

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

4  
5  
6 August Term, 2011

7  
8 Argued: May 2, 2012 Decided: March 28, 2013

9  
10 Docket No. 10-3891-cr

11  
12  
13 UNITED STATES OF AMERICA,

14  
15 *Appellee,*

16  
17 -v.-

18  
19 JAMES BOTTI

20  
21 *Defendant-Appellant.*

22  
23  
24 Before: SACK and RAGGI, Circuit Judges, and KOELTL, District  
25 Judge.<sup>\*</sup>

26  
27 Defendant James Botti was convicted of honest services  
28 mail fraud after a jury trial in the District of Connecticut  
29 (Charles S. Haight, Jr., Judge). See 18 U.S.C. §§ 1341 and  
30 1346. In this appeal from the judgment entered on September  
31 20, 2010, Botti argues that the District Court committed  
32 reversible error when it used a jury instruction on honest  
33 services mail fraud that allowed the jury to find Botti guilty

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\* The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 of that crime without finding a bribery or kickback scheme, in  
2 contravention of the Supreme Court's decision in Skilling v.  
3 United States, 130 S. Ct. 2896 (2010). While the jury  
4 instruction was error, it does not merit reversal because  
5 bribery was the only theory of honest services mail fraud  
6 available to the jury based on the arguments and evidence at  
7 trial. Therefore, we affirm the judgment of the District  
8 Court.

9 Affirmed.

10

\_\_\_\_\_

11 GEORGE W. GANIM, JR., The Ganim Law Firm, P.C., for Defendant-  
12 Appellant James Botti.

13

14 RICHARD J. SCHECHTER AND RAHUL KALE, Assistant United States  
15 Attorneys, (Sandra S. Glover on the brief) for Michael J.  
16 Gustafson, Acting United States Attorney for the District of  
17 Connecticut, for Appellee United States of America.

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19 John G. Koeltl, District Judge:

20

21 Defendant James Botti was convicted of honest services  
22 mail fraud after a jury trial in the District of Connecticut  
23 (Charles S. Haight, Jr., Judge). See 18 U.S.C. §§ 1341 and  
24 1346. In this appeal from the judgment entered on September  
25 20, 2010, Botti argues that the District Court committed  
26 reversible error when it used a jury instruction on honest  
27 services mail fraud that allowed the jury to find Botti guilty  
28 of that crime without finding a bribery or kickback scheme, in



1 indictment also included a forfeiture allegation in connection  
2 with the structuring counts.

3 Prior to trial, the District Court granted the  
4 defendant's motion to sever the indictment and ordered that  
5 the conspiracy to commit mail fraud, bribery, and mail fraud  
6 counts—Counts One, Two, and Three—be tried separately from the  
7 conspiracy to structure, structuring, and false statement  
8 counts—Counts Four through Seven. Separate redacted  
9 indictments were prepared for each trial.

10 On November 10, 2009, a jury found Botti guilty of  
11 conspiracy to structure and structuring. The jury found him  
12 not guilty of the two false statement counts.

13 On April 1, 2010, a separate jury found Botti guilty of  
14 honest services mail fraud, as charged in Count Three of the  
15 original and redacted indictments. On the verdict sheet, the  
16 jury answered "yes" to the statement: "James Botti engaged in  
17 a scheme or artifice to deprive the citizens of Shelton of the  
18 intangible right of honest services of their public official  
19 or officials, by utilizing or causing the United States mails  
20 to be used for the purpose of executing that scheme or  
21 artifice." The jury was unable to agree on whether an object  
22 of the mail fraud scheme was also "to obtain money or property  
23 by means of materially false or fraudulent pretenses,  
24 representations or promises . . . ." The jury was also unable

1 to reach a verdict on the conspiracy count and the bribery  
2 count, and the District Court declared a mistrial on those  
3 counts and on the money and property prong of the mail fraud  
4 count.

5 On September 17, 2012, Botti was sentenced principally to  
6 a 72-month term of imprisonment on the honest services mail  
7 fraud count and to concurrent sentences of 60 months on the  
8 conspiracy to structure and structuring convictions, followed  
9 by concurrent three-year terms of supervised release.

10 Judgment was entered on September 20, 2010.

11 On this appeal from the judgment of conviction, Botti  
12 challenges only his conviction on the honest services mail  
13 fraud count and only on the basis of the District Court's  
14 allegedly erroneous jury instruction.

15 The mail fraud conspiracy, bribery, and substantive mail  
16 fraud counts arose from Botti's alleged provision of corrupt  
17 payments and other benefits to public officials in Shelton,  
18 Connecticut where he worked as a real estate developer. The  
19 bribery count alleged that in June 2006, Botti provided over  
20 \$5,000 in things of value to "Public Official #1," identified  
21 at trial as the Mayor of Shelton, with the intent to influence  
22 that official to use his position and authority to assist  
23 Botti in obtaining approval from Shelton's Planning and Zoning  
24 Commission for a commercial development project at 828

1 Bridgeport Avenue in Shelton ("the 828 Project"). The mail  
2 fraud count alleged: (i) a scheme to obtain money and property  
3 and (ii) a scheme to deprive the citizens of Shelton of the  
4 intangible right of honest services of their public officials.  
5 The alleged fraudulent scheme to obtain money and property  
6 relied on allegations that Botti obtained approval for \$6.5  
7 million in financing for the 828 Project from a financial  
8 institution, later shown to be NewAlliance Bank. That  
9 financing depended on approval of the 828 Project by the  
10 Planning and Zoning Commission, which Botti allegedly had  
11 obtained fraudulently by, among other means, directing  
12 employees and persons affiliated with his business to attend a  
13 public hearing before the Commission to speak in favor of  
14 Botti's application without disclosing their affiliations with  
15 Botti. In support of the scheme to defraud the citizens of  
16 Shelton of the honest services of their public officials, the  
17 indictment alleged a scheme beginning in or about 2002 in  
18 which Botti provided bribes to the Mayor of Shelton and to  
19 other Shelton public officials to secure approval for Botti's  
20 commercial development projects.

