23-17

No. _____

In The

Supreme Court of the United States

WISAM RIZK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

WISAM RIZK, 65128-060
FCI Fort Dix
P.O. Box 2000
Joint Base MDL, N.J. 08640

QUESTIONS PRESENTED

1. This court has ruled that "conflict of interest" and "undisclosed self-dealing" by a private individual is not in the preview of §1346 (*Percoco*, 561 U.S., at 409–410). In this case, the underlying criterion of guilt was "conflict of interest" and "undisclosed self-dealing" with a bribery claim. The 3rd has ruled that jury instructions involving both. conflict of interest and a bribe are unconstitutionally vague. (*Wright*). The 6th, in this case, claims as long as there is a bribe, honest services can stand, no matter if "Conflict of interest" was the underlying criterion of guilt. This case does not involve a federal government nexus.

   The question is:

   Under §1346 Honest Services, can "conflict of interest" and "undisclosed self-dealing" be used as the underlying criterion of guilt even when a kickback or bribe is alleged?

2. This Court has held that a Guilty Plea does Not Inherently Waive a Constitutional Challenge against the Statute. A defendants guilty plea to a theory of guilt held unconstitutionally vague by this court, is one which the government may not constitutionally prosecute no matter how validly his factual guilt is established. (*Menna v. New York*, 423 U.S. 61 (1975)). In collateral review an attack on a guilty plea must be a violation that is of **constitutional** or **jurisdictional** basis.

QUESTIONS PRESENTED—Continued

The question presented is:

In a 2255 that was time barred, can an inmate overcome the time bar and receive a Certificate of Appealability, if the underlying theory of guilt in the indictment is held unconstitutionally vague due to a clarification of the indicted statute?

3. Commercial contracts under state law define commercial agreements such that they govern corporate policies, including fiduciary duty between signatories, of those contracts.

The question presented is:

Does Honest services apply to "everyone" who owes some sort of fiduciary responsibility to others, including a corporate officer or is that officer's fiduciary requirement bound to commercial (private) contract law that is under the jurisdiction of the State?

Note: Ciminelli *and* ***Percoco*** *were* ruled on after the 6th Circuit En Banc review was denied but before filing of this petition.

PARTIES

The petitioner is Wisam R. Rizk and is incarcerated in FCI Fort Dix at Joint Base MDL, New Jersey 08640. The respondent is the United States of America.

RELATED CASES

United States v. Rizk—Wisam R. Rizk, No. 1:2017cr424, U.S. District Court for the Northern District of Ohio Eastern Division Court, Judgment entered on November 4, 2019

Wisam Rizk v. USA, No. 1:2021cv01787, U.S. District Court for the Northern District of Ohio Eastern Division Court, Judgment entered on September 21, 2022

Wisam Rizk v. USA, No. 22-3834, U.S. Court of Appeals for the Sixth Circuit, Judgment entered April 25, 2023

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit as 0647-1, 1:21-cv-01787 F.3d (6th Circuit, 2023) and a copy is attached at App. 1. The decision of the United States District Court for the Northern District of Ohio is not reported. A copy is attached at App. 10 to this petition.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on February 7, 2023. An order denying petition for rehearing was entered on March 25, 2023 and a copy of the order is attached at App. 30 to this petition. Jurisdiction is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§1346 Honest Services Wire Fraud

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

(Added Pub. L. 100–690, title VII, §7603(a), Nov. 18, 1988, 102 Stat. 4508.)

The Tenth Amendment which holds:

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

The Sixth Amendment which holds:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment which holds:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court Cases:

United States v. Percoco (Supreme Court, May 11, 2023)

United States v. Ciminelli (Supreme Court, May 11, 2023)

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

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

United States v. Holland, 348 U.S. 121 (1954)

United States v. Timmreck, 441 U.S. 780 (1979)

Class v. United States, No. 16-424 (2018)

McQuiggin v. Perkins, 133 S.Ct. 1924, 1928 (2013)

United States v. Lemire, 720 F.2d [1327,] at 1335

Blackledge v. Perry, 417 U.S. 21 (1974)

Menna v. New York

Hill v. United States, 368 U.S. 424, 428

Lauritzen v. Larsen, 345 U.S. 571, 588–89 (1953)

McDonnell v. United States, 135 S.Ct. 2355 (2016)

United States v. Harris, 106 U.S. 629 (1883)

Romer v. Evans, 517 U.S. 620, 628 (1996)

Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982)

Blum v. Yaretsky, 457 U.S. 991, 1002 (1982)

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972)

Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970)

United States v. Cruikshank, 92 U.S. 542, 554 (1876)

Rule of law:

Restatement (Second) of Conflict of Laws §187(1) (Am. Law Inst. 1971).

District:

United States v. Wright, 665 F.3d 560 (3d Cir. 2012)

United States v. Brumley, 116 F.3d 728,734 (5th Cir. 1997)

Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)

Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)

United States v. Thompson, 484 F.3d 877, 884 (7th Cir. 2007) (Easterbrook, C.J.)

United States v. Bass, 404 U.S. 336, 348 (1971)

United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812)

United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting *United States v. Enmons*, 410 U.S. 396, 411–412 (1973))

United States v. Von Barta, 635 F.2d 999, 1003 (2d Cir. 1980)

United States v. Riley, 621 F.3d 312, 326–27 (3d Cir. 2010)

Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)

Musser v. Utah, 333 U.S. 95, 97 (1948)

Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (quoted in *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 498 (1982))

Winters v. New York, 333 U.S. 507, 515–16 (1948).

Colten v. Kentucky, 407 U.S. 104, 110 (1972)

Sessions v. Dimaya, 138 S.Ct. 1204, 1213 (2018)

Jordan v. De George, 341 U.S. 223, 231 (1951)

United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997)

United States v. Murphy, 323 F.3d 102 (3d Cir. 2003)

United States v. Sorich, 523 F.3d 702, 712 (7th Cir. 2008)

Kirtland v. Hotchkiss, 42 Conn. 426, 444 (1875)

Warner v. Warner, 235 Ill. 448, 456 (1908)

Krock v. Lipsay, 97 F.3d 640, 645 (2d Cir. 1996)

Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941)

State:

Anshutz Corp. v. Brown Robin Cap., LLC, 2019-0710-JRS (Del. Ch. June 11, 2020)

Arby P'rs V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006) (Strine, V.C.)

Virginia v. Rives, 100 U.S. 313, 318 (1880)

STATEMENT OF THE CASE

A. Background

The government indicted Rizk on the theory that he was not allowed to profit from a software development contract between iStarFZE (a company he had interest in) and iVHR (a company he became an employee of) because he had a fiduciary duty to the Cleveland Clinic Foundation (CCF:the company that wholly owned iVHR) and did not disclose it, while still ***disclosing*** his Conflict of interest to iVHR (his actual employer).

In June 2011, Rizk, was a consultant to CCF with the Innovations department. For 1 year he consulted for them on a variety of commercialization projects including building a funding and business plan for what became to be iVHR (Spin off Delaware Corporation). This business plan, included a list of vendors to build software, that was to be commercialized in the spun off iVHR Corp. The business plan that was built, "Level 3 Business Plan" included a vendor list that was to build

software, which included iStarFZE. It was reviewed by over 30 employees and vetted by the highest levels of the organization. Rizk was not part of the vetting meetings nor did he have influence over those meetings. Gary Fingerhut, who was director of technology of CCF Innovations department, was part of those meetings and he made a recommendation of iStarFZE, but the decision to choose it was not his. Instead the then Executive Director of Innovations, Chris Coburn, made the final recommendation. The actual decision makers where the CIO, CFO, COO and CEO of CCF. These individuals where separated from Rizk by a magnitude of 5. By April 2012 a contract was signed between iVHR and iStarFZE. No money or agreements had been made between Rizk and Fingerhut at this time.

On July 22, 2012, Rizk stopped being a contractor to CCF and became a contractor to iVHR. In September 2012 the first wire went to Fingerhut's company (BTI) in the form of a loan, about 5 months after the initial contract with iVHR. Then subsequent payments followed. Rizk told Fingerhut he should disclose his income to his employer, CCF, which Fingerhut claimed he did. On February 14,2013, Rizk disclosed his interest in iStarFZE to iVHR (the corporation that had the contract with iStarFZE). Rizk became an employee of iVHR in March 2013. He attempted to disclose to CCF but they did not provide their disclosure policy because he was not an employee. All this is factually verifiable with emails.

Note: Rizk did not plead to a loss amount. Rizk did not agree he was an employee of CCF.

REASONS FOR GRANTING THE PETITION

Overview:

- Conflict of interest and self-dealing as underlying criterions of guilt in §1346 have been held void for vagueness. (*Skilling*, 561 U.S. 358 (2010), *Percoco*, 21-1158, May 2023))
- "A defendants guilty plea to a theory of guilt held unconstitutionally vague by this court, is one which the state [federal government] may not constitutionally prosecute no matter how validly his factual guilt is established." (*Menna v. New York*, 423 U.S. 61 (1975))
- The government violated the constitutional right of Due process when they brought the indictment because they did used an unconstitutional theory of guilt to indict.
- Actual Innocence overcomes a 2255 time bar and the 1 year limitation should be suspended. A COA should have been issued by the 6th Circuit because the petitioner is now actually and factually innocent due to the constitutionally vague criterion of guilt voiding the indictment theory.

Importance of the questions presented

This case presents questions that are based on fundamental application of constitutional law. See Rule 10, Supreme Court rules (supreme court usually hears cases involving important and unsettled issues of federal law). On June 30, 2022, this court granted Certiorari in *Percoco v. United States*, No. 21-1158 (where the court continues it trend to limit the governments use of honest services fraud statute 18 U.S.C. Section §1346, to combat public corruption). In the Case before this court, the lower courts relied heavily on the petitioners Guilty plea to establish facts of guilt. *Percoco* clarified that "Self-dealing" and "conflict of interest" are beyond the realm of honest services. The guilty plea held that the underlying theory of guilt was one of "conflict of interest, "self-dealing" and "nondisclosure." This makes the plea invalid due to unconstitutionally vague criterion of guilt. The case here is not "misapplication" of a statute, but that the underlying theory of guilt has been found constitutionally invalid.

In Appeal in the 6th circuit, the appeals court held that as long as there is a kickback or bribe the indictment can stand, ignoring the underlying theory of guilt of "conflict of interest."

