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Appeal Nos. 05-6326, 05-6333, 05-6339, and 05-6342 (Consolidated)

UNITED STATES COURT OF APPEALS

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FOR THE SIXTH CIRCUIT

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LEONARD GREEN, Clerk

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

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LOREN GLENN TURNER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

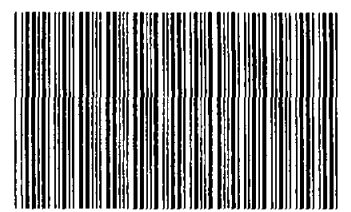
FINAL BRIEF OF APPELLANT LOREN GLENN TURNER

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ORAL ARGUMENT REQUESTED



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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant Turner hereby requests oral argument, which is to be expedited pursuant to the Court's September 21, 2005 order. Among other issues, this case presents the Court with an unprecedented venue decision and novel application of the mail fraud statute and the intended loss sentencing guidelines to local election activity. Accordingly, oral argument is warranted.

JURISDICTIONAL STATEMENT

Jurisdiction was secured in the district court under 18 U.S.C. § 3231 when indictments against Turner were filed on June 6, 2003 (Case No. 7:03cr11) and January 6, 2005 (Case No. 5:05cr13). Judgment was entered August 22, 2005, and Turner's notice of appeal was filed August 24, 2005. Jurisdiction in this Court is appropriate under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court violated Criminal Rule 18 and due process principles in transferring the case from the Pikeville Division at the government's request and over Defendants' objection.
2. Whether the district court erred in permitting the government to charge Defendants with mail fraud and conspiracy to commit mail fraud based on allegedly false state campaign finance reports, under theories of deprivation of the "intangible right to honest services" and the "salary and emoluments" of the elected offices.
3. Whether the district court erred in excluding evidence that would have fatally undermined the testimony of a key government witness.
4. Whether the district court erred by not dismissing the indictment based on the government's misconduct during the investigation and before the grand jury.
5. (a) Whether the district court misapplied U.S.S.G. § 2B1.1 by calculating "intended loss" as the full 4-year salary of the offices sought, leading to a 14-level enhancement.

(b) Whether Turner's 48-month prison sentence was "unreasonable" under 18 U.S.C. § 3553.

(c) Whether the district court violated Due Process by significantly increasing Turner's sentence based on facts not proven beyond a reasonable doubt.

STATEMENT OF CASE

In Case No. 7:03cr11, after a jury trial, Turner was convicted of conspiracy to commit mail fraud under 18 U.S.C. § 371 (Count 2), in relation to the John Doug Hays for Pike County District Judge campaign, and of two counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346 (Counts 16 and 17), in relation to the Donnie Newsome for Knott County Judge Executive campaign.

In Case No. 5:05cr13, based upon his grand jury testimony in the earlier case, Turner was prosecuted and pleaded guilty to perjury, in violation of 18 U.S.C. § 1623.

Turner was sentenced in both cases on July 20, 2005. The Court imposed concurrent sentences of 48 months imprisonment and 3 years supervised release on all counts.

STATEMENT OF FACTS

Defendants Ross Harris and Glenn Turner (“Defendants”) were indicted, tried, and sentenced together in Case No. 7:03cr11, and their appeals have been consolidated. Given the expanded factual discussion in Harris’s brief, Turner suggests that *Harris’s brief should be read first*. Turner adopts the statement of case and facts in Harris’s brief and adds the following.

A lifelong resident of eastern Kentucky, Turner started working in the coal industry as a teenager, eventually becoming mine manager and foreman. (R.984, Sentencing Memorandum at 32-33, J.A. 718-19.)¹ Turner is a devoted father whose life “revolved around his son’s activities” during his son’s upbringing. (*Id.* at 33, J.A. 719.) He showed the same support to his stepson and to three children (and one grandchild) of a female acquaintance, providing emotional and financial support and acting as a role model and counselor. (*Id.* at 33, Exs. A-E; J.A. 719, 737-43.) He guided and supported another young man whose father was an alcoholic, inspiring him to graduate from college and become a teacher. (*Id.* at 34, J.A. 720.) Turner has also been a basketball coach, Boy Scout troop leader, and active supporter of charitable activities and the local school system. (*Id.* at 35-36, Exs. F-M, J.A. 721-22, 744-49; R.756, Trial Tr. 8-110, J.A. 1560.) Until today’s case, Turner, now age 52, had never been charged with any offense.