21 Before trial, while Skilling v. United States, 130 S. Ct.  
22 2896, was pending before the Supreme Court, Botti moved to  
23 dismiss the mail fraud count to the extent that it depended on  
24 the deprivation of the intangible right to honest services

1 under 18 U.S.C. § 1346. That statute provides: "For the  
2 purposes of this chapter, the term 'scheme or artifice to  
3 defraud' includes a scheme or artifice to deprive another of  
4 the intangible right of honest services." 18 U.S.C. § 1346.  
5 Botti argued that the statute was unconstitutionally vague.  
6 In opposition to the motion, the Government argued that Botti  
7 "could quite easily understand that his conduct in bribing and  
8 rewarding public officials with intent that they use their  
9 office to benefit him was prohibited conduct proscribed by  
10 section 1346," and that "federal courts had uniformly  
11 construed the mail fraud statute to cover the situation where  
12 public officials received bribes and kickbacks thereby  
13 depriving the citizenry of their 'intangible rights' to good  
14 and honest government." Gov't Resp. to Def.'s Mot. to Dismiss  
15 at 5. The District Court denied Botti's motion.

16 At trial, the Government's theory of honest services mail  
17 fraud was that Botti made corrupt payments and provided other  
18 corrupt benefits to Shelton public officials with the intent  
19 to influence those officials and thereby secure approval for  
20 his real estate development projects. In its opening  
21 statement, the Government explained its theory of the case as  
22 follows: "At the end of this trial, you will be asked to  
23 decide if James Botti engaged in acts of corruption by bribing  
24 public officials with the intent to influence them so that

1 they would think of James Botti's interest, rather than the  
2 public interest."

3         The Government's honest services mail fraud theory  
4 alleged a prolonged effort by Botti to corrupt Shelton public  
5 officials. The Government elicited testimony at trial  
6 regarding a history of payments made and benefits given by  
7 Botti to Shelton's Mayor with the intent to influence the  
8 Mayor in the exercise of his official duties. This included  
9 testimony that: Botti had paid for a Florida vacation for the  
10 Mayor and his family; Botti had made payments to cover the  
11 costs of repairs on the Mayor's house; Botti had significantly  
12 overpaid the Mayor for a Christmas party that Botti held at a  
13 restaurant owned by the Mayor; and Botti had provided other  
14 services to the Mayor without charge including use of Botti's  
15 backhoe, removing furniture from the Mayor's house, storing  
16 the Mayor's car in Botti's maintenance garage, as well as  
17 hiring the Mayor's brother as a favor to the Mayor.

18         The Government did not limit its theory of honest  
19 services mail fraud to bribery of the Mayor. The Government  
20 also argued that Botti provided corrupt payments and benefits  
21 to Shelton Planning and Zoning Commission officials to obtain  
22 approval for the 828 Project. At trial, the Government  
23 presented evidence that Botti had submitted plans for the 828  
24 Project to the Shelton Planning and Zoning Commission. The



1 Government offered testimony that, after submitting his plans,  
2 Botti became aware that he lacked the votes to obtain approval  
3 for the 828 Project from the Planning and Zoning Commission,  
4 which led him to provide Shelton's Mayor with a \$50,000 bribe  
5 in exchange for which the Mayor would use his influence with  
6 the Planning and Zoning Commission to secure approval for the  
7 828 Project.<sup>1</sup> There was also evidence that, after receiving  
8 \$50,000 from Botti, the Mayor had urged members of the  
9 Planning and Zoning Commission to approve the 828 Project.

10 The Government also offered testimony that Botti had  
11 provided benefits directly to members of the Planning and  
12 Zoning Commission who had voted in favor of the 828 Project.  
13 Botti provided \$150 gift certificates to two members of the  
14 Planning and Zoning Commission who voted in favor of the 828  
15 Project and to another commissioner who provided assistance in  
16 obtaining approval of the 828 Project. Botti also paid about  
17 \$2000 for a Christmas party at a restaurant owned by one of  
18 the members of the Planning and Zoning Commission who voted in  
19 favor of the 828 Project.

20 During its summation, the Government argued that there  
21 were two prongs of the mail fraud alleged in the indictment:

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<sup>1</sup> This incident also served as evidence in support of the bribery count on which the jury ultimately could not reach a verdict.

1 "The first prong, he intended to deprive the citizens of  
2 Shelton of the honest services of their public officials. He  
3 also engaged in a mail fraud to deprive NewAlliance Bank of  
4 millions of dollars in loan proceeds." The Government  
5 summarized for the jury the evidence of the history of bribes  
6 that Botti had paid to the Mayor of Shelton and to other  
7 Shelton officials in exchange for favorable treatment. Based  
8 on this pattern of behavior, the Government argued, "James  
9 Botti thinks this is how you do business in Shelton; you  
10 grease the wheel. . . . James Botti thinks you have to pay to  
11 get things done."

12 With respect to the mail fraud scheme to obtain money and  
13 property from NewAlliance Bank, the Government focused on the  
14 misrepresentations that allegedly led the Planning and Zoning  
15 Commission to approve the 828 Project and thereby satisfy a  
16 condition for financing approval from the bank. The  
17 Government argued, "Botti's scheme to defraud was also an  
18 effort to make money for himself. He wanted the millions of  
19 dollars NewAlliance Bank had waiting for him, if he could just  
20 get [Planning and Zoning Commission] approval." As evidence  
21 of the materially false representations connected with this  
22 mail fraud allegation, the Government pointed to testimony  
23 that Botti had sent Greg Fracassini and Dan Witkins to testify  
24 in favor of the 828 Project before the Planning and Zoning

1 Commission in June 2006 and instructed them "to lie about  
2 their association with him." The Government argued that this  
3 testimony was highly influential in securing the Planning and  
4 Zoning Commission's approval of the 828 Project, which was a  
5 condition precedent to Botti's securing the multi-million  
6 dollar financing from NewAlliance Bank.

