based on self-dealing or undisclosed conflicts of interest, rather than bribery and kickbacks, is unconstitutional after Skilling.*

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143 See *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010).

144 See *United States v. Kleinman*, 859 F.3d 825, 841 (9th Cir. 2017). *See also United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014) ("When there is a question whether the district court's instructions adequately presented the defendant's theory of the case, the district court's denial of a proposed jury instruction is reviewed *de novo*.") (internal punctuation omitted).

Congress enacted 18 U.S.C. § 1346 in 1988, defining the term "scheme or artifice to defraud" in federal fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services." Following this enactment, federal courts interpreted § 1346 to encompass a broad swath of conduct, and to criminalize a wide variety of acts.[145]

That changed in 2010. In *Skilling v. United States*, 561 U.S. 358 (2010), "the Supreme Court limited the reach of § 1346."[146] *Skilling* "held that § 1346 criminalizes *only* bribery and kickback schemes, *not* failures to disclose a conflict of interest."[147] After *Skilling*, "honest services fraud theories other than bribery and kickback schemes are invalid."[148] In fact, broader interpretations of § 1346 are not just impermissible—they are *unconstitutional.*[149]

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[145] *See, e.g., United States v. Walker*, 490 F.3d 1282, 1297 (11th Cir. 2007) (describing "[t]he scope of conduct covered by the honest services mail fraud statute [as] extremely broad").

[146] *United States v. Garrido*, 713 F.3d 985, 993 (9th Cir. 2013).

[147] *Id.* (emphasis in original) (citing *Skilling*, 561 U.S. at 412).

[148] *United States v. Wilkes*, 662 F.3d 524, 544 (9th Cir. 2011).

[149] *See United States v. Rodrigues*, 678 F.3d 693, 695 (9th Cir. 2012) ("18 U.S.C. § 1346 . . . is limited to conduct that encompasses 'bribes and kickbacks,' because any broader construction would be *unconstitutionally vague*.") (emphasis provided).

United States v. Garrido shows this rule in action, and demonstrates why reversal is required here. In *Garrido*, a local public official and a businessperson were both convicted of honest-services fraud. The public official received actual bribes and kickbacks: that is, "portions of the city's money paid to [co-conspirator's] companies was funneled [back] to . . . friends and family."[150] The public official also accepted things of value for steering contracts to the businessperson—lucrative "consulting" payments, payments of copying bills, and a percentage of awarded contracts.[151] But while ample evidence of bribery existed, the jury instructions did not limit the defendant's criminal liability to bribes and kickbacks only: they "allowed a conviction where 'the official acts or makes his decision based on the official's own personal interests, such as accepting a bribe, taking a kickback, *or receiving a benefit from an undisclosed conflict of interest*. . . .'"[152] This Court reversed. "Because the district court's instructions permitted the

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[150] 713 F.3d at 989.

[151] *Id.* at 990-91.

[152] *Id.* at 995. The trial court defined the intent to defraud the public of honest services as follows: "Public officials and public employees inherently owe a duty to the public to act in the public's best interest. If, instead, the official acts or makes his decision based on the official's own personal interests, *such as accepting a bribe, taking a kickback, or receiving a benefit from an undisclosed conflict of interest*, the official has defrauded the public of the official's honest services even though the city may not suffer any monetary loss in the transaction." *Id.* at 995.

jury to convict . . . on *Skilling*'s now unconstitutional failure to disclose theory," this Court held, "there was error and the error was plain."[153]

Ms. case is controlled by *Garrido*. In reaction to an avalanche of purported self-dealing / conflict-of-interest evidence and argument,[154] the defense sought to prevent this same error. Ms. requested an instruction, (taken straight from Comments to the model jury instruction) that conflict-of-interest and self-dealing were *not* honest-services fraud, and that fraud had to be based on bribery and kickbacks instead.[155] This was an undeniably correct statement of the law.[156] To the extent that the government represented to the district court that this was *not* the law,[157] the government was badly mistaken.

It was necessary to provide this correct statement of the law because of the way the government charged and put on its case. The indictment specifically

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153 *Id.*

154 *See* Statement of Facts, *supra*, at D., E.