¹ Unless otherwise indicated, record cites are to Case No. 7:03cr11.

Turner is politically active, and in one campaign, he sought contributions from family and friends to John Doug Hays' campaign for Pike District Judge. His family members agreed, particularly because Hays was a relative. (R.751, Trial Tr. 7-160, J.A. 1556.) Based on these contributions, when Turner's employer, Ross Harris, came under FBI investigation for suspected "vote-buying" in the Hays campaign, *see* Harris Br. at 7, Turner was part of the investigation.

Like many of his family members and friends, Turner was forced to testify before the grand jury. At that appearance, Turner was not informed of the nature of the investigation or his suspected role in the conspiracy. AUSA Kenneth Taylor failed to advise Turner, who appeared without counsel, of his constitutional rights until after Turner answered critical questions regarding the campaign. (R.556, Motion, Ex. 2, Turner Grand Jury Tr. at 6-9, J.A. 2153-56.)

The government's primary focus was on other defendants. Turner was not named in the initial indictment, and at trial the government characterized him as a "minor" player. (R.719, Trial Tr. 3-32, J.A. 831.) Indeed, until the third week of trial Turner was not a significant focus of the government's evidence.

Count 2 of the Superseding Indictment alleged that at Turner's request, his family members and friends made \$20,000 in "straw" contributions to the Hays campaign, funds that allegedly came from Harris. (R.382, Superseding Indictment, J.A. 177-78.) Notably, Turner was not alleged to have been a member of the vote-

buying conspiracy, nor was he alleged to have participated in the alleged “conspiratorial” Hays campaign meetings. (R.719, Trial Tr. 3-32, J.A. 831; R.961, Trial Tr. 12-135-140, J.A. 1660-65.)

Counts 16 and 17 alleged that Turner acted as a middleman or “conduit,” *see* R.764, Trial Tr. 13-127, J.A. 1707, by delivering approximately \$20,000 from Harris to Donnie Newsome for his campaign for Judge-Executive. (R.382, Superseding Indictment, J.A. 186.) At trial, Newsome, a convicted felon, gave a story of his alleged encounter with Turner that contradicted in numerous respects the account his brother Bobby gave of the same encounter. (R.752, Trial Tr. 10-86-99, J.A. 1618-31; R.961, Trial Tr. 12-188-190, J.A. 1676-78.) Nevertheless, the court excluded Defendants’ key Rule 404(b) evidence regarding Newsome. *See* Harris Br. at 14.

Following Turner’s conviction for mail fraud and conspiracy, the prosecutor indicted Turner for perjury based on his earlier grand jury testimony, which, it bears repeating, was given without counsel and without the appropriate warnings to Turner. Turner pleaded guilty. (Case 5:05cr13, R.29, Transcript at 18, J.A. 2046.)

At sentencing, the district court applied U.S.S.G. § 2B1.1 to Turner’s mail fraud and conspiracy counts (Counts 2, 16, and 17). The court used the amount of four years’ salaries of the District Judge and the Judge-Executive as “intended

loss” under U.S.S.G. § 2B1.1, which enhanced Turner’s offense level from 6 to 20 levels. The court further increased Turner’s offense level by 3 based on his alleged managing role in the conspiracy and by 2 based on obstruction of justice due to the perjury conviction, R.1041, Sentencing Tr. at 52, J.A. 2026, and sentenced Turner to 48 months imprisonment, *id.* at 98, J.A. 2044. Due to his serious health condition, Harris was sentenced to home confinement. (*Id.* at 112.) Hays and his wife Brenda (who were indicted and sentenced with Defendants but tried separately) received 6 and 3 month sentences respectively for their mail fraud convictions. (R.1039, Sentencing Tr. at 49-50, J.A. 2008-09.) As a result, Turner, the alleged middleman and delivery person, received by far the heaviest sentence of all defendants involved in the alleged fraud.