1) Due process requires that a criminal law give fair warning, at the time of the offense, of what conduct is prohibited. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Accordingly, a statute must be clear and specific enough to inform the public of precisely what conduct is prohibited and

to cabin law enforcement's discretion within reasonable limits. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). Section 1346 fails both of these requirements. The "intangible right of honest services" is undefined in Section 1346, has no ordinary and natural meaning, and has no settled meaning in the pre- or post-*McNally* case law. Section 1346's "open-ended quality," *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007) (Easterbrook, C.J.), the statute gives prosecutors unbridled discretion to enforce their own views of "honest services." The result is a largely unconstrained federal right of "honest services" that potentially extends to a vast array of corporate, personal, and professional relationships. (*Black Writ 2012*).

2) Section 1346 also threatens to inject federal oversight into numerous areas of the law traditionally left to the States. Interpreting Section 1346, as most courts of appeals have, to impose a federal-law Duty to provide "honest services" irrespective of state law would, in practice, invite federal courts to create A federal common law of honest dealings, an approach which has been anathema for two centuries. See, e.g., *United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). Indeed, many courts applying Section 1346 have imposed federal duties of honesty without Looking to state law or when no duty otherwise exists (as in this case).

The minority view, which requires an independent violation of law before finding a deprivation of the "intangible right of honest services," would still deprive States of their ability to make numerous independent policy judgments, "effect[ing] a change in The sensitive relation between federal and state Criminal jurisdiction." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *United States v. Enmons*, 410 U.S. 396, 411–412 (1973)). (*Black Writ 2012*).

3) The federal government does not have a bribery law for private individuals. 35 out of 50 states have bribery laws. Some states lack a bribery statute for private individuals, and with some states not having bribery laws, the federal government overreaches in imposing criminal bribery interpretation of federal prosecutors on states that distinctly have chosen not to enact them.

4) "Conflict of interest" and "self-dealing" are not constitutionally barred. They are judge made laws. They are based on commercial contracts and are governed by contract law and corporate policy, not by federal statutes.

The Department of Justice is not America's corporate governance officer. 1346 gives it the unbridled power to be one.

Guilty plea does not waive constitutional attack on statute

On February 21, 2018, in *Class v. United States*, No. 16-424 this court addressed whether a guilty plea bars a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution. Class was charged with possessing firearms on the grounds of the United States Capitol, in violation of 40 U.S.C. §5104(e)(1) ("An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm."). In the district court, Class challenged the statute as violating the Second Amendment and also argued that he was denied fair notice that weapons were banned in the parking lot on the grounds of the Capitol. The district court rejected both claims. Pursuant to a written plea agreement, Class pled guilty, waiving several categories of rights. The agreement said nothing about the right to raise on direct appeal that the statute of conviction was unconstitutional. On appeal, Class repeated his constitutional claims. The appellate court held that Class could not raise his constitutional claims because, by pleading guilty, he had waived them.

In a 6 to 3 decision, this Court reversed and remanded, holding that a guilty plea does not inherently waive a constitutional challenge to the statute of conviction. The Court stated that the holding "flows directly" from the Court's prior decisions. The Court rejected the dissent's argument that its holding was inconsistent with Federal Rule of Criminal Procedure 11(a)(2), governing conditional pleas. The Court found

that Rule 11(a)(2) does not indicate whether it sets forth the exclusive procedure for a defendant to preserve a constitutional claim following a guilty plea. Looking to the Advisory Committee Notes, the Rule's drafters acknowledged that Rule 11(a)(2) "has no application" to certain kinds of constitutional objections. Finally, the Court did not distinguish between a facial constitutional challenge to the statute and an as-applied constitutional challenge to the statute. This is historically supported in *Blackledge v. Perry*, from 1974, and *Menna v. New York*, a per curiam opinion from 1975, which both allowed criminal defendants to raise certain constitutional challenges on appeal despite a plea of guilty ("factual guilt") to the offense charged. Blackledge also had an appellate claim of "vindictive prosecution" after a guilty plea, because the claim "went to the very power of the State to bring the defendant into court to answer the charge." *Menna* allowed a defendant to present a constitutional double-jeopardy claim on appeal despite having pled guilty, because if *Menna* was right, the criminal charge was "one which the State may not constitutionally prosecute . . . no matter how validly his factual guilt is established."

In a collateral attack setting the same holds true. *United States v. Timmreck*, 441 U.S. 780 (1979) a conviction based on a guilty plea is not subject to collateral attack when all that can be shown is a formal violation of Rule 11. Such a violation must be **constitutional** or **jurisdictional**. Or the claim must reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the

rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428.

A. Honest services are invalid if indictment theory was based on conflict of interest and self-dealing even if bribe occurred. The government fails to state a claim

1. Courts firmly established conflict of interest and self-dealing are not valid criterions of guilt under §1346

What criterion of guilt can be charged under §1346 has evolved over time and this court attempted to clarify it under *Skilling*. In *Skilling*, Judge Scalia indicated that while bribery and kickbacks might limit 1346, they are not the criterion of underlying criminal activity that causes 1346 to occur, instead they are a limiting factor. Meaning that another activity must be present in conjunction with bribery. If the other underlying activity is within the realm of 1346, then a crime can be prosecuted. At the time, Judge Scalia indicated that what these activities can be is still too vague under 1346. He stated that even with adherence to the pre-*McNally* doctrine, in his estimation, it would not address the vagueness of the honest-services statute:

> *[Limiting to bribery and kickbacks]. But it would not solve the most fundamentals indeterminacy: the character of the "fiduciary capacity" to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone,*

> *including the corporate officer here? The pre-*McNally *case law does not provide an answer. Thus, even with the bribery and kickback limitation the statute does not answer the question "What is the criterion of guilt?"*

(Id., at 2938–39 (Scalia, J., concurring)).

When *§1346* came under attack as unconstitutionally vague, this Court elected to save it from invalidation in *Skilling*. It did so by limiting the statute's scope to only those cases involving "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." A claim of Honest-services fraud must allege the fraudulent deprivation of honest services through a bribery or kickback scheme. *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 2832, 177 L.Ed.2d 619 (2010).

This Court rejected the argument that *§1346* should be extended to Conflict of Interest and lack of disclosure type of conduct:

> "undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his own undisclosed **financial** interests while purporting to act in the interests of those to whom he owes a fiduciary duty."

Although some circuit courts had upheld convictions for certain conflict-of-interest non-disclosure schemes before *McNally* was decided, the Court stated that these cases were infrequent and their outcomes were inconsistent. Thus, the court concluded that "a

reasonable limiting construction of §1346 must exclude this amorphous category of cases." Just like the *McNally* Court, the *Skilling* Court called on Congress to "speak more clearly" if it desired the honest-services statute "to go further." Congress elected not to go further.

This court again further cemented this limitation of *§1346* with *Percoco* where the court again stated "undisclosed self-dealing" by a private individual is not in the preview of §1346 (561 U.S., at 409–410):

> This is illustrated by Skilling's **rejection** of the Government's argument that §1346 should be held to reach cases involving "'undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.'"

561 U.S., at 409–410.

"What is the criterion of guilt?" (Id., at 2938–39 (Scalia, J., concurring in *Skilling*)) Judge Scalia asked, and this court has found that Conflict of Interest and self-dealing are ***not*** a criterion of guilt under §1346 because it is unconstitutionally vague.

Kickbacks and bribes are limitations on the breadth of 1346 and alone cannot constitute a violation of honest services. There has to be a fiduciary breach. For example, granting a contract based on a bribe might be a violation of 1346. Granting a person a

vendor contract based on a bribe or a promised kickback might be a 1346 violation. Yet in this case there was no bribe or kickback to get a contract. That was done at arm's length. The crime was to "hide a conflict of interest" and that a "bribe" occurred, (even when that conflict of interest was disclosed).

2. The 6th circuit is in conflict with other circuits and this court

The 6th circuit ignored both *Skilling* and *McNally* when the defendant appealed the denial of a COA based on erroneous ruling made in the district court. Self-dealing (promoting one's own financial interests) is not an aspect of Honest Services Wire fraud according to *Skilling*. The 3rd circuit held that when both conflict of interest and bribery are charged together, §*1346* fails. The 3rd Circuit stated it clearly in *United States v. Wright*, 665 F.3d 560, 570–72 (3d Cir. 2012) (holding that instruction of conflict-of-interest theory and bribery theory required reversal of convictions.). In pre-*McNally* cases, self-dealing was prosecuted. In the self-dealing cases, the employee typically caused his employer to conduct business with a company "in which the defendant [had] a secret interest, undisclosed to the employer." Id., at 140. In *United States v. Von Barta*, 635 F.2d 999, 1003 (2d Cir. 1980), an employee of a securities firm caused his employer to extend credit to an investment fund with "meager capitalization," in which he held an undisclosed fifty percent interest. He also failed to disclose the undercapitalization, even though his employer

could be responsible for future losses by the investment fund. Id.

In *Wright* (*United States v. Wright*, 665 F.3d 560, 570–72), the court stated that "Honest services fraud" has proven hard to define. We recently reviewed its history at length, see *United States v. Riley*, 621 F.3d 312, 326–27 (3d Cir. 2010)." The court then continues "*The District Court instructed the jury that it could convict for honest services fraud under either a "conflict of interest" theory (whereby it is fraud for a public servant not to disclose a conflict of interest resulting in personal gain) or a "bribery" theory (whereby it is fraud for a public servant to accept benefits in exchange for taking an official action).*"

The court in *Wright* continues with "However, the Supreme Court later construed "honest services fraud" to exclude the conflict-of-interest theory, holding that this interpretation of the statute would render it unconstitutionally vague." *Skilling*, 130 S.Ct., at 2927–35. **The jury's general verdict, encompassing both theories, could thus be defective.** See also *United States v. Riley*, 621 F.3d 312 (2010) (defendants' honest services fraud convictions were not based on either a kickback, or bribe theory and for that reason, under plain error review, the convictions could not be sustained post-*Skilling*.) The court vacated *Wright*'s conviction because the conflict-of-interest theory could have been reason for conviction even though a bribe took place.

Here, the criminal activity alleged was "lack of disclosure" and "conflict of interest" that leads to a bribe to keep it all quiet. Due to the vagueness of 1346, Rizk plead guilty because the district court, government and his attorney instructed him that even *disclosed conflict of interest* can be criminalized because the disclosure did not meet the governments standards.

