

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5
6 August Term, 2011

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

9
10 Docket No. 10-3891-cr

11
12
13 UNITED STATES OF AMERICA,

14
15 *Appellee,*

16
17 -v.-

18
19 JAMES BOTTI

20
21 *Defendant-Appellant.*

22
23
24 Before: SACK and RAGGI, Circuit Judges, and KOELTL, District
25 Judge.^{*}

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

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

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

9 Affirmed.

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

13
14 RICHARD J. SCHECHTER AND RAHUL KALE, Assistant United States
15 Attorneys, (Sandra S. Glover on the brief) for Michael J.
16 Gustafson, Acting United States Attorney for the District of
17 Connecticut, for Appellee United States of America.

18 _____
19 John G. Koeltl, District Judge:

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

1 contravention of the Supreme Court's decision in Skilling v.
2 United States, 130 S. Ct. 2896 (2010). While the jury
3 instruction was error, it does not merit reversal because
4 bribery was the only theory of honest services mail fraud
5 available to the jury based on the arguments and evidence at
6 trial.

7 Therefore, we AFFIRM the judgment of the District Court.

8 **BACKGROUND**

9 On November 6, 2008, a grand jury in the District of
10 Connecticut returned a seven-count indictment against Botti
11 charging (i) one count of conspiracy in violation of 18 U.S.C.
12 § 371 to commit mail fraud in violation of 18 U.S.C. §§ 1341
13 and 1346; (ii) one count of bribery of a public official in
14 violation of 18 U.S.C. § 666(a)(2); (iii) one count of
15 scheming to obtain money and property and to defraud the
16 citizens of Shelton, Connecticut of the right to honest
17 services by mail fraud in violation of 18 U.S.C. §§ 1341 and
18 1346; (iv) one count of conspiracy in violation of 18 U.S.C.
19 § 371 to structure transactions with domestic financial
20 institutions contrary to 31 U.S.C. §§ 5324(a)(3) and 5324(d);
21 (v) one substantive count of such structuring in violation of
22 31 U.S.C. §§ 5324(a)(3) and 5324(d); and (vi) and (vii) two
23 counts of making false statements to the Internal Revenue
24 Service in violation of 18 U.S.C. § 1001(a)(2). The

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

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

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

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

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

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

10 Judgment was entered on September 20, 2010.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 services on an "as needed" basis so that when the
2 opportunity presents itself that public official
3 will take specific official action on the payor's
4 behalf, that constitutes a breach of the public
5 official's duty of honest services. Previously,
6 in Request #34, I defined for you the definition
7 of a "bribe" and you may refer to that definition
8 in considering whether defendant JAMES BOTTI
9 engaged in a scheme to defraud the public of its
10 intangible right to the honest services of its
11 public officials.
12

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

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

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

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

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

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

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

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

33
34 Second element: That the defendant knowingly and
35 willfully participated in the scheme or artifice,
36 with knowledge of its fraudulent nature and with
37 specific intent.
38

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

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

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

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

29 Defense counsel did not object to the instruction.

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

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

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

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

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

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

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

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

5 There is no substance to this argument.
6 Botti nowhere suggests what this alternative,
7 constitutionally impermissible theory of
8 wrongdoing might be. That is not surprising,
9 since there is no evidence in the record of any
10 sort of wrongdoing other than Botti's bribery of
11 public officials. The indictment did not charge
12 any alternative theory. Neither the government
13 nor the defendant argued any other theory at
14 trial. Neither the jury charge nor the verdict
15 form suggests any other theory. There were no
16 facts, evidence or testimony presented at trial
17 that could reasonably support or give rise to an
18 alternative theory. Botti suggests none. To
19 conclude that the jury might have convicted the
20 Defendant on some theory of honest services mail
21 fraud other than the bribery theory suggested in
22 the jury charge would require pure speculation on
23 the Court's part, and an assumption that the jury
24 acted in an unreasonable manner in contriving
25 some grounds for conviction other than the
26 obvious one clearly supported by the record.
27

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

30 DISCUSSION

31 I.

32 The first issue is what standard of review applies to
33 Botti's claim of error. Generally, the propriety of jury
34 instructions is a matter of law that is reviewed de novo.

35 United States v. Bahel, 662 F.3d 610, 634 (2d Cir. 2011). "A

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

5 If the defendant objected to an erroneous jury
6 instruction at trial and raises the same claim of error on
7 appeal, a harmless error standard of review applies. See,
8 e.g., United States v. George, 266 F.3d 52, 58 (2d Cir. 2001),
9 vacated in part on other grounds, 386 F.3d 383 (2d Cir. 2004).

10 Under this standard of review, a conviction will be affirmed
11 only “if it is clear beyond a reasonable doubt that a rational
12 jury would have found the defendant guilty absent the error.”
13 United States v. Mahaffy, 693 F.3d 113, 136 (2d Cir. 2012)
14 (quoting United States v. Kozeny, 667 F.3d 122, 130 (2d Cir.
15 2011)) (internal quotation marks omitted).

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

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

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

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

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

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

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

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

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

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

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

12 II.

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

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

5 **A.**

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

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

17 **B.**

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

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

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

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

9 i.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1

CONCLUSION

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

3 To the extent not specifically addressed above, they are

4 either moot or without merit. For the reasons explained

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