SUMMARY OF ARGUMENT

This prosecution was flawed from beginning to end. At the outset, the trial court erred in granting the government's request to transfer the case, over Defendants' repeated objections, from Pikeville, where the government feared that Defendants' case would "play well." In granting that request, the trial court ignored Rule 18's near singular focus on the defendants' and witnesses' convenience as well as longstanding venue and constitutional principles, which prevent the government from manipulating venue to a defendant's detriment. *See Harris Br.* at 17-18.

Having moved the case at the government's request, the court then erroneously acquiesced in what the government described as an "unusual" theory of prosecution under the mail fraud statute. Since the watershed decision in *McNally v. United States*, 483 U.S. 350 (1987), no federal appellate court has interpreted the mail fraud statute as broadly as did the court below. *Pre-McNally*, the statute had been interpreted to protect certain "intangible rights" of the public, including the distinct rights to "honest services" and "honest elections." In *McNally*, the Court held that the statute did not reach "intangible rights." *Post-McNally*, Congress enacted 18 U.S.C. § 1346, restoring the reach of the statute to "honest services." Plain language, legislative history, and subsequent precedent all confirm that § 1346 reaches only conduct designated, *pre-McNally*, as involving

the “honest services” of an officeholder or private fiduciary. The decision below allowing this “honest elections” case to be prosecuted under an “honest services” theory contravenes this authority.

Compounding its error, the district court also allowed the government to prosecute Turner under the theory that he deprived the government of the “salary and emoluments” of the offices at issue. No federal appellate court has endorsed the “salary theory” in this context, likely because its use circumvents the limitations *McNally* and § 1346 place on the mail fraud statute.

Erroneous evidentiary rulings further tainted the prosecution. *See Harris Br.* at 15. So too did the improper tactics utilized by the government in its investigation and prosecution. *Id.* at 16.

Lastly, the sentencing proceedings were flawed, largely because the Sentencing Guidelines are ill-equipped to address the government’s novel application of the mail fraud statute. Applying the general fraud guideline, U.S.S.G. § 2B1.1, the court erroneously used the entire four-year salary of the offices at issue as “intended loss,” resulting in a 14-level increase. This led to a sentence far greater than that which would result under Guidelines specifically targeting election fraud and that is unreasonable when measured against the factors listed in 18 U.S.C. § 3553. Further, the enormous enhancement based on facts not proven beyond a reasonable doubt violated due process.

For these reasons, Turner's convictions on Counts 2, 16, and 17 should be vacated, and those claims dismissed. Alternatively, Turner deserves a new trial in the proper venue. At the very least, his unreasonable and erroneously calculated sentence should be vacated.

ARGUMENT

I. THE CHANGE OF VENUE WAS ERRONEOUS.

In accordance with F.R.A.P. 28(i), Turner hereby adopts by reference the venue arguments made by Defendant Harris, as the erroneous venue decision forced Defendants to stand trial away from their home Pikeville Division, where the government worried that Defendants' case might "play well." *See Harris Br.* at 17-35.

The transfer decision is particularly problematic as to Turner. The decision to transfer the case to London over Defendants' objections was based in large part on Harris's prominence in the Pikeville community and the alleged resulting pretrial publicity. Not only were those invalid grounds for transfer as to Harris, those grounds *did not even apply to Turner*. Accordingly, the transfer was doubly unwarranted as to Turner, and he is entitled to a new trial in Pikeville.

II. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE MAIL FRAUD CHARGES.