3. Applying *Wright* to Rizk

Rizk's case parallels the *Wright* case. The indictment is based on a conflict of interest theory. Under *Skilling* the court held that Honest Services fraud is limited to situations where the defendant breached **his** fiduciary duty as a **result** of actual bribes or kickback. A short review of Rizk indictment illustrates the basis of the indictment:

> *8. The Clinic relied on Fingerhut and RIZK to disclose possible conflicts of interest in entering into and managing third party contracts.*

The above statement sets the basis of the indictment theory. The indictment is based on a conflict of interest. This theory of "conflict of interest" is further given credence by the district court (DOC60 of original docket). It exemplifies the misinterpretation of *§1346* as it stands:

Defendant here was "an insider." (See App. 32 DOC60 district court loss ruling).

4. iVHR did not have disclosure policy. Rizk unaware of government set standards of disclosure

Having established that

1. Rizk was not an employee of CCF and
2. that CCF did not require his disclosure (evidence in 2255) and
3. the vendor contract was between iVHR and iStarFZE without CCF being party.

A study of iVHR must be performed to establish its disclosure requirements. iVHR did not have a disclosure policy, so was disclosure owed to it? How would that disclosure have to look like, for the disclosure to be acceptable if it is not defined by policy? and finally, who sets that disclosure standard in legal proceedings. Does Rizk have to meet standards set by government prosecutors? Here the government set Standards of disclosure and called Rizk's disclosure inadequate and made it a criminal breach.

iVHR also did not have a conflict of interest policy, no conflict of interest review board, not even review process. In its purest form, employees of iVHR did not have to disclose anything by policy. They might elect to disclose (like Rizk did) but they are not contractually bound to disclose anything. The company did not set disclosure standards. So how does an employee of iVHR meet the standard the government sets in 1346 without knowing what they are in order not to breach them? When Rizk requested that policy from CCF he

never received it. Rizk cannot adhere to standards he is unaware of, not the government's, not CCF's and not iVHR. The government cannot set Standards retroactively and call it a crime if they are not met. This court invalidated conflict of interest from Honest Services Wire fraud for that exact reason.

A corporation that does not have a disclosure policy is simply not owed disclosure. This is even more true when that company is led by sophisticated actors. In fact, Rizk did not even owe iVHR disclosure because it did not have the appropriate policies to enforce the requirements for disclosure. CCF did not provide those policies to Rizk, and so he didn't owe disclosure to CCF. In this case the government set those standards, and pointed at Rizk that he failed to adhere to them, without him knowing what those standards were.

The government cannot enforce disclosure because the standards it sets are not known to the indicted before it sets them, violating his due process rights. 1346 contains no language about disclosure standards. (See App. 35 emails showing attempted disclosure and that policy was never provided.)

Therefore 1346 is unconstitutionally vague when there is a conflict of interest theory even if a bribe or kickback occurred in a private setting.

5. Guilty plea taken unknowingly and only due to the vagueness of the statute

Criminal statutes that lack sufficient definiteness or specificity are commonly held "void for vagueness." (*Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)). Such legislation "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Musser v. Utah*, 333 U.S. 95, 97 (1948). "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." Id., at 97. "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (quoted in *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 498 (1982)).

"Men of common intelligence cannot be required to guess at the meaning of [an] enactment." *Winters v. New York*, 333 U.S. 507, 515–16 (1948). "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable test to ascertain guilt." Id. Cf. *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

In other situations, a statute may be unconstitutionally vague because the statute is worded in a standardless way that invites arbitrary enforcement. With respect to laws that define criminal offenses, the Court has required that a penal statute provide the definition of the offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The Court may also apply the void-for-vagueness doctrine to analyze statutes governing civil "removal cases," *Sessions v. Dimaya*, 138 S.Ct. 1204, 1213 (2018) (plurality opinion) "in view of the grave nature of deportation;" *Jordan v. De George*, 341 U.S. 223, 231 (1951). (Note: Rizk has a due process case in the 3rd District claiming U.S. Citizenship).

Here the defendant did not understand what the breadth of fiduciary duty he was being held under was. He did not know the governments standards of disclosure. If corporate policy was used, and contractual relationships, Rizk did not owe CCF any fiduciary duty. Yet due to the vagueness of 1346, the government ignored corporate policy and contracts establishing fiduciary

through affinity. Facts are facts, if the government claims otherwise in a plea, it does not make them facts.

He was not an employee of the organization (CCF) that the government claimed he owed fiduciary to. No matter what the guilty plea claims, the fact is, Rizk was not an employee. Not a living soul can disprove this fact. Courts strive to deny habeas petitions. The Appeals court accepted the version of events it wanted to deny the COA and ignored the factual truth.

The vendor contract in question was not with CCF. It was with iVHR. This is who was actually owed fiduciary if any fiduciary is owed.

As discussed earlier, iVHR did not have a disclosure policy. Rick disclosed to iVHR in a formal meeting with its Director of Operations. Rizk then became an employee of iVHR.

The defendant was made to understand that fiduciary could be conceived by the government without contractual basis (this was confirmed by the district court by calling Rizk an "insider," see App. 32).

1346 was held so broadly by the government and the district court that **not** one of the necessary step to establish guilt occurred with the exception of the forced guilty plea: "conflict of interest" as an invalid underlying theory of guilt (*Skilling and Percoco*) establishing fiduciary through employment (*Percoco*), and establishing delivery of product (*McDonnell*).

Instead of the court using surgical tools to ascertain disclosure through proper contract analysis and

company policy, the court used a broad sword and forced a guilty plea. The court could not claim the defendant was an employee of CCF but instead said he was an "insider," thereby ignoring employment, separation of corporate entities, corporate policies and contracts. Faced with that lack of regard for the facts, by both the court and the government, and a statute §1346 that allowed them that *unconstitutional breadth of power*, a guilty plea was entered.

Rizk could not have gone to trial because the underlying statute had no comprehensible limit, did not establish how fiduciary is owed and what definition of bribe should be used for private individuals. Saddled with that, the decision to plea was not one of "guilt" but one of necessity.

In 2255 Appeal, Rizk does not fare any better.

The appeals ruling also follows the same flawed logic. In App. 1, the court stated:

> "Even if that is so [that new evidence should have been admitted by the district court] Rizk's "new evidence" is insufficient to help him here. Rizk's proffered evidence, which he asserts shows that he was not an employee of CCF and that he disclosed his conflict of interest, merely contradict the statement of facts supporting his guilty plea."

The evidence presented shows that disclosure occurred through an email conversation. That another party was aware of the conflict of interest and was disclosed to.

The Appeals court received evidence contradicting the guilty plea, yet it found that evidence unpersuasive because of the Guilty Plea, even though the evidence factually disproved the Guilty plea facts.

Even though the petitioner can show the core component of the governments theory was proven factually wrong and that a crime did not occur (because with disclosure there can be no intent for a crime), the appeals court declined to issue a COA. This case further travels in the realm of vagueness, because the district court allows a guilty plea based on a unconstitutionally vague theory of guilt.

6. Establishing if Honest Services are owed is based on corporate policy and contracts. 3rd contradicts 7th

In order to establish if honest services are owed in a government setting, one must only follow *Percoco*.

Without becoming a government employee, individuals not formally employed by a government entity may enter into agreements that make them actual agents of the government. An "agent owes a fiduciary obligation to the principal," see, e.g., 1 Restatement (Third) of Agency §1.01, Comment e, p. 23 (2005), and therefore an agent of the government has a fiduciary duty to the government and thus to the public it serves.

Agency to the government must be established, either through employment or through agreements with the government, only then can honest services be

owed. There is no affinity rule, to the contrary, *Percoco* rejected a nebulous Insider definition of "reliance on" and "in control of":

> Alito observed that Percoco "owed a duty of honest services to the public if (1) he 'dominated and controlled any governmental business' and (2) 'people working in the government actually relied on him because of' " his relationship with the government. But that standard does not, Alito continued, provide enough information about what conduct is or is not allowed, nor does it shield against arbitrary enforcement by prosecutors."

The relationship has to have formality, either contractually or through some formal agency.

To establish that, in the private setting, employment contracts must be presented or an agreement between parties.

Judge Gorsuch's question in *Percoco* asks a pointed question that this could should answer: can private individuals owe honest services under *§1346*. The answer should be no due to contract law and state law:

> Does it (honest services) also apply "to private individuals who contract with the public?" Ibid. Or does it apply to "everyone" who owes some sort of fiduciary responsibility to others, including (say) a corporate officer? Ibid. What source of law, too, should a court consult to answer these questions? Must a fiduciary duty arise from positive state or federal law, or can

> it arise from general trust law, "a corpus juris festooned with various duties"?

Id., at 417–418.

In the private sphere fiduciary is established by commercial contract. There is no other formal arrangement that can establish fiduciary. This contract can be employment, agency or consultancy. The contract in a corporate setting then relies on policies to manage the relationship. Meaning, concepts such as disclosure, conflict of interest, receiving gifts and other commercial governance concepts are the realm of private company and corporate policy. Those policies are contracts in their own right. Some corporations require the disclosure of stock ownership by employees such as Deloitte and Touché (Consulting firm) while others don't. Some corporations do not have a disclosure policy whatsoever or a conflict of interest policy, such as iVHR. This sets the stage that "what is to be disclosed" is based on corporate policy and not government standards. In a case involving the prosecution of a Texas public official for conspiring to defraud the citizens of his honest services, the Fifth Circuit inquired whether, "services [must] be owed under state law? Second, must the breach of a duty to provide services rooted in state law violate the criminal law of the state?" *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997). The court concluded, "that services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered." Id. The court elaborated that:

> We will not lightly infer that Congress intended to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees. We find nothing to suggest that Congress was attempting in §1346 to garner to the federal government the right to impose upon the states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees. . . . Under the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law. Stated directly, the official must act or fail to act contrary to the requirements of his job under state law. There is conflict in the courts: *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003) (finding state law determines the existence of a duty to disclose) with *United States v. Sorich*, 523 F.3d 702, 712 (7th Cir. 2008) (holding that public officials always owe the public a duty to disclose).