7 The Government's proposed instruction on the honest  
8 services mail fraud count specified that its sole theory of  
9 honest services fraud was bribery. The Government's proposed  
10 jury instruction provided:

11 A government official who uses his or her public  
12 position for self-enrichment breaches the duty of  
13 honest service owed to the public and the  
14 government. So, for instance, a public official  
15 who accepts a bribe or corrupt payment breaches  
16 the duty of honest, faithful, and disinterested  
17 service. While outwardly appearing to be  
18 exercising independent judgment in his or her  
19 official work, the public official instead has  
20 been paid privately for his or her public  
21 conduct. Thus, the public is not receiving the  
22 public official's honest and faithful service to  
23 which it is entitled.

24  
25 The Government alleges that defendant JAMES  
26 BOTTI engaged in a scheme to defraud the citizens  
27 of Shelton, Connecticut of the intangible right  
28 to the honest services of its public officials by  
29 providing benefits to such officials with intent  
30 to influence such officials. Where there is a  
31 stream of benefits arranged by the payor to favor  
32 a public official, the Government need not  
33 demonstrate that any specific benefit was  
34 received by the public official in exchange for a  
35 specific official act. In other words, when  
36 payments are made by a payor to a public official  
37 with the intent to retain that official's

1 services on an "as needed" basis so that when the  
2 opportunity presents itself that public official  
3 will take specific official action on the payor's  
4 behalf, that constitutes a breach of the public  
5 official's duty of honest services. Previously,  
6 in Request #34, I defined for you the definition  
7 of a "bribe" and you may refer to that definition  
8 in considering whether defendant JAMES BOTTI  
9 engaged in a scheme to defraud the public of its  
10 intangible right to the honest services of its  
11 public officials.

12  
13 Request #34, the request relating to the § 666 bribery  
14 charge, defined a bribe as "a corrupt payment that a  
15 person provides to a public official with the intent to  
16 influence the official in the performance of his or her  
17 public duties."

18 At the charge conference, Botti's counsel stated that he  
19 was not comfortable with the Government's proposed instruction  
20 on honest services fraud because "it seems to be so skewed to  
21 the allegations here. . . . It is not, I don't think, a  
22 generic definition of theft of honest services. It is a  
23 description of theft of honest service as alleged in this  
24 case." Botti's attorney ultimately did not object to the  
25 instruction, did not offer alternative wording when given the  
26 opportunity, and stated that he would defer to the District  
27 Court regarding the jury instruction.

28 The District Court began its charge to the jury by  
29 handing out copies of the redacted indictment and reading most  
30 of it to the jury. The District Court instructed the jury on

1 the bribery charge as the Government had requested, and read  
2 the relevant statute to the jury. The District Court defined  
3 the elements of the offense of bribery as follows:

4 First, at the time alleged in the indictment  
5 . . . Public Official 1, was an agent of the city of  
6 Shelton, Connecticut; second, that the City of  
7 Shelton received federal benefits in excess of  
8 \$10,000 in a one-year period; third, that defendant  
9 gave or agreed to give or offered something of value  
10 to [Public Official 1]; fourth, that the defendant  
11 acted corruptly with the intent to influence or  
12 reward [Public Official 1] with respect to a  
13 transaction of the City of Shelton; fifth, that the  
14 value of the transaction to which the payment  
15 related was at least \$5,000.

16  
17 Turning to the honest services mail fraud count, the  
18 District Court read the allegations in the indictment and the  
19 relevant statutory provisions to the jury. The District Court  
20 then explained the elements:

21 First, that the defendant devised a scheme or  
22 artifice. There are two types of schemes charged in  
23 Count Three of the indictment. One is a scheme or  
24 artifice for obtaining money or property by  
25 materially false and fraudulent pretenses,  
26 representations or promises, as alleged in the  
27 indictment.

28  
29 The other is a scheme or artifice to deprive the  
30 citizens of Shelton of the intangible right of the  
31 honest services of their public officials as alleged  
32 in the indictment.

33  
34 Second element: That the defendant knowingly and  
35 willfully participated in the scheme or artifice,  
36 with knowledge of its fraudulent nature and with  
37 specific intent.

38

1 Third: That in execution of that scheme or artifice,  
2 the Defendant used or caused the use of the mails,  
3 as specified in the indictment.  
4

5 The District Court provided a more truncated explanation of  
6 honest services than the charge sought by the Government. The  
7 District Court instructed the jury as follows:

8 A public official or local government employee  
9 owes a duty of honest, faithful, and  
10 disinterested service to the public and to the  
11 government that he or she serves. The public  
12 relies on officials of the government to act for  
13 the public interest not for their own enrichment.  
14 A government official who uses his or her public  
15 position for self-enrichment breaches the duty of  
16 honest service owed to the public and to the  
17 Government.  
18

19 So, for instance, a public official who accepts a  
20 bribe or corrupt payment [breaches] the duty of  
21 honest, faithful and disinterested service, while  
22 outwardly appearing to be exercising  
23 independen[ce] in his or her official work, the  
24 public official instead has been paid privately  
25 for his or her public conduct. Thus, the public  
26 is not receiving the public official's honest and  
27 faithful service to which it is entitled.  
28

29 Defense counsel did not object to the instruction.

30 The jury returned a guilty verdict on the honest services  
31 mail fraud count. The jury was unable to reach a verdict on  
32 the mail fraud count based on deprivation of money or  
33 property.

34 After trial, Botti moved for a judgment of acquittal  
35 pursuant to Federal Rule of Criminal Procedure 29 and for a  
36 new trial pursuant to Federal Rule of Criminal Procedure 33,

1 arguing that the evidence of honest services mail fraud was  
2 insufficient to support a conviction. In his motion for a  
3 judgment of acquittal, Botti argued that none of the testimony  
4 relating to bribery of the Mayor of Shelton could be  
5 considered in support of his conviction because the jury had  
6 not voted to convict Botti of bribery. Botti argued that the  
7 remaining evidence of bribes of Planning and Zoning Commission  
8 officials was insufficient to support a conviction of honest  
9 services fraud.