Since the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987) and Congress's amendment of the mail fraud statute through 18 U.S.C. § 1346, this Circuit has not addressed application of the statute to state election law violations. Indeed, in this Circuit and elsewhere, prosecutors have made few attempts to apply the statute in this context since *McNally*. Entering these untested

waters, the prosecution launched an aggressive effort to extend the mail fraud statute into state elections.

The indictment charged that Defendants committed mail fraud and conspiracy to commit mail fraud by scheming to deprive the public of the “honest services” of a candidate for public office, and to obtain “money and things of value, that is, the salary and emoluments” of the offices involved. (R.382, Superseding Indictment, J.A. 175.) Defendants moved to dismiss, arguing that the mailing of state election reports that allegedly failed to comply with state law was not properly charged as mail fraud. (R.526, Motion to Dismiss; R.240, Order, J.A. 273.)

The district court allowed the case to proceed on both the “honest services” and “salary” theories. (R.762, Order, J.A. 447-48, 453.) In so doing, it extended the mail fraud statute beyond the reach permitted by the statute’s plain language, relevant caselaw, and constitutional and jurisprudential principles.²

² The district court’s interpretation of the mail fraud statute is reviewed *de novo*. *United States v. Ostrander*, 411 F.3d 684, 686 (6th Cir. 2005). Sufficiency of the evidence, *see* Part II B.2, is reviewed *de novo*, considering the evidence in the light most favorable to the prosecution. *United States v. Humphrey*, 279 F.3d 372, 378 (6th Cir. 2002).

A. The District Court Misconstrued § 1346’s “Honest Services” Provision.

1. Election Fraud By State Candidates Involves No “Services.”

The mail fraud statute prohibits use of the mails to further “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises” 18 U.S.C. § 1341. Under 18 U.S.C. § 1346, “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”

In interpreting a statute, this Court looks “first to [its] plain language.” *Cowherd v. Million*, 380 F.3d 909, 913 (6th Cir. 2004). Particularly in the criminal context, courts must not extend a statute’s language beyond that which is provided, and “are bound to construe narrowly the applicability of any criminal statute.” *D&W Food Centers, Inc. v. Block*, 786 F.2d 751, 758 (6th Cir. 1986).

By its terms, § 1346 does not sweep in every scheme involving dishonest conduct; it is limited to deprivations of the “right of honest services.” Its plain terms, therefore, do not extend to fraud involving misconduct of candidates. While candidates may be dishonest in seeking election, they cannot deprive anyone of any right to honest “services” for the simple reason that candidates, as candidates, provide no “services.”

2. Section 1346 Did Not Restore The Mail Fraud Statute's Application To "Honest Elections."

Prior to *McNally*, (and prior to the 1988 enactment of § 1346), courts had broadly interpreted "scheme or artifice to defraud" to encompass a variety of "intangible rights" not involving "money or property": (1) the "right to the honest services" of government officials and individuals with "clear fiduciary duties to their employers or unions"; (2) the "right to an honest election"; and (3) miscellaneous "nonmonetary rights." *Id.* at 362-64 (Stevens, J., dissenting).

McNally invalidated all of these "intangible rights" theories, concluding that the mail fraud statute was "limited in scope to the protection of property rights." 483 U.S. at 360. If Congress intended to protect "intangible rights," the Court explained, "it must speak more clearly than it has." *Id.* at 360.

In response, Congress enacted § 1346. By its terms, this provision did not restore application of the mail fraud statute to *all* intangible rights, but only the "right of honest services," which had a specific pre-*McNally* meaning. In particular, § 1346 did not restore the statute's reach to "honest elections."

That distinction is critical. Pre-*McNally* "honest services" cases concerned misconduct by public officials, those exercising the powers of public officials, or private employees. *United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985) (bribery of judge deprived public of "honest services"); *United States v. Bruno*, 809 F.2d 1097, 1105 (5th Cir. 1987) (same); *United States v. Margiotta*, 688 F.2d

108, 123 (2d Cir. 1982) (individual exercising powers of public official may deprive public of right to “honest and faithful services”); *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980) (private employee); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975) (same).