7. Bribery vague under §1346 for private individuals. No federal bribery statute for private individuals

In *McDonnell*, an issue on appeal was whether the definition of "official act" within the federal bribery statutes encompassed the actions for which *McDonnell* had been convicted and whether the jury had been properly instructed on this definition at trial. This

court formally acknowledged the lack of uniformity regarding a proper definition of bribery in honest services fraud cases in *McDonnell v. United States*, 135 S.Ct. 2355 (2016). The federal bribery statute 18 U.S.C. §201 on bribery of public officials and witnesses, is limited to government employees. States have enacted laws criminalizing bribery between private sector commercial entities. ***No federal statute prohibits explicitly commercial bribery.*** 36 states have laws specifically prohibiting commercial bribery. Among them are Ohio, California, Delaware, Massachusetts, New Jersey, New York, and Texas (*Note: Ohio has a bribery statute, Section 2921.02, Title 29 of the Ohio Revised Code. Ohio is where the alleged bribe occurred without crossing state lines.*) (Generally, a public official for these purposes is anyone who works for the federal (or state) government. That includes members of Congress, delegates, resident commissioners, any officer, employee, or person acting on behalf of the United States or any department, agency, or branch of the U.S. government, including the District of Columbia. It even applies to people who will become public officials once they are nominated or appointed.)

Under §1346 should private sector employees be held to the same standards under bribery as defined in the federal statute that does not mention them or does the state bribery statute take effect: If a state has no bribery statute, is the federal statute imposed and when one exists the state statute is used? *§1346* is still vague in that it does not define what a bribe is and what jurisdiction is to be used to determine what a

bribe is for the purposes of private individuals. What would be more concerning, for states that do not have a bribery statute, it gives federal prosecutors the ability to impose one on them. Had Congress intended to implement a bribery statute for private individuals, it would have done so, and using one intended only for public employees is an unconstitutional broadening of a statute.

B. Private individuals cannot be held to §1346. Indictment unconstitutional due to vagueness of the statute

Although Congress may have intended to apply section §1346 to the private sector, its failure to specifically state that intent has left prosecutors with the discretion and ability to criminalize conduct in private industry that may not otherwise be illegal. The courts have also been unable to enunciate clear guidelines for what constitutes "honest services fraud" in the private sector. In the private sector context, §1346 poses special risks as is evident in this case. Every material act of dishonesty by an employee deprives the employer of that worker's 'honest services,' yet not every act is converted into a federal crime by the mere use of the mails or interstate phone system. Aware of that risk that federal criminal liability could metastasize, It was held in *United States v. Lemire* that "not every breach of fiduciary duty works a criminal fraud." *Lemire*, 720 F.2d [1327,] at 1335 (quoting *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1973)).

1. Commercial Contracts are under State jurisdiction

A contract is an agreement between parties, creating mutual obligations that are enforceable by law. The basic elements required for the agreement to be a legally enforceable contract are mutual assent, expressed by a valid offer and acceptance; adequate consideration; capacity; and legality. A contract can be governed by two different types of state law, depending on the subject of the contract:

> *Common Law*: The bulk of most contracts are controlled by common law in most states. This is a traditional set of laws that are made by judges based on different court decisions throughout history.
>
> *The Uniform Commercial Code*: The common law cannot control any contract that is meant for the sale of goods. These are controlled by the UCC.

Jurisdiction is invoked explicitly in contracts using a "choice of law provision." In it the parties proactively choose which jurisdiction will oversee any problems, including allegations of fraud. Applying Federal Laws when parties choose specific state law, invalidates choice of law provisions in contracts, a practice that dates back to 1869.

2. Choice of law provisions ("freedom of contract provisions")

The earliest known express choice-of-law clause in the United States appears in a lending agreement executed in 1869 (*Kirtland v. Hotchkiss*, 42 Conn. 426, 444 (1875)). That clause provided that the contract was "made under, and is in all respects to be construed, by the laws of the state of Illinois." (*Kirtland*, 42 Conn., at 444; see also *Warner v. Warner*, 235 Ill. 448, 456 (1908) (referencing a choice-of-law clause in an 1874 prenuptial agreement)). The Uniform Commercial Code (UCC) was published in 1952. (See also *Lauritzen v. Larsen*, 345 U.S. 571, 588–89 (1953) ("[T]his contract was explicit that the Danish law and the contract with the Danish union were to control. Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply."). The drafters of the UCC included a provision that expressly permitted the contracting parties to choose the law of any state that bore a "reasonable relation" to the contract. (U.C.C. §1-105 (Am. Law Inst. 1952)). In 1969 the Second Restatement stipulated that the parties could choose the law of any state on the theory that they could have simply written the rule into their contract further cementing the choice of law provisions. (Restatement (Second) of Conflict of Laws §187(1) (Am. Law Inst. 1971)). A default rule is one that the parties can contract around in their agreement. The parties may, for example, select the law of any state to govern issues relating to contract interpretation because they could just as easily rewrite their

agreement to resolve the interpretive issue themselves). *With* respect to mandatory legal rules, the Second Restatement took the position that parties could select the law of a particular state to govern their agreement.

Today, choice-of-law clauses are everywhere. A recent study of every contract filed with the SEC between 1996 and 2012 found that 70 percent contained a choice-of-law *clause*. Sarath Sanga, Choice of Law: An Empirical Analysis, 11 J. Empirical Legal Stud. 894, 902–03 (2014).

A subsequent study looking at the same database covering the time period from 2000 to 2016 pegged the number at 75 percent. Choice of law provisions have a long-standing history in commercial contracts and speak to the Autonomy of parties. Contracts are governed by state law: with rare exceptions (such as certain contracts to which the federal government is a party), there is no such thing as U.S. contract law. Accordingly, choice of law and choice of forum provisions in commercial agreements are generally enforced in accordance with the contract language. (The federal government governs its government contracts under FAR: Federal Acquisition Regulation. Its purpose is to ensure purchasing procedures are standard, consistent, and conducted in a fair and impartial manner.) U.S. courts may apply different laws to different issues presented in the same case. In commercial disputes, one circumstance involves claims that arise under the contract in combination with extra-contractual claims. For example, a defendant may argue both that it did

not breach the terms of the contract, and that the plaintiff intentionally misrepresented certain material facts in the course of negotiations. The former defense (no breach) is contractual, while the latter defense (fraud) is extra-contractual. Thus, if the contract's choice of law provision states simply that "This Agreement shall be construed in accordance with the law of the State of California," but the alleged fraud occurred while the parties were negotiating the contract in New York, a New York court is likely to apply California law to the defense of "no breach," but New York law to the fraud claim. See, e.g., *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) ("Under New York law, a choice-of-law provision indicating that the contract will be governed by a certain body of law does not dispositively determine that law which will govern a claim of fraud arising incident to the contract.") (Emphasis in original). The Delaware Supreme Court affirmed that freedom of contract is a bedrock principle of Delaware law and, accordingly, re Oxbow Carbon LLC Unitholder Litigation (Feb. 1, 2019). Another notable case in Delaware is Delaware Supreme Court in *Express Scripts, Inc. v. Bracket Holdings Corp.*, 248 A.3d 824 (Del. Feb. 23, 2021). Under a securities purchase agreement (the "SPA") with United BioSource LLC, a subsidiary of Express Scripts, Inc. (collectively, "UBC"), Bracket Holding Corp. ("Bracket") purchased three businesses from UBC for $187 million. After closing, Bracket claimed that revenue and working capital had been overstated and took legal action. Generally, the SPA provided that Bracket's sole remedy for breaches of non-fundamental representations and warranties was to recover under

a representation and warranty insurance policy (the "R&W Policy"). The SPA also included a carve-out, however, which provided that claims of "deliberate" fraud were not subject to the R&W Policy. Bracket obtained a $13 million arbitration award under the R&W Policy and then sued UBC in the Superior Court of the State of Delaware for fraud. A jury awarded Bracket $82 million, but the Delaware Supreme Court ***reversed*** that award because it determined that the SPA's requirement that Bracket resort to the R&W Policy absent "deliberate" fraud meant that Bracket could not prevail without establishing "intentional" fraud. Also in Delaware, in *Anshutz Corp. v. Brown Robin Cap., LLC*, 2019-0710-JRS (Del. Ch. June 11, 2020), the Chancery affirms choice of law in contractual fraud claims. The Court concluded that the parties' contractual choice of Delaware law meant that Delaware law also governed the buyer's fraud claims. Comparing the case to *Arby P'rs V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006) (Strine, V.C.), the Court found that the buyer's breach of contract and fraud claims involved virtually the same conduct, and the fraud claim was also "entangled at a granular level with the operative contract's allocation of risk." It restated its previous conclusion in *Arby* that applying different laws to the intertwined claims would create the "kind of confusion contractual choice of law provisions are meant to avoid." How choice of law clauses are interpreted may vary by forum. ("FindLaw's Court of Chancery of Delaware case and opinions." Findlaw. Retrieved 2021-02-18. "Delaware Court of Chancery upholds freedom of contract (with narrow

exception)." Lexology, 19 January 2007. Archived from the original on 2013-01-23.) When a contract includes a choice of law clause, all the parties are clear about which state's laws govern the agreement and any conflicts that arise from it. §1346 Honest Services interferes with that autonomy and clarity. It imposes the will of a federal prosecutor over the will of the involved parties on where to settle disputes.

3. Pre-*McNally* focus was public officials

Honest Services was Congress's answer to this court's ruling in *McNally*. In it Congress was responding to a certain activity that it wanted controlled. This court went on to address who was **intended** for the statute based on pre-*McNally* cases:

> Because the pre-*McNally* lower court decisions involving such conduct were "inconsistent[t]," we concluded that this "amorphous category of cases" did not "constitute core applications of the honest-services doctrine."

561 U.S., at 410.

Most of the pre-*McNally* honest services prosecutions, including what appears to be the first case to adopt that theory, involved actual public officials. See *Skilling*, 561 U.S., at 400–401 (citing *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941)).

Congress's target was honest services owed to the federal government.