10 After the Supreme Court issued its opinion in Skilling,  
11 130 S. Ct. 2896, Botti submitted a supplemental memorandum in  
12 support of his motion for a judgment of acquittal, which  
13 argued that the jury charge and verdict form left open the  
14 possibility that the jury could have convicted Botti of honest  
15 services mail fraud on a non-bribery theory in contravention  
16 of the Supreme Court's holding in Skilling. Botti claimed  
17 that the indictment was defective insofar as it did not  
18 "specifically allege that the scheme used to commit honest  
19 services fraud was bribery"; instead, it "indicat[ed] a  
20 general theory of honest services mail fraud, namely, that  
21 defendant contrived a scheme or artifice to defraud by means  
22 of fraudulent pretenses or misrepresentations." Botti argued  
23 that the Government's proposed instruction—with which defense  
24 counsel had expressed discomfort at the charge conference—

1 would have complied with Skilling because it specified that  
2 the Government's theory of honest services mail fraud was  
3 bribery. However, he claimed that the instruction actually  
4 given to the jury did not comply with Skilling because it  
5 conflated "general self-enrichment" with "actual bribery."  
6 Botti argued that the jury charge was defective because it  
7 "did not limit self-enrichment to bribery as required by  
8 Skilling, but rather referred to bribery as illustrative."

9       The District Court denied Botti's motions for a judgment  
10 of acquittal and for a new trial. The District Court found  
11 that there was "ample evidence that Botti extended numerous  
12 favors to several Shelton public servants for the purpose of  
13 obtaining in return favorable action on his development  
14 applications, particularly the 828 Project, in derogation of  
15 the Shelton citizenry's right to their public servants' honest  
16 services." The District Court rejected Botti's argument that  
17 the jury's failure to return a verdict on the bribery charge  
18 necessarily meant that the evidence of honest services fraud  
19 was insufficient to support a guilty verdict. The District  
20 Court first noted that in Yeager v. United States, 557 U.S.  
21 110 (2009), the Supreme Court had instructed courts not to  
22 attribute any meaning to the failure to return a verdict.  
23 Furthermore, the District Court found that the evidence



1 produced at trial was sufficient to support Botti's conviction  
2 for honest services mail fraud.

3 With respect to Botti's objection to the jury charge  
4 based on Skilling, the Court determined:

5 There is no substance to this argument.  
6 Botti nowhere suggests what this alternative,  
7 constitutionally impermissible theory of  
8 wrongdoing might be. That is not surprising,  
9 since there is no evidence in the record of any  
10 sort of wrongdoing other than Botti's bribery of  
11 public officials. The indictment did not charge  
12 any alternative theory. Neither the government  
13 nor the defendant argued any other theory at  
14 trial. Neither the jury charge nor the verdict  
15 form suggests any other theory. There were no  
16 facts, evidence or testimony presented at trial  
17 that could reasonably support or give rise to an  
18 alternative theory. Botti suggests none. To  
19 conclude that the jury might have convicted the  
20 Defendant on some theory of honest services mail  
21 fraud other than the bribery theory suggested in  
22 the jury charge would require pure speculation on  
23 the Court's part, and an assumption that the jury  
24 acted in an unreasonable manner in contriving  
25 some grounds for conviction other than the  
26 obvious one clearly supported by the record.

27  
28 Accordingly, the District Court denied the post-trial motions.  
29 This appeal followed.

## 30 DISCUSSION

### 31 I.

32 The first issue is what standard of review applies to  
33 Botti's claim of error. Generally, the propriety of jury  
34 instructions is a matter of law that is reviewed de novo.  
35 United States v. Bahel, 662 F.3d 610, 634 (2d Cir. 2011). "A

1 jury instruction is erroneous if it misleads the jury as to  
2 the correct legal standard or does not adequately inform the  
3 jury on the law." Id. (quoting United States v. Bok, 156 F.3d  
4 157, 160 (2d Cir. 1998)) (internal quotation marks omitted).

5 If the defendant objected to an erroneous jury  
6 instruction at trial and raises the same claim of error on  
7 appeal, a harmless error standard of review applies. See,  
8 e.g., United States v. George, 266 F.3d 52, 58 (2d Cir. 2001),  
9 vacated in part on other grounds, 386 F.3d 383 (2d Cir. 2004).  
10 Under this standard of review, a conviction will be affirmed  
11 only "if it is clear beyond a reasonable doubt that a rational  
12 jury would have found the defendant guilty absent the error."  
13 United States v. Mahaffy, 693 F.3d 113, 136 (2d Cir. 2012)  
14 (quoting United States v. Kozeny, 667 F.3d 122, 130 (2d Cir.  
15 2011)) (internal quotation marks omitted).

16 If the defendant did not object to an erroneous jury  
17 instruction before the jury retired to consider its verdict, a  
18 plain error standard of review applies. See Johnson v. United  
19 States, 520 U.S. 461, 465-66 (1997) (citing Fed. R. Crim. P.  
20 30); Bahel, 662 F.3d at 634. Under this standard of review,  
21 the Court of Appeals has discretion to reverse only if the  
22 instruction contains "(1) error, (2) that is plain, and (3)  
23 that affect[s] substantial rights." Johnson, 520 U.S. at 467  
24 (quoting United States v. Olano, 507 U.S. 725, 732 (1993))

1 (internal quotation marks omitted and alteration in original).  
2 If those three conditions are met, a court may exercise its  
3 discretion to correct the error only if the error "seriously  
4 affect[ed] the fairness, integrity or public reputation of  
5 judicial proceedings." Id. at 467 (quoting Olano, 507 U.S. at  
6 732) (internal quotation marks omitted).