155 ER 276.

156 *See Garrido,* 713 F.3d at 993; *see also United States v. Rodrigues*, 678 F.3d 693, 695 (9th Cir. 2012) (after *Skilling* "the crime of theft of the intangible right of honest services, as described in 18 U.S.C. § 1346 . . . is limited to conduct that encompasses 'bribes and kickbacks,' because *any broader construction would be unconstitutionally vague*.") (internal citations omitted).

157 ER 315.

alleged conflict of interest and self-dealing.[158] It repeated the charges in pretrial filings[159] and the joint statement to the jury.[160] It framed the case that way in its

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[158] *See* ER 1460-1461 (alleging deprivation of Fannie Mae's "right to the honest services of defendant . . .by secretly using defendant official position to enrich defendant and her co-schemers *by approving below-market sales of Fannie Mae REO properties to defendant through intermediaries and alter egos, and to others*. . . .") (emphasis provided); ER 1461-1462 (3 of 6 "manners" of the conspiracy addressing self-dealing only).

[159] *See* ER 1454 ("The government alleges that defendant demanded and received bribes and kickbacks from brokers for the opportunity to list Fannie Mae-owned properties. *Additionally, the government alleges that defendant authorized a below-market sale of one Fannie Mae-owned property to herself* and another below-market sale to a broker with whom she demanded bribes.") (emphasis provided). *See also* ER 1435 ("In violation of these rules and federal law, *defendant engaged in the self-dealing described above* using her position to obtain bribes and kickbacks from brokers to whom she referred real estate listings, *and purchasing at least one Fannie Mae REO property for herself.")* (emphasis provided).

[160] ER 1372 *("The indictment further alleges that, in at least one instance, defendant purchased a property from herself for herself, at a price that was below market value for the property, and that she used intermediaries to hide her involvement in the transaction.")* (emphasis provided).

opening,[161] through its witnesses,[162] through its exhibits,[163] and in its closing.[164] And while *Garrido* included an affirmatively incorrect instruction that self-dealing could be honest-services fraud, and the district court gave only model instructions here, these instructions were equally harmful by *permitting* the same wrongful theory of conviction without correction. Indeed, "improper prosecutorial statements cannot be neutralized by instructions that do not in any way address 'the specific statements of the prosecutor.'"[165] Even when instructions do not themselves misstate the law, constitutional error occurs when "the instructions entirely failed to address the specific misstatements made by the prosecutor" and "[t]he jury could have concluded that the instructions were perfectly compatible with the prosecutor's repeated assertions."[166] Indeed, reversal is necessary where,

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161 ER 1025 (""Based on this conduct, defendant is charged with two counts of honest services wire fraud. As a Fannie Mae employee, defendant owed Fannie Mae a duty to act in a trustworthy and honest manner. And the charges related to defendant violating that trust by engaging in a scheme to take bribes and kickbacks *and to sell the property to herself*.") (emphasis provided).

162 *See, e.g.,* ER 688, 692, 858, 880, 983-984, 1061-1063, 1067. *See also* Statement of Facts, *supra*, at Section I.D.

163 *See* ER 184-207.

164 *See generally* ER 340-380. *See also* Statement of Facts*, supra,* at G.

165 *Deck v. Jenkins*, 814 F.3d 954, 982 (9th Cir. 2016) (quoting *United States v. Weatherspoon*, 410 F.3d 1142, 1151 (9th Cir. 2005)).

166 *Deck*, 814 F.3d at 982.

as here, "the record shows that the most diligent of juries would have had no way of divining whether the prosecutor's interpretation of the law . . . was incorrect from the instructions given to them."[167]

Thus, the government's evidence and argument, combined with the absence of any instruction cabining the government's case within *Skilling's* holding, was error. For the reasons set forth below, that error calls for reversal of both counts of conviction.

2. Reversal is required under United States v. Yates, because it is impossible to tell if the convictions rested on an unconstitutional theory of honest-services fraud.

Here, "reversal is required . . . if one of the objects of the conspiracy is *legally* deficient—for example, because the conduct underlying the object is protected by the Constitution, occurred outside the statute of limitations, or 'fails to come within the statutory definition of the crime.'"[168] "In [this] scenario, if the basis for the jury's verdict is unclear, *reversal is required because we do not expect*

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[167] *Id. See also United States v. Flores*, 802 F.3d 1028, 1036 (9th Cir. 2015) (finding plain error without affirmatively erroneous jury instructions when prosecutor suggested that evidence that defendant exported small amount of marijuana supported drug *importation* conviction).