4. §1346 is in violation of the Fourteenth Amendment Void For Vagueness doctrine in a private setting: disregards contract law and long established state Jurisprudence

Shortly after the Fourteenth Amendment was adopted, this court decided two cases interpreting the Amendment's provisions, *United States v. Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883). In *Harris*, the Court considered a challenge to §2 of the Civil Rights Act of 1871. That section sought to punish "private persons" for "conspiring to deprive any one of the equal protections of the laws enacted by the State." 106 U.S., at 639. We concluded that this law exceeded Congress' §5 power because the law was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers." Id., at 640. In so doing, we reemphasized our statement from *Virginia v. Rives*, 100 U.S. 313, 318 (1880), that "'these provisions of the fourteenth amendment have reference to State action exclusively, and not to any action of private individuals.'" *Harris*, supra, at 639 (misquotation in *Harris*). The court held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the §5 enforcement power. 109 U.S., at 11 ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment"). See also, e.g., *Romer v. Evans*, 517 U.S. 620, 628 (1996) ("[I]t was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in

public accommodations"); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power"); *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *United States v. Cruikshank*, 92 U.S. 542, 554 (1876) ("The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."). The court concluded that this law exceeded Congress' §5 power because the law was "*directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers.*" Id., at 640.

§1346 as applied to private entities (this case being the perfect example) was applied without reference to the laws of the state or the administration by her officers, or its judiciary.

5. 1346 federalizes Corporate Governance. Makes the federal government America's corporate governance officer

Corporate America is flush with policies such as Conflict of interest policies, Disclosure Policies, Gratuity Policies and non-disclosure policies. They establish the

right and wrong in a relationship between two parties. The states have the ability and expertise to manage these issues themselves. §1346 supersedes state law and forces private entities to enact disclosure and levels of governance to standards set by the federal government, even when the federal government has not defined those standards for private corporations. When this court tried to limit §1346 to Bribery and kickback schemes, it does so without defining bribery on a federal lev. The federal government does not have bribery laws for private Enterprise. A Corporation that does not have a disclosure policy or a governance standard acceptable to a federal prosecutor, exposes its employees to federal prosecution. Any gratuity or payment can then be considered as a bribe or kickback by a federal prosecutor, even if it was acceptable to the corporation. The current interpretation in the 6th of §1346 Honest Services violates *Skilling* and *McNally* by trying to adjudicate concepts such disclosure, conflicts of interest and good governance which are governed by state or private law based on contractual agreements in a private setting. This case presents a situation where the government, district court and appeals circuit threw out contractual agreements of the parties, ignored lack of contracts, ignored actual disclosure and allowed the government to use the §1346 Honest Services statute as a catch all for activity that the government might deem as questionable or unethical, and subsequently made it a crime. Justice Gorsuch's concurring opinion, joined by Justice Thomas, echoed Justice Scalia's concurring opinion in *Skilling v. United States* (that was joined by Justice Kennedy), concluded

that a statute that criminalizes "a scheme or artifice to deprive another of the intangible right of honest services" is hopelessly vague and offends Due Process.

§1346 allows the federalization of state contract law, private contract law, and allows federal prosecutors to apply their own subjective standards to corporate governance. Two long established bodies of law governing conduct in relationships are replaced with one federal statute, *§1346 Honest Services.*

Citations:

Commercial contracts contain language such as

> Any disputes arising out of or related to this Agreement, or the Parties' relationship created hereby, shall be governed by the internal law of the State of ___.
>
> And so does Rizk's contract with iVHR, namely Delaware.

CONCLUSION

Actual Innocence, §2255 Statute of Limitations, and the Suspension Clause

The statute of limitations found in 28 U.S.C. §2255(f) potentially implicates the Suspension Clause. "The Privilege of the Writ of Habeas Corpus," says the Clause, "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may

require it" (emphasis added). Courts have generally determined that the §2255 statute of limitations does not implicate the Suspension Clause. But there is a case where it might: actual innocence.

If a federal prisoner is actually innocent of a crime, and a procedural bar, such as the §2255 statute of limitations, prevents him from getting to court, the writ—which is designed for this exact circumstance—is suspended.

This Court has recognized this, and has said that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of limitations." *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013). The actual innocence exception, in the court's view, is a "fundamental miscarriage of justice exception, grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." Id., at 1931. The fundamental miscarriage of justice exception also ensures that the Suspension Clause is not violated by the §2255 statute of limitations.

The guilty plea was taken based on an underlying theory of "self-dealing," "conflict of interest" and "non-disclosure," that was ruled unconstitutionally vague by this court. A defendant's guilty plea to a theory of guilt held unconstitutionally vague by this court, is one which the government may not constitutionally prosecute no matter how validly his factual guilt is established. (*Menna v. New York*, 423 U.S. 61 (1975)).

For that reason the 2255 COA should have been granted, the time bar suspended, because the actual innocence claim has met the Standards to overcome the 1 year time bar statute of limitation.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

No. 22-3834

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WISAM R. RIZK, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	)	ORDER (Filed Feb. 27, 2023)

Before: LARSEN, Circuit Judge.

Wisam R. Rizk, a pro se federal prisoner, appeals the district court's judgment denying as untimely his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Rizk moves the court for a certificate of appealability (COA).

In November 2019, the district court sentenced Rizk to concurrent terms of 58 months of imprisonment after he pleaded guilty to conspiracy to commit wire fraud and honest services wire fraud, in violation of 18 U.S.C. § 1349; wire fraud and honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346; and making false statements, in violation of 18 U.S.C. § 1001(a). Rizk's convictions arose out of a scheme to defraud the Cleveland Clinic Foundation (CCF) by directing its software-design contracts, which he had control over, to a shell corporation that he had an undisclosed interest in. Rizk filed a timely notice of appeal

from the district court's judgment, but he voluntarily dismissed his appeal on November 27, 2019.

On September 10, 2021, Rizk moved the district court to vacate his sentence under § 2255. Rizk acknowledged that his motion was untimely under the one-year statute of limitations in § 2255(f), but he argued that he could overcome the statute of limitations based on his actual innocence and that he was entitled to equitable tolling based on his counsel's ineffective assistance, his lack of access to the prison law library during the COVID-19 pandemic, the law library's rudimentary word-processing equipment, and his lack of legal training. The district court ruled that Rizk had not presented a tenable claim of actual innocence to avoid the statute of limitations and was not entitled to equitable tolling.

First, the court concluded that the actual-innocence route was not available because Rizk possessed the evidence that allegedly established his innocence before he pleaded guilty; therefore, the evidence was not newly discovered. To the extent that Rizk relied on the results of polygraph examinations, the court ruled that this evidence was "inherently unreliable" and did not establish his actual innocence. Further, the court found that Rizk had not shown that he was legally innocent due to an intervening change in the law.

Second, in an integrated analysis, the court found that Rizk had not diligently pursued his rights or established that some extraordinary circumstance prevented him from filing a timely motion. The court

noted that while the § 2255(f)(1) limitations period was running, Rizk's attorneys had filed motions requesting that Rizk be permitted to serve his sentence in Austria, where he holds citizenship, and that Rizk's sentence be reduced instead of attempting to collaterally attack Rizk's convictions. Additionally, the court noted that Rizk did nothing to collaterally attack his sentence during the approximate three-month period between the time he voluntarily dismissed his appeal and the time he was required to report to the Bureau of Prisons for service of his sentence.

The court rejected the alleged incompetence of Rizk's attorneys as grounds for equitable tolling, finding that Rizk made a reasoned post-conviction choice to have them pursue alternate venues in which to serve his prison sentence instead of collaterally attacking his convictions. Moreover, the court noted that Rizk could have deferred pursuing a transfer to Austria, which is not subject to a limitations period, until he filed for § 2255 relief.

Finally, the court found that the COVID-19 pandemic and the consequent limitations on Rizk's ability to use the prison law library were not extraordinary circumstances. The court reasoned that the pandemic affected all federal prisoners, and yet many prisoners had no difficulty filing timely motions to vacate during that time. Additionally, the court found that his transfer of institutions did not prevent his timely filing. Rizk's September 2021 transfer occurred well past the original statute of limitations deadline, and Rizk mailed his motion days after transferring institutions.

The court concluded therefore that Rizk's lack of access to the law library, lack of access to legal forms, lack of legal training, and transfers between institutions did not justify equitable tolling.

The district court therefore denied Rizk's motion to vacate as untimely. The district court also denied Rizk's motions for production of the grand jury transcripts and for disclosure of conflicts of interest because his contention that the government failed to present exculpatory evidence to the grand jury and that some of the government's witnesses may have had their own conflicts of interest had no bearing on the timeliness of his motion to vacate. The court denied Rizk a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court denies a motion to vacate on procedural grounds, the court may issue a COA only if the applicant shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Rizk did not dispute that his § 2255 motion was untimely. Equitable tolling of the statute of limitations is available, however, if the petitioner exercised reasonable diligence pursuing his claims *and* some extraordinary circumstance prevented him from filing a

timely petition. *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750 (6th Cir. 2011); *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010) (stating that equitable tolling requires the petitioner to make "a two-part showing").

Here, even if Rizk had diligently pursued his rights, reasonable jurists would not debate the district court's conclusion that he failed to show that his § 2255 motion was untimely due to extraordinary circumstances. Rizk's pro se status and lack of access to the prison law library were insufficient to justify equitable tolling. *See Hall*, 662 F.3d at 751. An egregious attorney error can sometimes warrant equitable tolling, *see Holland v. Florida*, 560 U.S. 631, 651-52 (2010), but here, as the district court found, Rizk showed only that his lawyers made a strategic decision about which post-conviction remedies to pursue on his behalf and not some legal or factual error on their part.

The untimeliness of a petition may be excused if the petitioner makes a credible showing of actual innocence. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)); *see also Harvey v. Jones*, 179 F. App'x 294, 298-99 (6th Cir. 2006) (noting that a claim of legal innocence does not satisfy the actual-innocence standard) (collecting cases). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence,

trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

Here, the district court arguably erred in ruling that evidence that Rizk possessed at the time he pleaded guilty did not qualify as "new." "There is a circuit split about whether the 'new' evidence required under *Schlup* includes only newly discovered evidence that was not available at the time of trial, or broadly encompasses all evidence that was not presented to the fact-finder during trial, *i.e.*, newly presented evidence." *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012); *see Connolly v. Howes*, 304 F. App'x 412, 419 (6th Cir. 2008) (Sutton, J., concurring). "Our opinion in *Souter* suggests that this Circuit considers 'newly presented' evidence sufficient." *Cleveland*, 693 F.3d at 633. (citing *Souter*, 395 F.3d at 596 n.9.) Even if that is so, Rizk's "new evidence" is insufficient to help him here.