7 Botti argues that he objected to the jury instruction,  
8 and therefore, a traditional harmless error standard of review  
9 should apply. This argument is without merit. Defense  
10 counsel's objection to the proposed instruction at the charge  
11 conference was not based on the instruction's failure  
12 expressly to limit honest services fraud to bribery and  
13 kickback schemes. Rather, Botti's counsel objected to the  
14 instruction because it was "so skewed to the allegations  
15 here," and it was not "a generic description of theft of  
16 honest services." In short, Botti objected because the  
17 proposed instruction was too focused on bribery as the means  
18 for committing honest services fraud, not because it lacked  
19 that focus. These circumstances come close to a waiver of any  
20 appellate challenge to the instruction for failing to limit  
21 honest services mail fraud to bribery. See United States v.  
22 Quinones, 511 F.3d 289, 321-23 (2d Cir. 2007) (discussing true  
23 waiver). In any event, because Botti did not object at trial

1 on the grounds raised in this appeal, harmless error review  
2 does not apply.

3 Nor is modified plain error review warranted here. See  
4 United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994) (placing  
5 the burden on the Government "to show that plain error in  
6 light of a supervening decision did not affect substantial  
7 rights"). The Supreme Court's decision in Johnson v. United  
8 States, 520 U.S. 461, called into question the modified plain  
9 error standard of review that this Court established in Viola.  
10 In Johnson, the defendant had been charged with making a false  
11 material declaration under oath before a grand jury in  
12 violation of 18 U.S.C. § 1623. 520 U.S. at 463. The District  
13 Court instructed the jury that materiality was a question for  
14 the judge to decide, and the defense did not object. Id. at  
15 464. The trial judge ultimately found that the statements  
16 were material, and the jury returned a verdict of guilty. Id.  
17 After Johnson's conviction, but before her appeal to the Court  
18 of Appeals, the Supreme Court decided United States v. Gaudin,  
19 515 U.S. 506 (1995), which established that a jury must decide  
20 materiality. Johnson, 520 U.S. at 464. When Johnson's case  
21 reached the Supreme Court, the Court applied plain error  
22 review without mentioning modified plain error review. Id. at  
23 466-67. The Court found that the failure to instruct the jury  
24 that materiality was an element of the offense was error and

1 that it was plain. Id. at 467-68. The Court did not decide  
2 the third element—whether the forfeited error affected  
3 substantial rights—because the Court determined that the  
4 satisfaction of the first three factors only gave the Court  
5 discretion to correct the error if the error seriously  
6 affected the fairness, integrity, or public reputation of the  
7 judicial proceedings. Id. at 468-70. The Court never placed  
8 the burden of proof on the Government. See id. at 470.  
9 Indeed, the Court cautioned against any unwarranted expansion  
10 of or creation of any exceptions to the plain error rule in  
11 Rule 52(b) of the Federal Rules of Criminal Procedure. Id. at  
12 466. In the final step of its analysis, the Court evaluated  
13 whether the defendant had presented a plausible argument that  
14 the error in the charge had affected the fairness, integrity,  
15 or public reputation of the proceedings. The Court concluded  
16 that the error did not seriously affect “the fairness,  
17 integrity or public reputation of judicial proceedings” and  
18 affirmed the judgment of the Court of Appeals sustaining the  
19 conviction. Id. at 470.

20 Without deciding whether Johnson overruled Viola, this  
21 Court has frequently declined to reach the question of whether  
22 the modified plain error standard of review continues to apply  
23 when there has been a supervening change in the law after a

1 conviction.<sup>2</sup> See, e. g., United States v. Nouri, No. 09-3627-  
2 CR, 2013 WL 780918, at \*6 n.2 (2d Cir. Mar. 4, 2013); Bahel,  
3 662 F.3d at 634; Henry, 325 F.3d 93, 100 n.4 (2d Cir. 2003);  
4 United States v. Outen, 286 F.3d 622, 639 n.18 (2d Cir.  
5 2002).<sup>3</sup> In this case, it is also unnecessary to decide  
6 whether the modified plain error standard of review survived  
7 Johnson because the rationale animating the modified plain  
8 error standard of review—that the defendant should not have to  
9 show prejudice from an error when the defendant did not  
10 contribute to the error and had no basis to object to the  
11 error—does not apply. See Viola, 35 F.3d at 42-43. In Viola,  
12 this Court explained that the purpose of the modified plain  
13 error standard of review was to avoid insisting on “an  
14 omniscience on the part of defendants about the course of the

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<sup>2</sup> In Mahaffy, 693 F.3d 113, this Court applied modified plain error analysis. Id. at 136. However, in Mahaffy, the defendant had objected at trial on the grounds raised in his appeal. Id. at 122. Therefore, it would not have been unfair to place the burden on the Government to show that the error had not prejudiced the defendant.

<sup>3</sup> Under similar circumstances, other Courts of Appeals apply the traditional plain error standard of review. See, e.g., United States v. Pelisamen, 641 F.3d 399, 404 (9th Cir. 2011) (applying a plain error standard of review in a case where “there were no legal grounds for challenging the instructions at the time they were given, but such legal grounds ha[d] since arisen due to a new rule of law arising between the time of conviction and the time of appeal”); see also id. at 404-05 (collecting cases and explaining that no Court of Appeals other than the Court of Appeals for the Second Circuit has adopted the modified plain error standard of review).

1 law that we do not have as judges." 35 F.3d at 42. At  
2 Botti's trial, the Government sought an instruction that  
3 plainly would have established bribery as the only basis for  
4 the honest services mail fraud charge alleged in this case.  
5 Botti's counsel resisted that instruction because it was "so  
6 skewed" to the allegations against Botti. Modified plain  
7 error review should not apply when it is the defendant's  
8 discomfort with the proposed jury instruction that contributed  
9 to the error about which the defendant now complains.  
10 Accordingly, in this case, the instruction will be reviewed  
11 under the traditional plain error standard.