[168] *United States v. Gonzalez*, 906 F.3d 784, 790 (9th Cir. 2018) (emphasis in original) (citing *Griffin v. United States*, 502 U.S. 46, 59 (1991)). *See also Skilling v. United States*, 561 U.S. 358, 414 (2010) (citing *Yates v. United States*, 354 U.S. 298 (1957)).

jurors to be able to determine 'whether a particular theory of conviction submitted to them is contrary to law.'"[169]

Here, one of the objects of the conspiracy—undisclosed self-dealing / conflicts of interest—is legally deficient. That theory runs afoul of two of the three examples that *Gonzalez* provides: being unconstitutional,[170] and "falling outside of the statutory definition[171] of the crime."[172]

It does not matter that there may have been evidence to support a bribery or kickback theory. That was also true in *Garrido*. And as the Court held, "[t]here is evidence in the record that could support a bribery or kickback conviction . . . . *Nevertheless, it is impossible to conclude that the jury convicted [defendants] based on their participation in either a bribery or a kickback scheme instead of based on Skilling's unconstitutional failure to disclose a conflict of interest.*"[173]

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[169] *Gonzalez*, 906 F.3d at 790 (citing *Griffin*, 502 U.S. at 59). *See also Yates*, 354 U.S. at 312.

[170] *See Rodrigues*, 678 F.3d at 695 (broader construction is "unconstitutionally vague").

[171] *See Garrido*, 713 F.3d at 993 (statutory definition cannot include conflicts or self-dealing).

[172] *Gonzalez*, 906 F.3d at 790.

[173] *United States v. Garrido*, 713 F.3d 985, 997 (9th Cir. 2013) (emphasis provided).

Reversal is required consequently.[174] Because the general verdict form did not distinguish between the lawful and unlawful theories that the government pursued at trial, reversal is required under *Yates* and *Garrido*.

3. Reversal is also required for failure to provide a defense theory-of-the-case instruction.

Reversal should also occur because Ms. [redacted] was wrongly deprived of a valid theory-of-defense instruction.[175] Where there is a "wholesale failure to give an instruction, we must reverse if the evidence supports giving the instruction: a criminal defendant is entitled to jury instructions related to a defense theory so long as there is any foundation in the evidence."[176]

A sister Circuit reached this result on closely analogous facts in *United States v. Aunspaugh*.[177] There, the Eleventh Circuit reversed where the jury instructions "did not require the jury to acquit on a finding that [the] scheme

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[174] *Id.*

[175] *See United States v. Washington*, 819 F.2d 221, 225 (9th Cir. 1987) ("a defendant is entitled to an instruction concerning [her] theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility.") (citation omitted).

[176] *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014) (internal quotations and citations omitted).

[177] 792 F.3d 1302, 1310 (11th Cir. 2015).

involved only self-dealing, not kickbacks."[178] Even though the Court found that "[t]he evidence against [defendants] was easily sufficient to support their convictions under [a bribery and kickback theory] of the right to honest services," the Court reversed, because the defendants "were . . . entitled to have the jury apply the law as set out in *Skilling*."[179] The Court found that the defendants were "entitled to jury instructions fairly presenting [their theory that they engaged only in self-dealing]" even if "the evidence was easily sufficient to allow a reasonable jury to conclude the payments were indeed kickbacks."[180]

Ms. [REDACTED] jury had no reason to believe that self-dealing and mere non-disclosure of conflicts-of-interest were insufficient to constitute honest-services fraud. She too did not receive a theory-of-the-case instruction. Reversal should result.

C. Cumulatively, the flawed jury instructions created constitutional error, and the government cannot prove harmlessness beyond a reasonable doubt.

Reversal is required even if this case does not fit neatly within the *Yates* paradigm, and even if the Court finds that Ms. [REDACTED] theory-of-the-case instruction was otherwise conveyed to the jury. This is so because "[a]ny omission

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178 *Id.*

179 *Id.* at 1307.

180 *Id.* at 1308.

or misstatement of an element of an offense in the jury instructions is constitutional error and, therefore, requires reversal unless we find the error 'harmless beyond a reasonable doubt.'"[181] The instructions, taken as a whole, misstated and omitted several key elements of the offense, as set forth below.