Rizk's proffered evidence, which he asserts shows that he was not an employee of CCF and that he disclosed his conflict of interest, merely contradicts the statement of facts supporting his guilty plea, in which he admitted that he was prohibited from having an undisclosed financial interest in any third-party entity that did business with CCF, that he failed to disclose his interest in the shell corporation to CCF, and that he paid his supervisor to keep this conflict under wraps. *See Skilling v. United States*, 561 U.S. 358, 408-09 (2010) (holding that honest services wire fraud covers only bribery and kickback schemes); *United*

States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997) ("[A]n employee deprives his employer of honest services when 'the defendant might reasonably have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict along with any other information relevant to the transaction.'" (quoting *United States v. Lemire*, 720 F.2d 1327, 1337 (D.C. Cir. 1983))). Rizk also admitted his fraud in his sentencing memorandum. Consequently, Rizk's "new" evidence is insufficient to make a credible showing of actual innocence. *See United States v. Chavers*, 515 F.3d 722, 725 (7th Cir. 2008). In other words, a reasonable factfinder could conclude that Rizk was guilty based on his own admissions. In contrast, his "new" evidence is not so strong that a reasonable jurist could conclude that confidence in the reliability of his guilty plea is undermined. *See Turner v. Romanowski*, 409 F. App'x 922, 926 (6th Cir. 2011); *see also Charles v. Chandler*, 180 F.3d 753, 757 (6th Cir. 1999) (per curiam) (holding that the petitioner's claim that his guilty plea was invalid was not a claim of actual innocence). And polygraph evidence is too unreliable to establish a claim of actual innocence. *Knickerbocker v. Wolfenbarger*, 212 F. App'x 426, 433 (6th Cir. 2007); *Bolton v. Berghuis*, 164 F. App'x 543, 550 (6th Cir. 2006).

Moreover, and contrary to Rizk's COA application, he cannot establish actual innocence by demonstrating mere defects in the indictment, *see Perry v. McKune*, 381 F. App'x 850, 853 (10th Cir. 2010); *Burnside v.*

Lamanna, 27 F. App'x 439, 439 (6th Cir. 2001), and his guilty plea obviated any alleged error in the grand jury proceedings, *see United States v. Hansel*, 70 F.3d 6, 8 (2d Cir. 1995) (per curiam). The fact that CCF allegedly was not a federal-funds recipient has no bearing on whether Rizk committed honest services wire fraud. *Cf. United States v. Nouri*, 711 F.3d 129, 137-40 (2d Cir. 2013) (sustaining the defendants' convictions for honest services wire fraud where they bribed securities brokers to buy stock in the defendants' corporation for their customers' accounts). To the extent that Rizk contends that he is actually innocent of violating § 1001 because his failure to disclose his conflict of interest to CCF was not within the jurisdiction of the federal government, he misreads both the indictment and his plea agreement. This conviction was based on the false statements that he made to the FBI during its wire-fraud investigation, which was within its jurisdiction.

Finally, reasonable jurists would not debate whether the district court erred in denying Rizk's discovery requests because the government is not required to present exculpatory or impeachment evidence to the grand jury. *See United States v. Angel*, 355 F.3d 462, 475 (6th Cir. 2004); *United States v. Jones*, 766 F.2d 994, 998 n.1 (6th Cir. 1985). Moreover, as just discussed, alleged errors in the grand jury proceedings do not relate to actual innocence.

For these reasons, reasonable jurists would not debate the district court's conclusion that Rizk was not

entitled to equitable tolling of the § 2255(f)(1) statute of limitations. The court therefore **DENIES** Rizk's COA application.

ENTERED BY ORDER
OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WISAM RIZK,	**CASE NO. 1:17CR424**
Defendant-Petitioner,	**1:21CV1787**
vs.	**SENIOR JUDGE CHRISTOPHER A. BOYKO**
UNITED STATES OF AMERICA,	**OPINION AND ORDER**
Plaintiff-Respondent.	(Filed Sep. 21, 2022)

CHRISTOPHER A. BOYKO, SR. J.:

Defendant Wisam Rizk attempts to vacate his conviction under 28 U.S.C. § 2255. (Doc. 83). He also seeks to discover evidence outside of the record. (Docs. 87 & 88). But because Defendant's request to vacate is untimely and his requests for discovery do not establish good cause, Defendant's Motions are **DENIED**.

I. BACKGROUND FACTS

On November 16, 2018, Defendant pleaded guilty to one count of Conspiracy to Commit Mail Fraud and Wire Fraud, a violation of 18 U.S.C. § 1349; one count of Wire Fraud and Honest Services Wire Fraud, a violation of 18 U.S.C. §§ 1343, 1436 and 2; and False Statements, a violation of 18 U.S.C. § 1001(a)(2) and (3). For these crimes, the Court sentenced Defendant to 58 months imprisonment. The Court also ordered

Defendant's removal from the United States to Austria upon the completion of Defendant's incarceration.

Important here is what happened after Defendant's conviction and judgment. Initially, Defendant filed a Notice of Appeal. However, roughly two weeks later, on November 27, 2019, Defendant filed a notice to dismiss his appeal. The Sixth Circuit granted dismissal that same day.

Also on that same day, Defendant moved to extend his report date to the Bureau of Prisons. Defendant justified his request on his wife's upcoming surgery in February of 2020. The Court granted this motion and extended Defendant's report date until March 12, 2020.

Around the same time as Defendant reported to prison, the COVID-19 pandemic swept across the nation. The pandemic led to the Bureau restricting the movement of all federal prisoners. This included limiting access to law libraries. It also resulted in various transfers of prisoners throughout the country.

Defendant claims this happened to him. Beginning in March of 2020, Defendant was subjected to 24-hour lockdowns with no access to the law library. These restrictions remained in place throughout much of the year. The restrictions also largely continued into 2021, with Defendant experiencing only limited access to the law library.

Yet during this time, Defendant remained on top of his case. Through counsel, he requested transfer to

Austrian authorities. (Doc. 70). He also sought a reduction in sentence with both the Bureau and this Court. (Doc. 74). The Court denied both motions. (Docs. 72 & 79). Defendant decided to continue to pursue these challenges through the Department of Justice and the Sixth Circuit. But nothing fruitful came from these efforts.

Over 21 months after he dismissed his appeal, Defendant mailed the pending motion on September 10, 2021. (Doc. 83). The Government opposed, arguing that Defendant's motion was untimely. (Doc. 89). The Court ordered Defendant to reply solely to the Government's statute of limitations argument (Non-Doc. Entry 12/16/2021) and Defendant filed a lengthy Reply. (Doc. 93).

After he filed his Motion to Vacate, Defendant also moved to compel the government (and others) to produce additional information. (Docs. 87 & 88). The Government never responded to either motion.

II. Law & Analysis

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Defendant has a one-year period of limitation running from the latest of the following:

> (1) the date on which the judgment of conviction becomes final;

> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution of United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Here, Defendant voluntarily dismissed his appeal on November 27, 2019. The one-year statute of limitations started that same day. Thus, Defendant had until November 27, 2020, to file his motion under § 2255. Yet Defendant filed his Motion on September 10, 2021. Therefore, on its face, Defendant's Motion is untimely.

Defendant does not disagree with this application of the one-year clock. Nor does he argue that his Motion should be governed under the other provisions in § 2255(f). Instead, Defendant argues that three exceptions apply to the straightforward application of the statute of limitations – his actual innocence, his attorneys' incompetence and equitable tolling. For the following reasons, Defendant's arguments have no merit.

B. Actual Innocence

Defendant argues that he is actually innocent of the charges against him. If Defendant can prove this, it provides an exception to the AEDPA's one-year statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Phillips v. United States*, 734 F.3d 573, 580-81 (6th Cir. 2013) (applying *McQuiggin* to the § 2255 context). However, "tenable actual-innocence gateway pleas are rare." *McQuiggin*, 569 U.S. at 386. "To be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial." *Schulp v. Delo*, 513 U.S. 298, 324 (1995). Courts hold that "exculpatory scientific evidence, trustworthy eyewitness accounts and critical physical evidence" not presented at trial all constitute "new, reliable evidence." *Id.*; *Davis v. Bradshaw*, 900 F.3d 315, 326 (6th Cir. 2018). In the end, the defendant must show that, "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schulp*, 513 U.S. at 329.

Defendant's claim of innocence is predicated on two theories: one, he is factually innocent because he disclosed his conflict of interest; and two, he is legally innocent because the Indictment is both insufficient and inaccurate. The Court holds that neither theory supports a "tenable actual innocence claim" to serve as an exception to the statute of limitations.

As to his factual innocence, Defendant relies on evidence he had possessed since before his guilty plea.

"A defendant's own late-proffered testimony" in support of his actual innocence in a habeas action "is not 'new' because it was available at trial." *Hubbard v. Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004). Nor can Defendant merely repackage the evidence and consider it new evidence to support his claim. *Id.* at 341. Rather, Defendant must present some newly discovered evidence, which he does not. *Schulp*, 513 U.S. at 332 (O'Connor, J., concurring).

To the extent Defendant relies on polygraph results, that does not qualify as 'new, reliable evidence' under the actual innocence exception. Results of polygraphs are inherently unreliable. *United States v. Scarborough*, 43 F.3d 1021, 1026 (6th Cir. 1994). Thus, polygraph results are not "reliable evidence" to demonstrate one's innocence to forgo the statute of limitations. *See Bolton v. Berghuis*, 164 Fed. App'x 543, 550 (6th Cir. Jan. 13, 2006) (polygraph evidence did not qualify as new and reliable evidence to support actual innocence exception to the statute of limitations). Accordingly, Defendant's claims of factual innocence fail to serve as an exception to the statute of limitations.

Likewise, Defendant's claim of legal innocence also fails. The Sixth Circuit says that a petitioner can demonstrate his actual innocence by showing that an intervening change in the law establishes his innocence. *Phillips*, 734 F.3d at 581-82. To fall within this exception, a defendant must demonstrate:

> (1) the existence of a new interpretation of statutory law; (2) which was issued after the

> petitioner had a meaningful time to incorporate the new interpretation into his direct appeal or subsequent motions; (3) is retroactive; and (4) applies to the merits of the petition to make it more likely than not that no reasonable juror would have convicted him.

Id. at 582.

Defendant's claim to legal innocence stems from his rendition of the facts and his belief that the indictment is insufficient. In support of these claims, Defendant cites a plethora of caselaw. However, none of that caselaw provides a "new interpretation of statutory law." Rather, the caselaw Defendant relies upon existed before his guilty plea, thus allowing him "meaningful time" to incorporate into his case. Accordingly, Defendant's claim of legal innocence fails.