## 12 II.

13 Under a plain error standard of review, if this Court  
14 finds that the jury instruction (i) was error; (ii) that the  
15 error was plain; and (iii) that the error affected substantial  
16 rights, then this Court (iv) has discretion to correct the  
17 error, "but [it] is not required to do so." See Olano, 507  
18 U.S. at 735; see also Fed. R. Crim. P. 52(b). It is well  
19 established that "the discretion conferred by Rule 52(b)  
20 should be employed in those circumstances in which a  
21 miscarriage of justice would otherwise result." Olano, 507  
22 U.S. at 736 (quoting United States v. Young, 470 U.S. 1, 15  
23 (1985)) (internal quotation marks omitted). Accordingly, if  
24 the first three conditions are met, this Court should exercise

1 its discretion to correct the error only if it "seriously  
2 affect[ed] the fairness, integrity or public reputation of  
3 judicial proceedings." Johnson, 520 U.S. at 470 (alteration  
4 in original and citation omitted).

5 **A.**

6 In this case, the failure of the jury instruction to  
7 specify that the Government was required to prove honest  
8 services mail fraud by a bribery or kickback scheme was plain  
9 error, satisfying the first two Olano factors. Error is  
10 deviation from a legal rule, unless the rule has been waived  
11 by "intentional relinquishment or abandonment of a known  
12 right." Olano, 507 U.S. at 732-33 (quoting Johnson v. Zerbst,  
13 304 U.S. 458, 464 (1938)). Error is plain if it is clear or  
14 obvious. Olano, 507 U.S. at 734. "Whether an error is  
15 'plain' is determined by reference to the law as of the time  
16 of appeal." United States v. Garcia, 587 F.3d 509, 520 (2d  
17 Cir. 2009) (quoting United States v. Gamez, 577 F.3d 394, 400  
18 (2d Cir. 2009) (per curiam)) (quotation marks omitted); see  
19 also Henderson v. United States, 133 S. Ct. 1121, 1130-31  
20 (2013) (holding that regardless of whether a legal question  
21 was settled or unsettled at the time of trial, a court of  
22 appeals is bound to apply the law as it exists at the time of  
23 appeal).



1       The Supreme Court held in Skilling that the honest  
2       services fraud encompassed by 18 U.S.C. § 1346 must be limited  
3       to schemes involving bribes or kickbacks in order to avoid due  
4       process concerns. See 130 S. Ct. at 2931. Botti correctly  
5       argues that the District Court’s jury instruction on honest  
6       services mail fraud failed to anticipate and, therefore, to  
7       satisfy this requirement because it employed language broad  
8       enough to encompass a non-bribery theory, which the Supreme  
9       Court found unconstitutional in Skilling. This Court has held  
10       that, after Skilling, it is error for a district court to fail  
11       to limit honest services fraud to bribery or kickback schemes  
12       in the jury instructions. See, e.g., United States v. Bruno,  
13       661 F.3d 733, 740 (2d Cir. 2011). Because the District  
14       Court’s instruction did not specify that only bribes or  
15       kickbacks could support an honest services mail fraud  
16       conviction, it was plainly erroneous.

17                                   **B.**

18       In this case, however, Botti has failed to establish that  
19       the plain error in the charge affected his substantial rights.  
20       When evaluating the effect of an allegedly erroneous jury  
21       instruction, the jury charge must be read as a whole. See  
22       generally United States v. Allah, 130 F.3d 33, 42 (2d Cir.  
23       1997) (collecting cases). This Court has reversed in cases  
24       tried before Skilling and decided on appeal after Skilling

1 where the Government argued a non-bribery or -kickback scheme  
2 theory of honest services mail fraud, or where the Government  
3 intertwined an alternative theory with a bribery or kickback  
4 scheme theory. See, e.g., Mahaffy, 693 F.3d at 136; Bruno,  
5 661 F.3d at 739-40; see also United States v. Hornsby, 666  
6 F.3d 296, 306-07 (4th Cir. 2012); United States v. Wright, 665  
7 F.3d 560, 570-72 (3d Cir. 2012); United States v. Riley, 621  
8 F.3d 312, 321-24 (3d Cir. 2010). In contrast, in cases tried  
9 before Skilling and decided on appeal after Skilling where the  
10 jury instruction did not specify that a guilty verdict could  
11 be returned only if the jury found that the defendant engaged  
12 in a bribery or kickback scheme, but the evidence would  
13 support only a bribery or kickback scheme theory, this Court  
14 has affirmed. See, e.g., Nouri, 2013 WL 780918, at \*5-\*8; see  
15 also United States v. Andrews, 681 F.3d 509, 521 (3d Cir.  
16 2012); United States v. Spellissy, 438 F. App'x 780, 783-84  
17 (11th Cir. 2011) (affirming the denial of a petition for a  
18 writ of error coram nobis); see generally Andrews, 681 F.3d at  
19 521-28 (collecting cases). This is such a case.

20 Botti is correct that, after Skilling, a jury instruction  
21 must require the jury to find that the defendant participated  
22 in honest services mail fraud by way of a bribery or kickback  
23 scheme. However, it does not follow that reversal is  
24 necessary in every case in which the District Court erred by

1 failing to give that instruction. Viewing the erroneous jury  
2 instruction in this case in light of the charge as a whole and  
3 in the context of proceedings in which deprivation of honest  
4 services by bribery was the only theory that the evidence  
5 would support and the only theory that the Government argued  
6 at trial, the District Court's failure to limit honest  
7 services mail fraud to a bribery or kickback scheme did not  
8 affect Botti's substantial rights.