Because candidates do not owe anyone “services” like a public or private employee, cases involving campaign violations were addressed under a different intangible rights theory – the right of the “citizenry” to an “honest election.” *McNally*, 483 U.S. at 363 (Stevens, J., dissenting) (citing *United States v. Girdner*, 754 F.2d 877 (10th Cir. 1985) (legislative candidate); *United States v. Odom*, 736 F.2d 104, 116 n.13 (4th Cir. 1984) (sheriff candidate); *United States v. Clapps*, 732 F.2d 1148, 1153 (3d Cir. 1984) (party chairman candidate); and *United States v. States*, 488 F.2d 761 (8th Cir. 1973) (city office candidates)); *see also Ingber v. Enzor*, 841 F.2d 450, 451, 452, 455-56 (2d Cir. 1988) (involving separate theories to deprive “honest and faithful services” through corruption in role as Town Supervisor and to deprive “right to a fair and impartial electoral process” by falsifying ballots as candidate). In limiting “intangible rights” under § 1346 to cases involving “honest services,” Congress is presumed to have been aware that the term did not encompass “honest elections” cases. *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004).

The Supreme Court confirmed in *Cleveland v. United States*, 531 U.S. 12 (2000), that § 1346 did not restore the entire pre-*McNally* legal framework.

Concluding that § 1346 did not reach licensing fraud, the unanimous Court held that Congress “amended the law specifically to cover *one* of the ‘intangible rights’ that lower courts had protected under § 1341 prior to *McNally*: ‘the intangible right of honest services.’” 531 U.S. at 19-20 (emphasis added). “Significantly, Congress covered only the intangible right of honest services even though federal courts, relying on *McNally*, had dismissed, for want of monetary loss to any victim, prosecutions under § 1341 for diverse forms of public corruption, including licensing fraud.” *Id.*

The limited scope of § 1346, as recognized by *Cleveland*, decides this case. The right to honest services and the right to honest elections were *distinct branches* of the intangible rights doctrine. The terms “honest services” and “honest elections” were not interchangeable, and the conduct alleged here would have fallen under the “honest elections” line of cases.

Section 1346’s legislative history confirms this understanding. Unlike the statute actually enacted, prior proposals would have explicitly reached honest elections. The Fraud Amendments Act of 1987 introduced in response to *McNally* would have extended the mail fraud statute to encompass election fraud by defining “fraud” to include “defrauding another” of “intangible rights of any kind

whatsoever in any manner or for any purpose whatsoever. . . .” H.R. 3089, 133 Cong. Rec. E3240-02, 1987 WL 944184 (daily ed. 8/4/87).

The following year, Senator Biden proposed the Anti-Corruption Act of 1988, which would not only have prohibited schemes to deprive the public of “the honest services of an official” and schemes to defraud “an organization of the intangible right of honest services,” but also contained a separate provision prohibiting schemes to deprive the public of a “fair and impartially conducted election process.” S. 2793, 134 Cong. Rec. S16315-01, 1988 WL 177972 (daily ed. 10/14/88). Although this bill passed the Senate, *see id.*, the honest elections provision was deleted before § 1346 was enacted. And after § 1346 was enacted, Senator Biden *reintroduced* the honest elections provision because “current law does not permit prosecution of election fraud because such offenses do not involve anyone’s ‘honest services.’” 135 Cong. Rec. S1025-02, 1989 WL 169400 (daily ed. 2/2/89) (statement of Sen. Biden).

The Department of Justice, which was involved in drafting § 1346, reached the same conclusion:

In 1988, Congress enacted the so-called “*McNally*-fix” statute, 18 U.S.C. § 1346, to restore the pre-*McNally* scope of the mail fraud statute. Unfortunately, by its express terms, section 1346 only applies to schemes to deprive another of the ‘intangible right of *honest services*.’ Thus, while the mail fraud statute can once again be used to prosecute such things as corruption by public servants and embezzlement by campaign officials,

it does not reach schemes to deprive citizens of fair elections because such schemes do not include an intent to deprive any identifiable victim of the “honest services” of any fiduciary.