Finally, while *McQuiggin* allowed a claim of actual innocence to circumvent the statute of limitations, it also allowed courts to consider the "timing of the petition" alleging actual innocence. *McQuiggin*, 569 U.S. at 399-400. As discussed above, Defendant brought his claim of actual innocence – predicated solely on evidence that he knew of at the time of his plea – nine months after the statute of limitations expired. Thus, the timing of Defendant's claim to innocence cuts against him.

For all these reasons, Defendant has not presented a tenable claim of actual innocence to avoid the statute of limitations.

C. Equitable Tolling

Defendant's next two proffered excuses fall under the same legal analysis. Essentially, Defendant claims he is entitled to extend – i.e., toll – the starting date of the limitations period because of circumstances outside his control. The Government disagrees.

Defendant's claims fall under a general equitable tolling review. A defendant may be entitled to equitable tolling of the statute of limitations if he demonstrates "(1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010). A defendant seeking equitable tolling must satisfy both prongs. *Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250, 256 (2016). The burden of establishing grounds that warrant tolling rest with the defendant. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Equitable tolling claims are granted sparingly. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010).

Defendant cannot satisfy his burden in this case. First, Defendant has not shown that he pursued his rights diligently. Diligence "for equitable tolling purposes is 'reasonable diligence,' not maximum feasible diligence." *Holland*, 560 U.S. at 653 (citations omitted). It also requires a petitioner to act diligently both before and after the extraordinary circumstance arose. *See Pace*, 544 U.S. at 418-19 (2005). Defendant points to two proofs of his diligence – 1) his attorneys filed two

motions after his sentencing; and 2) his actions while imprisoned during the COVID-19 pandemic.

As to his first point, Defendant cannot rely on his attorneys' filings to demonstrate diligence. For one, Defendant uses his attorneys' actions as both a shield and a sword to the statute of limitations. Defendant wants to rely on their professional competence here to demonstrate his own diligence. Yet at the same time, Defendant cites his attorneys' incompetence as a reason he failed to file a timely motion to vacate. Defendant cannot have it both ways. Moreover, both motions Defendant relies on do not attack his conviction, which is the "right" equitable tolling is concerned with. Instead, both motions essentially agree with the conviction, but seek to have the sentence served elsewhere – either in Austria or at home. Because Defendant was not pursuing his rights to vacate or correct his sentence, he cannot rely on his prior motions to constitute his own diligence under equitable tolling.

As to his second point, the Court finds that Defendant did not act diligently during the COVID-19 pandemic. This point will be discussed more below, but the Court finds Defendant could have filed a timely § 2255 motion despite the pandemic.

Not only has Defendant not acted diligently, but he has also failed to show that an extraordinary circumstance stood in his way. Defendant argues eight "extraordinary circumstances" prevented him from filing a timely § 2255 petition: i) his innocence claim; ii) failure to claim against the indictment; iii) ineffective

assistance of counsel; iv) limited access to the legal library; v) litigation for removal to Austria; vi) movement of prisons; vii) lack of legal knowledge; and viii) lack of necessary forms. The Court holds that none of the circumstances – either alone or in combination – constitute extraordinary circumstances contemplated by the law.

Before addressing each circumstance, the Court notes two overarching points. First, none of these circumstances existed for the months before Defendant reported to prison. Yet Defendant did nothing to attack his conviction like he does here – despite having knowledge of all the evidence he now presents. While Defendant cites his wife's surgery as a reason for his inaction during this period, that surgery did not occur until the end of February 2020. Defendant dismissed his appeal in November of 2019. At a minimum then, Defendant had three months to challenge his conviction. Moreover, the record belies Defendant's claim that he was unaware of his rights under § 2255. In his Plea Agreement, Defendant specifically waived his rights to collaterally attack the sentence. The Court reviewed this waiver and found that Defendant entered his plea knowingly and voluntarily.

Second, many of Defendant's cited circumstances flow from the COVID-19 pandemic. District courts in the Sixth Circuit have determined that "the COVID-19 pandemic does not automatically warrant equitable tolling for a petitioner who seeks it on that basis. [Rather, t]he petitioner must establish that he was pursuing his rights diligently and that the COVID-19

pandemic specifically prevented him from filing his motion." *United States v. West*, 578 F. Supp. 3d 962, 967 (N.D. Ohio 2022) (Lioi, J.); *see also Pryor v. Erdos*, 2022 WL 4245038, *9 (N.D. Ohio Sept. 17, 2021) (Barker, J.) *aff'd* 2022 WL 1021911 (6th Cir. Mar. 31, 2022); *Taylor v. Valentine*, 2021 WL 864145 (W.D. Ky. Mar. 8, 2021); *United States v. Barga*, 2022 WL 16900261, * 4 (E.D. Ky. May 26, 2022). Accordingly, just because Defendant faced imprisonment during the pandemic does not automatically warrant equitable tolling.

Moving then to Defendant's specific points, circumstances (i) and (ii) – Defendant's claim of (i) innocence and (ii) insufficient indictment – did not present roadblocks to a timely § 2255 claim. Rather, both claims are legal arguments. Defendant knew these points by sentencing at the latest, yet he neglected to raise them. Thus, the Court finds that Defendant claim of innocence and attack on the Indictment are not extraordinary circumstances that prevented the timely filing of a § 2255 motion.

Neither is the performance of post-conviction counsel. As mentioned above, Defendant now attacks his counsel's performance arguing that their incompetent advice prevented a timely filing. While counsel's egregious conduct may serve as an extraordinary circumstance to warrant equitable tolling, *Holland*, 560 U.S. at 652, that is not what happened in this case. Here, counsel pursued alternative ways for Defendant to serve his sentence. Professional decisions to pursue different courses of action are not egregious roadblocks to a defendant's compliance with time requirements.

See Malcom v. Payne, 281 F.3d 951, 962 (9th Cir. 2002) (no equitable tolling where counsel chose to pursue clemency and limitations period expired during that process). Indeed, counsel would have faced trouble filing a post-conviction attack on the conviction due to Defendant's knowing waiver of the right. (*See* Plea Agreement, Doc. 37, PageID: 127). Even if counsel could be said to have acted negligently, that is not enough to warrant equitable tolling. *Holland*, 560 U.S. at 651-52. In the end, by employing attorneys to act on his post-conviction behalf, Defendant bore the risk that they may not have pursued the exact route he would have preferred. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Accordingly, counsels' performance did not constitute an extraordinary circumstance to warrant equitable tolling.

Along these lines, awaiting the results of his transfer request to Austria is not an extraordinary circumstance. Soon after his sentencing, Defendant sought transfer to Austria under the Department of Justice. This transfer program restricts inmates with pending collateral attacks from requesting a transfer. But the program has no "statute of limitations" like a collateral attack under § 2255 does. Yet, Defendant writes that a transfer to Austria was his main goal. (Doc. 93, PageID: 990-91, Defendant "felt his transfer to an Austrian prison . . . was his first and most important goal"). The fact that he chose to pursue a transfer route (with no limitations period) instead of a collateral attack (with a one-year limitations period) was Defendant's decision. He cannot now rely on his own decision as an

extraordinary circumstance. Moreover, even accepting as true the fact that Defendant learned of his denial in March of 2021, Defendant still waited six months before filing his § 2255 motion. By this time, Defendant admits that he had four hours of access a day to the prison's law library. The six-month time gap is thus unreasonable, especially since Defendant knew an attack under § 2255 was likely untimely. Accordingly, Defendant's decision to pursue transfer to Austria is not an extraordinary circumstance to warrant tolling of the limitations period.

Finally, Defendant raises circumstances that all federal inmates faced – especially those confined during the COVID-19 pandemic. Yet the Court received hundreds of timely inmate filings during that time. Thus, circumstances like lack of law library access, movement between institutions, lack of forms and lack of legal knowledge are all insufficient to warrant equitable tolling in Defendant's case.

Moreover, Defendant is unlike the typical defendant the Court sees. Indeed, the Court agrees with the Government about Defendant's sophistication and intelligence. Both attributes were evident throughout each of the Court's interactions with Defendant. And Defendant displayed that intelligence throughout his briefing on this matter, arguing for his release in over thirty pages and countering the Government with over eighty pages in his Reply. While this briefing violated the District's Local Rules, it nonetheless demonstrates his competence.

The fact that Defendant could not access the library or the correct forms for filing are not extraordinary circumstances. As mentioned, Defendant did not even begin pursing his collateral attack options until his transfer request was denied. From then on, he could access the law library. Nor is it necessary that a defendant support his post-conviction attack with law. Moreover, Defendant argues he was delayed because the Court never sent him the right form. But the form Defendant sought was available on the District's website. Despite this ease of access, the form is not absolutely required to bring a motion to vacate. Like the Court overlooked Defendant's lengthy briefing, it is probable the Court would have overlooked this requirement as well.

Finally, Defendant's transfer of institutions did not prevent his timely filing. Defendant specifically mentions the transfer of institutions that took place in September of 2021. But not only is this date well past the original statute of limitations deadline, it also did not affect his filing. Indeed, Defendant mailed his motion mere days after transferring institutions. Accordingly, the Court does not find that Defendant's movement between institutions prevented the timely filing of the motion to vacate.

Ultimately, the Court disagrees with Defendant that extraordinary circumstances prevented Defendant from timely filing a motion to vacate under § 2255. As such, his claim for equitable tolling is meritless.

D. Evidentiary Motions

Under the Rules Governing § 2255 Motions, a court must grant leave before the parties engage in discovery. 28 U.S.C. § 2255, Rule 6(a). To receive leave, the party must demonstrate good cause for the requested information. *Id.* The requesting party must also provide the reason for the request, as well as specify the documents sought or the questions needed to be answered. *Id.* at Rule 6(b).

With two motions filed after his § 2255 motion, Defendant seeks (i) the transcript of the proceedings before the Grand Jury; and (ii) a disclosure of potential conflicts between the Cleveland Clinic and several individuals involved in Defendant's case. (Docs. 87 & 88). Neither motion as merit. At the outset, both motions seek to support the merits of Defendant's § 2255 Motion. But as the Court held above, the statute of limitations prevents the Court from considering the merits of Defendant's motion. These requests do not influence the statute of limitations consideration.