9 **i.**

10 Bribery is the only theory of honest services fraud that  
11 the Government presented in the indictment or argued at trial,  
12 and the District Court's instructions on the mail fraud charge  
13 reflected that. The District Court began its instructions by  
14 reading most of the indictment to the jury. The indictment  
15 detailed extensive allegations of Botti's providing public  
16 officials with money and other benefits in order to secure  
17 approval for certain development projects. The District Court  
18 instructed the jury on the bribery count, during which it  
19 defined a bribe as "a corrupt payment that a person provides  
20 to a public official with the intent to influence the official  
21 in the performance of his or her public duties." The District  
22 Court then directed the jury to Count Three of the indictment,  
23 the mail fraud charge, read the allegations and the relevant  
24 statutory provisions, and explained the elements of the

1 offense. Although the District Court did not explain that  
2 bribery is the only theory that can support a conviction of  
3 honest services mail fraud, bribery is the only example it  
4 provided of how the Government could prove the honest services  
5 deprivation prong of mail fraud. This is not a case where the  
6 charge was interwoven with an alternative theory of how the  
7 public could have been deprived of the honest services of its  
8 officials such as by a conflict of interest theory, see, e.g.,  
9 Bruno, 661 F.3d at 739-40.

10 Botti argues that "[t]he District Court's instruction  
11 allowed the payment of a bribe to be but one of many paths  
12 rather than the only path" to conviction of honest services  
13 mail fraud. He suggests several potential alternative  
14 theories that could have supported his conviction. These  
15 theories are divorced from the context of the trial and cannot  
16 plausibly explain the jury's guilty verdict.

17 Botti argues that the definition of "scheme or artifice"  
18 that the District Court provided allowed the jury to convict  
19 him of honest services mail fraud based simply on a finding of  
20 fraud, deception, or misrepresentation. The District Court  
21 defined "scheme or artifice" as "a plan for the accomplishment  
22 of an object," and "a scheme to defraud" as,

23 [A]ny plan . . . or course of action to obtain money  
24 or property or the intangible right of honest  
25 services by means of materially false or fraudulent

1 pretenses, representations, and promises reasonably  
2 calculated to deceive persons of average prudence  
3 . . . a plan to deprive another of money or property  
4 or of the intangible right to honest services by  
5 trick, deceit, deception, or swindle.

6  
7 The District Court provided these definitions within the  
8 larger explanation that the scheme or artifice element of  
9 honest services mail fraud required "a scheme or artifice to  
10 deprive the citizens of Shelton of the intangible right of the  
11 honest services of the officials as alleged in the  
12 indictment."

13 In context, the jury could not have understood this  
14 definition as anything more than a basic definition of a  
15 scheme or artifice to defraud. The jury could not have  
16 understood the definition as providing an independent theory  
17 of honest services fraud. Mail fraud requires both a scheme  
18 or artifice to defraud and an object of that fraud.  
19 Pasquantino v. United States, 544 U.S. 349, 355 (2005). At  
20 trial, the Government presented two theories of mail fraud,  
21 each with distinct objects: (i) a scheme to obtain money  
22 fraudulently from NewAlliance Bank, and (ii) a scheme to  
23 deprive the citizens of Shelton of the honest services of  
24 their public officials by bribery. The victim of the scheme  
25 to obtain money fraudulently was NewAlliance Bank, whereas the  
26 victims of the honest services fraud scheme were the citizens  
27 of Shelton. The District Court made this clear when, at

1 several points in the charge it clarified that, with respect  
2 to the honest services charge, it was the public, or the  
3 "citizens of Shelton," who were the victims of the scheme or  
4 artifice to defraud, and the District Court specified that the  
5 trick or swindle involved in a bribe was that the bribee,  
6 "while outwardly appearing to be exercising independen[ce] in  
7 his or her official work . . . instead has been paid privately  
8 for his or her public conduct." Because the jury charge  
9 cannot be read as endorsing, or even suggesting, a theory of  
10 honest services mail fraud that is predicated on a  
11 freestanding or amorphous swindle or trick, this theory cannot  
12 explain the jury's verdict.

13 Botti also argues that the jury could have convicted him  
14 of honest services mail fraud based on the failure to disclose  
15 the business relationship he had with Fracassini and Witkins  
16 who testified on Botti's behalf before the Planning and Zoning  
17 Commission. Therefore, Botti argues that the jury instruction  
18 permitted the jury to convict him based on his deception of  
19 the Planning and Zoning Commission. However, the Government  
20 did not suggest to the jury that sending employees to a public  
21 meeting to advocate for Botti's interests without disclosing  
22 that they worked for Botti constituted honest services mail  
23 fraud. The deception of the Planning and Zoning Commission  
24 was used as an instance of the misrepresentations that Botti

1 had used to obtain approval for the 828 Project from the  
2 Planning and Zoning Commission and, as a result, financing  
3 from NewAlliance Bank.

4       Moreover, the jury could not have convicted Botti of  
5 honest services mail fraud on the basis of the deception of  
6 the Planning and Zoning Commission consistent with the  
7 District Court's instructions. The honest services fraud  
8 instruction was based upon the premise that "[a] public  
9 official or local government employee owes a duty of honest,  
10 faithful, and disinterested service to the public and to the  
11 government that he or she serves." Thus, the District Court  
12 clarified, the public may be deprived of that right when an  
13 official "uses his or her public position for self-enrichment"  
14 by, for example, taking a bribe, because the official is no  
15 longer "exercising independen[ce] in his or her official  
16 work," and the public is not receiving the public official's  
17 "honest and faithful service to which it is entitled." This  
18 definition of honest services mail fraud requires that a  
19 public official be working dishonestly, unfaithfully, or  
20 interestedly. A public official who has been deceived could  
21 not reasonably fall within such a definition.

22       Botti also suggests that the jury could have relied on  
23 evidence of self-enrichment without bribery to satisfy the  
24 honest services prong of mail fraud. However, the District

1 Court's use of the term "self-enrichment" in the jury  
2 instruction plainly encompassed bribery. There is no  
3 reasonable view of the evidence that would support a finding  
4 that the public officials enriched themselves other than  
5 through the receipt of bribes. In this case, the Government  
6 did not offer any alternative theory of self-enrichment, such  
7 as through a conflict of interest scheme. See, e.g., Bruno,  
8 661 F.3d at 740.