U.S. DOJ, *Federal Prosecution of Election Offenses* (6th ed. 1995), at 46, found at 1270 PLI/Corp 1019.

Because § 1346 restored only “honest services” cases to the mail fraud statute’s reach, the government’s use of § 1346 here is untenable. Although the indictment dutifully recites a deprivation of “honest services,” this case would not have been within the scope of pre-*McNally* “honest services” cases. Despite the honest services trappings, what the government has essentially charged is that Defendants deprived the “citizenry of its right to an honest election.” *McNally*, 483 U.S. at 363 (Stevens, J., dissenting). This is beyond § 1346.³

³ Even if there were any pre-*McNally* support for treating election fraud cases as involving “honest services,” it would fall far short of being a consistent line of cases that Congress could “reinstate.” Reading § 1346 to reinstate as “honest services” cases situations that were not clearly within existing doctrine would violate principles of fair notice. See *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (*en banc*) (because the meaning of honest services pre-*McNally* was “uneven,” “some defendants on the outer reaches of the statute” could complain that “they were not on notice that Congress criminalized their conduct when it revived the honest services doctrine”). See *infra* at 33. Further, under separation of powers principles, “[i]t is the legislature, not the court, which is to define a crime, and ordain its punishment.” *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820). While Congress may reference court decisions to do so, it could not restore the *status quo ante* on issues for which there was no consensus.

3. The District Court Incorrectly Concluded That Candidates For Public Office Are Fiduciaries.

Although recognizing that § 1346 restored only “honest services” cases and not all aspects of the intangible rights doctrine, *see* R.762, Order, J.A. 441, the district court rejected Defendants’ arguments that § 1346 did not reach the conduct alleged here. In the court’s view, even though § 1346 did not restore “honest elections” cases *per se*, Defendants could still be prosecuted if their conduct *also* fits within the “honest services” doctrine.

According to the court, the “key question in determining the validity of the government’s ‘honest services’ theory” was “whether a candidate for public office has a fiduciary duty to the public to conduct an honest and legal election campaign,” which it answered in the affirmative. (*Id.*, J.A. 446.) The district court was not only wrong in its answer to this question, it was wrong to even ask it, given that this prosecution would have been treated as an “honest elections” (not “honest services”) case pre-*McNally*. Had Congress intended to include cases involving “honest elections” in § 1346, it would have done so by making express reference to that established category of cases (as earlier legislative proposals did), not by assuming that courts would change the pre-*McNally* analysis and henceforth treat them as within the phrase “honest services.”

Nevertheless, even if the district court’s inquiry was proper, it still reached the wrong conclusion. As the court recognized, “honest services” fraud cannot

occur absent a fiduciary duty. *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986), *rev'd by McNally v. United States*, 483 U.S. 350 (1987) (“[A]n intangible rights scheme is only cognizable when at least one of the schemers has a fiduciary relationship with the defrauded person or entity.”) (quotation omitted)).⁴ The court therefore purported to look for, and found, a fiduciary duty owed by candidates Hays and Newsome to the public. (R.762, Order, J.A. 447.) The court’s analysis, however, was severely flawed.

First, while it is true that an honest services theory requires the existence of a fiduciary duty, what it requires *first* is that someone be deprived of “services.” Only after a deprivation of services is found is it necessary to inquire whether those services were provided in a fiduciary capacity. The district court’s “key question”—looking to whether there is a fiduciary duty “to conduct an honest and legal election”—does not even bother to reference the key concept of “services,” instead turning the mail fraud statute into a sweeping mechanism for patrolling violation of any “duty to be honest.”