1. The instruction on specific intent, which this Court views as a constitutional bulwark against the otherwise vast reach of § 1346, was also plainly erroneous in light of United States v. Miller.

First, in addition to failing to provide the constitutional limits that *Skilling* requires, the district court misinstructed the jury on the *mens rea* that was necessary for conviction. The district court instructed that "[a]n intent to defraud is an intent to deceive *or* cheat."[182] But that is not the law. In *United States v. Miller*,[183] this Court reviewed the identical instruction and concluded that "we have no trouble concluding that this instruction was erroneous."[184] "Like the mail fraud statute from which it is derived, the wire fraud statute, in plain and simple language, criminalizes the use of interstate wires to further, not mere deception, but a scheme or artifice to defraud or obtain money or property, i.e., in every day

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[181] *United States v. Kilbride*, 584 F.3d 1240, 1247 (9th Cir. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

[182] ER 261.

[183] 953 F.3d 1095, 1101 (9th Cir. 2020)

[184] *Id.*

parlance, to cheat someone out of something valuable."[185] "It follows that to be guilty of wire fraud, a defendant must act with the intent not only to make false statements or utilize other forms of deception, but also to deprive a victim of money or property by means of those deceptions. *In other words, a defendant must intend to deceive and cheat."*[186]

It is a distinction with a difference. For example, the Seventh Circuit overturned the conviction of a sports agent on this basis in *United States v. Walters*,[187] There, the court reviewed a conviction for purportedly defrauding the NCAA, not by stealing its property, but by inducing college athletes to sign secret representation contracts in violation of NCAA rules. In other words, the agent had deceived, but not cheated, his victim. The Seventh Circuit reversed Walters' conviction, holding that the statute requires "a scheme to obtain money or other property from the victim," and that "[l]osses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement."[188] Similarly here, undisclosed self-dealing—or even accepting things of value—could have led to conviction if

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185 *Id.*

186 *Id.* (emphasis in original).

187 997 F.2d 1219 (7th Cir. 1993).

188 *Id.* at 1227.

the jury merely thought that Ms. [REDACTED] was deceiving her employer about following internal policies, but without the requisite intent to *cheat* a victim too. The error was harmful consequently.

This failure was also harmful because this Court considers a proper specific-intent instruction to be an important bulwark post-*Skilling*, saving what would otherwise be unconstitutional prosecutions. In *United States v. Milovanovic*,[189], for example, this Court described several important "limitations to the conduct susceptible to prosecution under the otherwise broad reach" of § 1346—including that "under the plain text of the statute, the defendant must have a specific intent to defraud."[190] Indeed, according to this Court, "*the specific intent requirement* for honest services fraud survives McNally by virtue of § 1346 and *is necessary to distinguish legal conduct from honest services fraud*."[191] But the instructions here didn't properly define the specific-intent requirement. They allowed the jury to convict if Ms. [REDACTED] had an intent to "deceive" only, whether or not she had an intent to "cheat." This constitutes both stand-alone error after *Miller* requiring

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189 678 F.3d 713, 726 (9th Cir. 2012).

190 *Id.*

191 *Id.* (quoting *United States v. Kincaid-Chauncey*, 556 F.3d 923, 941 (9th Cir. 2009) (internal brackets omitted)).

reversal, and cumulative error when combined with the other deficiencies described above.

2. The trial court exacerbated the failure to instruct on self-dealing by also failing to define the elements of "bribery" or "kickbacks" for the jury.

As described above, the jury instructions did not describe what honest-services fraud *wasn't*—that is, that it cannot be mere self-dealing or conflicts of interest. But they also did not really define what honest-services fraud *was*. The instructions did not define "bribe" or "kickback" at all. While the district court gave a Ninth Circuit pattern instruction, "[p]attern jury instructions are not authoritative legal pronouncements."[192] The instruction simply falls short where bribery is not otherwise defined in other counts for the jury. By way of comparison, the Model Instructions from the Fifth, Seventh, and Eleventh Circuits each properly require guidance on these definitions.[193] The Ninth Circuit's Model

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192 *United States v. Luong*, 2020 U.S. App. LEXIS 22279, at *17-18 (9th Cir. July 17, 2020). *See also* Caveat, 9th Cir. Crim. Jury Instr. iv ("[t]he Ninth Circuit Court of Appeals does not adopt these instructions as definitive. . . . the correctness of a given instruction may be the subject of a Ninth Circuit opinion.").