9 In two footnotes in his briefs to this Court, Botti  
10 suggests that the jury could have convicted him of honest  
11 services mail fraud based on his provision to Shelton public  
12 officials of "gifts and benefits" that did not constitute  
13 bribes. This cursory argument is not a basis for reversal.  
14 "It is a settled appellate rule that issues adverted to in a  
15 perfunctory manner, unaccompanied by some effort at developed  
16 argumentation, are deemed waived. This rule has particular  
17 force where an appellant makes an argument only in a  
18 footnote." Niagara Mohawk Power Corp. v. Hudson River-Black  
19 River Regulating Dist., 673 F.3d 84, 107 (2d Cir. 2012)  
20 (quoting Tolbert v. Queens Coll., 242 F.3d 58, 75 (2d Cir.  
21 2001)) (quotation marks omitted).

22 Moreover, a gifts or benefits theory of honest services  
23 mail fraud is inconsistent with the trial record. The  
24 indictment charged and the trial record supported that the



1 gifts Botti gave to the Shelton public officials were in  
2 exchange for favorable actions that they took for him. With  
3 respect to the Mayor, the indictment charged and the evidence  
4 supported that Botti provided benefits to the Mayor of Shelton  
5 from about 2002 to 2006 and that he "expected that the  
6 benefits he provided to [the Mayor of Shelton] would result in  
7 favorable treatment for Botti and his construction projects."  
8 Such a pattern of behavior is sufficient to establish bribery:

9 [I]n order to establish the quid pro quo essential  
10 to proving bribery, the government need not show  
11 that the defendant intended for his payments to be  
12 tied to specific official acts (or omissions).  
13 Rather, bribery can be accomplished through an  
14 ongoing course of conduct, so long as evidence shows  
15 that the favors and gifts flowing to a public  
16 official [are] in exchange for a pattern of official  
17 actions favorable to the donor.

18  
19 Bahel, 662 F.3d at 635 (internal quotations marks and  
20 citations omitted).

21 The Government also contended and the evidence supported  
22 that the benefits that Botti gave to the members of the  
23 Planning and Zoning Commission were made in exchange for their  
24 support for the 828 Project. The gifts to the members of the  
25 Planning and Zoning Commission were charged in the portion of  
26 the redacted indictment under the heading, "Botti Provides  
27 Things of Value to Public Officials For Their Assistance."  
28 The Government's Request to Charge explained its theory of  
29 honest services fraud as alleging the following:

1 [Botti] engaged in a scheme to defraud the citizens  
2 of Shelton, Connecticut of the intangible right to  
3 the honest services of its public officials by  
4 providing benefits to such officials with intent to  
5 influence such officials. Where there is a stream  
6 of benefits arranged by the payor to favor a public  
7 official, the Government need not demonstrate that  
8 any specific benefit was received by the public  
9 official in exchange for a specific official act.

10  
11 It was unnecessary for the District Court "to use the magic  
12 words 'corrupt intent' or 'quid pro quo' to effectively charge  
13 a jury on bribery." See Bahel, 662 F.3d at 635.

14 Botti's alternative theories are contrary to the only  
15 theory of honest services mail fraud that the Government  
16 actually presented to the jury and that the Government asked  
17 the Court to explain as its theory. Accordingly, these  
18 alternative theories do not demonstrate that Botti's  
19 conviction was based on a non-bribery theory of honest  
20 services mail fraud.<sup>4</sup>

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<sup>4</sup> Botti also argues that the jury's failure to return a guilty verdict on the bribery charge demonstrates that it could not have convicted him of honest services mail fraud on a bribery theory. This argument is without merit.

The Supreme Court has instructed lower courts not to attempt to divine the meaning of a hung count when analyzing a unanimous verdict on another count. See Yeager, 557 U.S. at 121-22. Botti attempts to distinguish Yeager on the basis that it involved a hung jury and an acquittal, whereas this case involves a hung jury and a conviction. However, the reasoning in Yeager was not as limited as Botti suggests. Id. at 120-22. The Court explained that "conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." Id. at 122.

2 Finally, assuming that we had discretion to reverse the  
3 conviction, we would not exercise that discretion in this case  
4 because the error did not "seriously affect the fairness,  
5 integrity or public reputation of judicial proceedings."  
6 Johnson, 520 U.S. at 470 (alteration omitted). The Government  
7 sought a proper instruction that would have obviated the error  
8 in the jury charge and the defense demurred because that  
9 charge hewed too closely to the actual proof in the case. The  
10 evidence of the bribe-based honest services mail fraud was  
11 overwhelming and there was no other plausible theory presented  
12 to the jury. On this record, it cannot be said that the error  
13 seriously affected the fairness, integrity, or public  
14 reputation of the judicial proceedings.

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Botti asks this Court to intuit the jury's logic in returning a conviction on the honest services mail fraud charge by analyzing the bribery charge on which the jury was unable to reach a verdict. Yeager forecloses this approach. See, e.g., Hornsby, 666 F.3d at 305 n.4 (rejecting the argument that if "bribes were the dominant theory used to convict [the defendant], then the jury would have found him guilty of the counts that deal directly with facts supporting [the defendant]'s receipt of money").

Moreover, this would be a particularly inappropriate case to find an exception to Yeager. The honest services mail fraud charge of which Botti was convicted charged a scheme from in or about 2002 to defraud the citizens of Shelton of the honest services of the Mayor of Shelton and of other Shelton public officials. Unlike the bribery count, it was not limited to a single instance of providing money to the Mayor of Shelton in or about June 2006.

**CONCLUSION**

1

2           We have considered all of the arguments of the parties.

3 To the extent not specifically addressed above, they are

4 either moot or without merit. For the reasons explained

5 above, we **AFFIRM** the judgment of the District Court.