Moreover, in considering whether the candidates had a fiduciary duty in conducting their campaigns, the court should have been guided by *Gray*, where this Court, faced with a defendant who did not hold an official post but was

⁴ Although *McNally* reversed *Gray*, it reflects this Court’s interpretation of the intangible right to honest services pre-*McNally*, which § 1346 reinstated. *United States v. Frost*, 125 F.3d 346, 364 (6th Cir. 1997).

claimed to have fiduciary duties to the public, identified “two time-tested measures of fiduciary duty”:

(1) a reliance test, under which one may be a fiduciary when others rely upon him because of a special relationship in the government, and (2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary.

790 F.2d at 1296 (quoting *Margiotta*, 688 F.2d at 122); *see also Frost*, 125 F.3d, at 366.

Gray demonstrates the lack of any fiduciary duty on the part of the candidates here. Taking *Gray*’s second prong first, there was no allegation that either Hays or Newsome (in his role as candidate) controlled any governmental decisions. Because candidates by definition have not yet obtained control over governmental decisions, they cannot be *de facto* public officials.⁵

Nor do candidates for public office meet *Gray*’s reliance prong, under which others must rely on the alleged fiduciary because of a “special relationship.” In *Margiotta*, for example, a private individual effectively made important governmental decisions, like hiring, and others relied on him for those decisions. 688 F.2d at 122. Candidates are not decisionmakers, and are not individuals on

⁵ Although Newsome was an incumbent during the campaign in question, both the court’s decision to allow the case to proceed and the jury’s verdict rested solely on Newsome’s role as candidate. (*See* R.762, Order, J.A. 447; R.775, Verdict, J.A. 476.)

whom the public relies or in whom it reposes trust. A candidate is no more a fiduciary *vis a vis* the public than a job applicant is a fiduciary to a prospective employer.⁶

Rather than apply the standard for identifying a fiduciary duty articulated in *Gray*—or any other identifiable standard—the district court created a fiduciary duty on the part of candidates out of whole cloth, without citing any independent source of that duty. The court cited this Court’s decision in *Frost* as indicating that the public’s right to “honest services” encompasses the “right of citizens to fair and honest government.” (R.762, Order, J.A. 445). It then found “axiomatic” that “*the right to fair and honest government includes the right to fair and honest elections.*” *Id.*, J.A. 446.

Frost, however, involved a claimed breach of *private* fiduciary duties to an employer, and its discussion focused on that context, not the public context, and certainly not the context of a state election. *Frost*’s statement that the right to “honest services” includes the right to “honest and impartial government” was a quote from the Fifth Circuit’s decision in *United States v. Brumley*, 116 F.3d 728, 731 (5th Cir. 1997) (*en banc*), which *Frost* mentioned in rejecting the broad

⁶ The Department of Justice has recognized the lack of any fiduciary duty in such situations. *See supra* at 17-18 (DOJ noting that fair election schemes “do not deprive any identifiable victim of the honest services of a fiduciary”); *see also United States v. Ratcliff*, 381 F. Supp. 2d 537, 543 n.32 (M.D. La. 2005) (endorsing government’s concession on this point).

argument that § 1346 had not succeeded in restoring honest services cases under the mail fraud statute at all. *Frost*, 125 F.3d at 364. *Frost*'s general conclusion that § 1346 reinstated the doctrine "according to previous opinions interpreting the intangible right to honest services," *id.*, sheds no light on whether a state election fraud case would have been interpreted as an "honest services" case under those "previous opinions." Nothing in *Frost* makes it "axiomatic" that candidates fall within the scope of established "honest services" theory.

The district court's only effort to actually analyze candidates' duties to the public focused narrowly on the existence of various statutory requirements for candidates. Citing Kentucky statutes limiting contributions, prohibiting vote-buying, and requiring disclosures, the court essentially transformed those statutory requirements into a fiduciary duty: "if a candidate for public office violates laws restricting campaign contributions and expenditures and then utilizes the mails . . . to thwart [state-imposed] reporting requirements . . . he or she has breached a fiduciary duty to provide the citizenry with honest services and is thus subject to prosecution under 18 U.S.C. § 1346." (R.762, Order, J.A. 447.)