193 *See, e.g., Pattern Jury Instructions (Criminal Cases), Prepared by the Committee on Pattern Jury Instructions District Judges Association Fifth Circuit* (2019 ed.) (Instr. 2.57, "[Define "bribery" pursuant to 18 U.S.C. §§ 201(b) or 665(a)(2) or state law; define "kickback" pursuant to 41 U.S.C. § 52(2) or state law]"); *Pattern Criminal Jury Instructions of the Seventh Circuit, Prepared by the Committee on Federal Criminal Jury Instructions of the Seventh Circuit* (2012 ed.) (plus 2015-2019 changes) (defining both bribes and kickbacks); *Eleventh Circuit Pattern Jury Instructions, Criminal Cases* (2016 ed., rev. 2019) (Instr. 050.3,

Instructions do not. Unlike these other Circuits, this instruction failed to give any guidance on what constituted bribery or kickbacks. This Court should find this to be error here.

This error was particularly harmful because "Section 1346 honest services convictions on a bribery theory . . . require at least an implied *quid pro quo,*" *United States v. Garrido*,[194] and a "*quid pro quo* in bribery is the 'specific intent to give or receive something of value in exchange for an official act.'"[195] The jury instructions did not define this concept. While it described an "exchange," it did not make clear that specific intent had to accompany that exchange, and as described *supra,* the specific-intent definition that was included in a later instruction did not require an intent to "cheat" anyway.[196] Moreover, bribery was

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defining bribe or kickback as "any money or compensation of any kind which is provided, directly or indirectly, to an employee for the purpose of improperly obtaining or rewarding favorable treatment from the employee in connection with [his] [her] employment.").

[194] 713 F.3d 985, 997 (9th Cir. 2013).

[195] *Id.* (quoting *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999)).

[196] *See discussion*, *infra*.

not charged in any separate counts, so the jury did not have correct instructions from any other context to rely upon instead.[197]

To summarize: there was no definition of bribery or kickback at all; no explanation of *quid pro quo* or the *mens rea* that is required to accompany the act; and no similar instructions for other charged counts to provide any guidance either. Reversal is the only fair remedy.[198]

3. The jury instructions allowed the government to argue, and the jury to convict, on the basis of self-dealing and conflicts of interest only.

Ultimately, without an instruction that self-dealing and conflicts of interest are not sufficient to prove honest services fraud, the government's repeated arguments that Ms. [redacted] sold "properties to herself" (self-dealing) and that "[s]he was not allowed to use her position for her own personal gain" (conflict of interest) were left unchecked. The only plausible use of this evidence, based on the instructions as they were provided to the jurors, was to support the

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197 *Cf. United States v. Wilkes,* 662 F.3d 524, 544 (9th Cir. 2011). In *Wilkes*, this Court held that "the jury's guilty verdict on the separate substantive count of bribery in violation of 18 U.S.C. § 201 confirms beyond any reasonable doubt that the jury would have convicted Wilkes of honest services fraud if the court's definition had been limited to the bribery basis that *Skilling* expressly approved. Any error concerning the jury instruction was harmless." 662 F.3d at 544. There were no other counts of conviction, and no other proper bribery instructions, to remedy similar shortcomings here.

198 *See Garrido,* 713 F.3d at 996 (reversing where "the district court did not define either 'bribery' or 'kickback' in the § 1346 context.")

government's position that they constituted bribes and kickbacks. Without a legal framework to understand the evidence of self-dealing and conflicts of interest, or any other jury instruction meaningfully limiting use of the evidence, the jurors could only apply it as evidence of honest services fraud—a use that is unconstitutional under *Skilling*.

II. The district court erred in sentencing Ms. [redacted] under U.S.S.G. § 2C1.1 and as a "public official" when the indictment charged her as working only for a "private corporation."

A. Standard of review.

This Court reviews *de novo* the trial court's "interpretation and application of the Sentencing Guidelines."[199]

B. Ms. [redacted] should not have been sentenced as a "public official" because the indictment alleged that Fannie Mae was a "private corporation" and the applicable Guidelines must be determined by "the offense charged in the indictment, not the court's perception of the facts of the case presented at trial."[200]

Under the Sentencing Guidelines, there are two possible guideline sections referenced for the statute under which Ms. [redacted] was convicted: § 2B1.1 & § 2C1.1.[201] When "more than one guideline section is referenced for [a] particular

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199 *United States v. D.M.*, 869 F.3d 1133, 1138 (9th Cir. 2017) (internal citation and quotation omitted).