Defendant claims he needs the grand jury transcripts to show that the Indictment was predicated on false facts. In other words, the Government did not present the facts as Defendant believes support his case. Normally, grand jury proceedings remain secret. Fed. R. Crim. P. 6(e). To lift the veil of secrecy, a defendant must demonstrate the existence of a particularized need for such discovery that outweighs the general rule of secrecy. *Clinkscale v. United States*, 367 F. Supp. 2d 1150, 1154 (N.D. Ohio 2005) (citing *Douglas Oil v.*

Petrol Stops Northwest, 441 U.S. 211, 220-23 (1979)). A defendant bears a heavy burden to show a particularized need. *United States v. Darden*, 353 F. Supp. 3d 697, 722 (M.D. Tenn. 2018) (citing *FDIC v. Ernst & Whinney*, 921 F.2d 83, 87 (6th Cir. 1990)). Moreover, requests for disclosure should be limited to what is necessary and so the disclosure is no greater than the need for secrecy. *Id.* Finally, the Fifth Amendment does not require a prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury. *United States v. Williams*, 504 U.S. 36, 45 (1992); *United States v. Angel*, 355 F.3d 462, 475 (6th Cir. 2004) (the Government has no judicially enforceable duty to provide a grand jury with exculpatory evidence).

Defendant has not satisfied his heavy burden in showing his particularized need for the grand jury transcripts. Again, since the Court has ruled that Defendant's post-conviction attack is barred by the statute of limitations, he has no further need for the transcripts. *See Jones v. Perry*, 2020 WL 10486255, * 3 (M.D. Tenn. Dec. 21, 2020) (no particularized need when related federal claim is procedurally defaulted). Moreover, Defendant's attack on the grand jury proceedings is likewise meritless. He claims the Government failed to present the facts as he argues occurred. This is essentially asking the Government to present exculpatory information to the grand jury, which it has no obligation to do. Finally, Defendant broadly seeks the entire grand jury proceeding and not a limited subset which would help preserve the secrecy of the

proceeding. For these reasons, Defendant's request for grand jury transcripts fails.

Likewise, Defendant's speculative inquiry into alleged conflicts also fails. In his motion, Defendant believes that various actors in his matter may have had a personal conflict of interest involving the Cleveland Clinic. This list of actors includes the attorneys on both sides of the matter, plus the investigators, plus those who "have a substantive impact on the . . . proceedings within the court[,]" which presumably means the Court itself. (Doc. 88, PageID: 925). But the Court finds that this does not satisfy good cause necessary to allow for discovery in this post-conviction setting. The requested information is both speculative and conspiratorial. As such, the Court denies Defendant's Motion.

III. CONCLUSION

Accordingly, Defendant's Motion to Vacate under § 2255 (Doc. 83) is **DENIED** as untimely under the statute of limitations. Likewise, his request for post-conviction discovery (Docs. 87 & 88) are **DENIED**.

The Court finds an appeal from this decision could not be taken in good faith. 28 U.S.C. § 1915(a)(3). Defendant has failed to make a substantial showing that he was denied any Constitutional right. The Court thus declines to issue a certificate of appealability. 28 U.S.C. § 2253(c)(2); § 2255, Rule 11(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
Senior United States District Judge

Dated: September 21, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WISAM RIZK,	)	**CASE NO. 1:17CR424**
	)	**1:21CV1787**
Defendant-Petitioner,	)	**SENIOR JUDGE CHRISTOPHER A. BOYKO**
vs.	)	
UNITED STATES OF AMERICA,	)	**JUDGMENT**
	)	(Filed Sep. 21, 2022)
Plaintiff-Respondent.	)	

CHRISTOPHER A. BOYKO, J.:

Pursuant to Federal Rule of Civil Procedure 58 and this Court's Opinion and Order filed contemporaneously, Defendant-Petitioner's Motion to Vacate under 28 U.S.C. § 2255 (Doc. 83) is **DENIED** as untimely. The Court finds that Defendant could not appeal the Court's decision in good faith. 28 U.S.C. § 1915(a)(3). Since Defendant has not made a substantial showing of a denial of a Constitutional right directly related to his conviction or custody, the Court declines to issue a certificate of appealability. 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b); 28 U.S.C. § 2255, Rule 11.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
Senior United States District Judge

Dated: September 21, 2022

No. 22-3834

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WISAM R. RIZK, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	)	ORDER (Filed Apr. 10, 2023)

Before: SILER, COLE, and DAVIS, Circuit Judges.

Wisam R. Rizk, a pro se federal prisoner, petitions the court to rehear en banc its order denying his application for a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	**CASE NO. 1:17CR424**
Plaintiff,	**JUDGE CHRISTOPHER A. BOYKO**
vs.	**ORDER**
WISAM R. RIZK,	(Filed Oct. 17, 2019)
Defendant.	

CHRISTOPHER A. BOYKO, J.:

Before the Court is Defendant Wisam R. Rizk's Motion to Alter or Amend the Court's September 30, 2019 Order under Federal Rule of Civil Procedure 59(e). (Doc. 58). Because the Court did not make a clear error of law, the Court **DENIES** Defendant's Motion to Alter or Amend.

When asked to reconsider a criminal judgment, courts in the Sixth District apply Federal Rule of Civil Procedure 59(e). *See generally, United States v. Correa-Gomez*, 328 F.3d 297 (6th Cir. 2003); *United States v. Reeves*, 2013 WL 6507353 (N.D. Ohio Dec. 12, 2013). Rule 59(e) allows "the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings." *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008). Furthermore, the Rule "permits district courts to amend judgments where there is: (1) clear error of law; (2) newly discovered evidence; (3) an intervening change

in controlling law; or (4) a need to prevent manifest injustice.'" *Reeves*, at *1 (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)).

Defendant argues the Court made a "clear error" when it determined Defendant was an employee of the Cleveland Clinic Foundation (the "Clinic"). According to Defendant, Defendant was (1) a 1099-contractor for the Clinic from 2011 through 2013; and (2) subsequently an employee of Interactive Visual Health Records ("IVHR"). This distinction is "significant" because Defendant told IVHR about his actions and the Clinic is a client of IVHR. Therefore, Defendant could charge the Clinic a premium on a third-party's services.

The Court rejects Defendant's argument. Rather than raising a "clear legal error," Defendant raises a factual distinction without a difference. Defendant cites no law to support how being an employee or contractor would alter the Court's determination of loss. The Court was tasked to determine either the actual or intended loss amount in this case. The Court reasonably could not determine either, so the Court based the loss amount on Defendant's gain. *See* U.S.S.G. § 2B1.1, cmmt. 3(B). Defendant agreed in his Plea Agreement to "divert[ing] at least $2,784,847 . . . to himself." (Doc. 37, PageID: 130). Thus, the Court reaffirms Defendant's gain as the "reasonable estimate of the loss" in this matter. U.S.S.G. § 2B1.1, cmmt. 3(C).

Defendant's expert sums up Defendant's role with the Clinic and IVHR nicely. When asked about a third-party vendor's surcharge versus Defendant's situation,

Mr. Bender responded: "I've seen vendors pad, but not where the insider, some employee of the company, was profiting from it." (Doc. 51, PageID: 578). Defendant here was "an insider." He profited from his deceit. He did not disclose his interests in iStarFZE, LLC. Defendant did not disclose the premiums he added to a third-party's invoice but rather diverted those premiums to accounts he controlled. On top of the premiums, Defendant collected a salary from IVHR. To the extent anybody else knew of his scheme, Defendant paid that person for his silence and cooperation. Regardless of Defendant's status – as either a contractor or IVHR employee – Defendant was "an insider" who gained $2,784,847 from his scheme.

Accordingly, the Court will not alter or amend its September 30, 2019 Order. The Court determined a reasonable estimate of the loss based on a figure Defendant agreed to in his Plea Agreement. Defendant's gain remains the same regardless if he were a contractor or an employee of IVHR. Therefore, the Court **DENIES** Defendant's Motion.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

Dated: October 17, 2019

/O=EXG6/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/ CN=RECIPIENTS/CI

From: Mindy Toth
Sent: Friday, May 10, 2013 10:41 AM
To: williac12@ccf.org
Cc: Sam Rizk
Subject: Conflict of Interest Policy
Attachments: iStar - Cleveland Clinic Signed Agreement 01 May 2012.pdf

Cec,

At your earliest convenience, could you please send me the Conflict of interest Policy referenced in Section 7 of the attached Consulting Services Agreement by and between iStarFZE and iVHR? I assume the language is part of CCF's form, however, I do not believe a representative of iVHR has seen the Conflict of Interest Policy.

Thank you,
Mindy

Mindy T. Toth
iVHR™
Director of Operations
10000 Cedar Avenue
Cleveland, Ohio 44106
Phone: 216.533.4763
E-mail: mtoth@ivhr.com

From: Mindy Toth
Sent: Friday, May 10, 2013 10:46 AM
To: Sam Rizk
Subject: RE: More information

Not sure what's going on or if you are getting pushback with conflict of interest but here's my two cents. Are you on the board of iStar FZE or another iStar entity? If it's another iStar entity then this section would not apply. Also, it's likely any relationship just needs to be disclosed. It didn't exist at the time the agreement was signed so an acknowledgement letter by and between iVHR and iStar FZE (which you and iStar could sign) should be all that's required pending the language in the policy. I sent an email to legal requesting it. The policy isn't something I have seen to my knowledge.

From: Sam Rizk
Sent: Friday, May 10, 2013 10:36 AM
To: Mindy Toth
Subject: More information

Conflict of Interest Policy as referenced in section 7 of the consulting agreement between Istar and IvHR.

Can we get that?

Sam Rizk
IVHR™
Chief Technology Officer
10000 Cedar Avenue
Cleveland, Ohio 44106
Phone: 216.650.1906
E-mail: srizk@ivhr.com

From: Mindy Toth
Sent: Thursday, November 01, 2012 4:15 PM
To: Sam Rizk
Subject: Addendum to iStar Consulting Services Agreement

Sam,

My rationale for preparing the addendum to the iStar Consulting Services Agreement (the "Agreement") was based on the fact that the services of a director of software development were not contemplated in the Agreement. As such, we needed to document the professional fees together with the reimbursement of moving expenses since iStar hired a preferred consultant, at our request, that needed to relocate.

Thank you,
Mindy

Mindy T. Toth
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Director of Operations
10000 Cedar Avenue
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Phone: 216.533.4763
E-mail: mtoth@ivhr.com