200 *United States v. Boney*, 769 F.3d 153, 161 (3d Cir. 2014). *See also United States v. Ballard*, 850 F.3d 292, 295 (6th Cir. 2017) ("The only offense conduct we look at is what's described in the indictment or stipulated in the plea agreement.").

201 *See* U.S. Sentencing Comm'n, *Guidelines Manua*l, Appendix A.

statute," the Introduction to the Guidelines' Appendix A directs courts to select the guideline "most appropriate for the offense conduct *charged in the count* of which the defendant was convicted."[202] Chapter One, Part B of the Guidelines also instructs courts—when multiple guidelines sections are referenced for a statute of conviction—to "determine which of the referenced guideline sections is most appropriate for the offense conduct *charged in the count* of which the defendant was convicted."[203] The sentencing court in this case looked not to what was charged in Ms. [redacted] indictment to determine the base offense level, but instead used the "construed broadly" language in Application Note 1 of § 2C1.1 to determine that § 2C1.1 instead of § 2B1.1 should be used to determine the base offense level for her sentence.[204] This was error.

In interpreting the language of § 1B1.2 and Appendix A directing Guidelines users to select the guideline "most appropriate for the offense conduct charged in

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[202] *Id*. (emphasis added).

[203] *See* U.S. Sentencing Comm'n, *Guidelines Manua*l, § 1B1.2, Application Note 1 (emphasis added).

[204] The district court did not identify which facts it was relying on to determine that Ms. [redacted] should be sentenced under § 2C1.1 instead of § 2B1.1. Instead the court repeatedly stated that it understood—per Application Note 1 in § 2C1.1—that the term "public official" was to be "construed broadly." *See* ER 78, 82. It apparently used this language to guide it to the application of § 2C1.1 instead of § 2B1.1.

the count of which the defendant was convicted," other Circuits to consider this language have determined that the sentencing court must look only to the language of the indictment. In *United States v. Almeida*, for example, the First Circuit reversed and remanded for resentencing after the district court sentenced the defendant "by selecting the guideline applicable to [the defendant's] conduct not alleged in the indictment."[205] As in this case, Sentencing Guidelines for the statute of conviction in *Almeida* referenced "more than one guideline section."[206] The statute of conviction in *Almeida* covered conduct constituting either a robbery or a burglary.[207] But the indictment in *Almeida* only alleged facts consistent with the "burglary" prong of the statute. In such a situation, the First Circuit held that the district court was required "to select the applicable guideline based only on conduct charged in the indictment."[208]

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205 710 F.3d 437, 442 (1st Cir. 2013).

206 *Id*. at 440.

207 *Id*.

208 *Id*. at 441. *See also United States v. Boney*, 769 F.3d 153, 161 (3d Cir. 2014) ("the Guidelines Manual makes clear that the sentencing court must select the 'most appropriate' guideline based on the offense charged in the indictment, not the court's perception of the facts of the case presented at trial."); *United States v. Ballard*, 850 F.3d 292, 295 (6th Cir. 2017) ("The only offense conduct we look at is what's described in the indictment or stipulated in the plea agreement.").

Here, had the district court looked only to the language of the indictment—which at no point alleged that Ms. [redacted] was a public official, nor an official or employee of the government, nor a person in a position of public trust with official responsibility for carrying out a government program or policy, nor acted under color of law or official right, nor participated so substantially in government operations as to possess de facto authority to make governmental decisions—the selection of § 2B1.1 over § 2C1.1 would have been evident.

According to the facts as alleged by the government in the indictment, Ms. [redacted] was working for a "private corporation."[209] At trial, the government's own witness, Special Agent James Shields, testified that Fannie Mae is a "private business."[210] Even the government's sentencing papers allege "Fannie Mae was a private corporation"[211] "In the ordinary course of its business, Fannie Mae acquired residential properties through foreclosure and other transfers; Fannie Mae was then authorized to sell those properties, commonly referred to as Fannie

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[209] ER 1459-1462. The Indictment alleged that Fannie Mae was "under conservatorship by the Federal Housing Finance Agency" but—as discussed *infra*—this fact does not convert it into a government agency nor its employees into "public officials."

[210] ER 447.

[211] ER 142.

Mae Real Estate Owned or REO properties."[212] Had the government believed it could successfully prosecute Ms. [REDACTED] as a "public official" it likely would have charged her with a violation of 18 U.S.C. § 201: "Bribery of public officials and witnesses." If the government had chosen to prosecute her as a "public official," it would have had to allege that she was a "public official" in the indictment and necessarily been required to prove the same at trial.[213] Instead, the government decided to plead and prove a charge without this element. It presented no evidence to the jury that Ms. [REDACTED] was a public official. In fact, as noted above, its own witness testified that Fannie Mae was a "private business."[214] Notwithstanding these charging decisions, the government argued for the first time in its sentencing papers—without having pled or proved the same—that Ms. [REDACTED] should be sentenced as if it had met this heightened burden.[215] This was error.

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212 *Id.*

213 *See* 9th Cir. Model Jury Instr. 8.13 "Receiving Bribe by Public Official."

214 ER 447.

215 *See* ER 152.

C. Even if the Court looks to facts outside of the indictment, Ms. [redacted] was not a "public official."

Even if the district court could look to facts beyond those alleged in the indictment to determine the appropriate Sentencing Guideline under Chapter 2, the district court erred in selecting § 2C1.1 over § 2B1.1 based on the facts of this case. The government argued at sentencing that because Fannie Mae was in conservatorship during the time of Ms. [redacted] employment, the charged offense meant she was actually stealing "from the American taxpayers."[216] But this equivalency of conservatorship with government ownership of Fannie Mae is contrary to prior published caselaw of this Court. In 2016, this Court considered whether Fannie Mae was a "private" company for purposes of the False Claims Act.[217] This Court held that "Fannie Mae [is a] private compan[y], albeit [one] sponsored or chartered by the federal government."[218] The Court went on to state that the conservatorship—argued by the government here to have converted Ms. [redacted] from an employee in a private company into a public official—did

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216 ER 80.

217 *United States ex rel. Adams v. Aurora Loan Servs*., 813 F.3d 1259, 1260 (9th Cir. 2016).

218 *Id.* at 1260.

not change that "private" company status.[219] In *Aurora Loan Servs*., the U.S. government filed amicus briefing with this Court arguing that despite conservatorship, Fannie Mae "remain[ed] [a] private corporation[]."[220] Now, as this Court pointed out in *Aurora Loan Servs.,* "just because an entity is considered a federal instrumentality for one purpose does not mean that the same entity is a federal instrumentality for another purpose."[221] But, even if there were ambiguity as to Fannie Mae's employees' status as "public officials" for the purposes of the Sentencing Guidelines, any ambiguity should be resolved in Ms. [redacted] favor under the rule of lenity.[222]

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[219] *Id.* at 1261 ("Nor does the Federal Housing Finance Agency's conservatorship transform Fannie Mae and Freddie Mac into federal instrumentalities. We agree that the FHFA has 'all the rights, titles, powers and privileges of' Fannie Mae . . . However, this places FHFA in the shoes of Fannie Mae . . . , and gives the FHFA [its] rights and duties, not the other way around.").

[220] *Brief for the United States of America as Amicus Curiae in Support of Neither Party*, at 13-14 (no. 14-15031); *see also id.* at 15 n.4 ("Federal courts around the country have concluded that FHFA's conservatorship does not constitute permanent government control within the meaning of *Lebron* and that the [Government Sponsored Enterprises] therefore are not 'government actors' subject to constitutional claims.") (citation omitted).

[221] 813 F.3d at 1261.

[222] *United States v. Edling*, 891 F.3d 1190, 1195 (9th Cir. 2018) (rule of lenity applies to the Guidelines).

It was error for the district court not to rely on the facts as they were alleged in the indictment in determining which base offense level should apply at sentencing and this Court should reverse and remand for resentencing under § 2B1.1.

Conclusion

For all these reasons, convictions should be reversed and the case remanded for a new trial.

Dated: August 17, 2020

Respectfully submitted,

s/ Timothy A. Scott

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CERTIFICATE OF RELATED CASES

Counsel is not aware of any cases pending before this Court that are related to this matter.

Dated: August 17, 2020

s/ Timothy A. Scott

TIMOTHY A. SCOTT

Attorney for

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