The candid transformation of state statutory requirements into a fiduciary duty triggering the mail fraud statute not only federalizes a broad range of state election law, but it is also an illegitimate means for determining the existence of a fiduciary duty. Every citizen is subject to a host of statutory requirements, but that

does not make us fiduciaries. See *United States v. Mangiardi*, 962 F. Supp. 49, 52 (M.D. Pa. 1997) (regulatory duty to report to state agency may actually result in adversarial, not fiduciary, relationship).

Apparently recognizing that the fiduciary duty of candidates was not “axiomatic” after all, the court attempted to bolster its argument by reasoning that “a candidate who obtains public office through fraud *may likely commit fraud* on the public while he or she is serving in office.” (R.762, Order, J.A. 446-47.) (emphasis added). This roundabout reasoning, predicting the *possibility* of a later breach of an *actual* fiduciary duty, cannot create a fiduciary duty on candidates before election. With regard to public officials, honest services mail fraud is “anchored upon the defendant’s misuse of his public office for personal profit.” *Gray*, 790 F.2d at 1295. That is not possible unless and until an individual has obtained public office. The fact that a candidate *might* misuse the office in the future if elected is speculative and irrelevant.

Similarly, the court’s dismissive characterization of defendants’ positions as “you can cheat to get elected to office, but you can’t cheat once you get there,” (R.762, Order, J.A. 446), ignored both the fiduciary crux of “honest services” fraud and the fact that Defendants’ alleged conduct would likely have fallen under other state or federal criminal provisions. The sole issue here is whether the charged conduct is within the mail fraud statute.

Ultimately, the district court's honest services theory fails on every score. Because this election case is not within the scope of pre-*McNally* "honest services" cases, and because candidates in any event have no fiduciary duty to provide "services" to anyone, the court erred in not dismissing the government's "honest services" charges on Counts 2, 16, and 17.

B. The "Salary" Theory Is Inapplicable Here.

As a fallback, the district court held that Defendants' conduct could violate the mail fraud statute by depriving the government of the "salary and emoluments" of the affected offices. This "salary" theory, however, is an impermissible attempt to circumvent Congress's decision not to include "honest election" cases in § 1346, and no federal appellate court has adopted it in this context. Even were the theory viable, the government failed to prove the necessary elements.

1. The Salary Theory Fails In This Context.

The "salary" theory arose as an effort to counter *McNally's* rejection of the intangible rights theories. The potential recharacterization of certain "intangible rights" cases as "money or property" cases by referencing an official's salary was suggested by Justice Stevens' *McNally* dissent. 483 U.S. at 377. The Justice Department seized on the suggestion, instructing prosecutors to use a "salary" theory to avoid § 1346's limitations. *See Federal Prosecution of Election Offenses*, at 46-47.

Under the government's apparent view, any mail fraud case alleging election fraud could be prosecuted under a "salary" theory. This fails to honor Congress's judgment in enacting § 1346. Guided by existing caselaw, Congress would have viewed election fraud cases as "intangible rights" cases removed from § 1341's scope by *McNally*. By limiting § 1346 to "honest services," Congress chose not to reincorporate such "honest elections" cases.

Where Congress has closed the front door, the prosecution should not be allowed to walk in through a newly devised back door. This Court should follow other courts in rejecting this "salary" recharacterization of "honest elections" cases. See *Ratcliff*, 381 F. Supp. 2d at 548 (rejecting salary theory because citizens "lost no money or property, but only the intangible right to a fair election"); *United States v. George*, 1987 WL 48848, *2 (W.D. Ky. Oct. 20, 1987) (rejecting salary theory because right to determine recipient of salary is same as intangible right legally to elect official).

While no circuit has addressed use of a "salary" theory in an election case, the Eleventh Circuit rejected a similar use of the theory in *United States v. Goodrich*, 871 F.2d 1011 (11th Cir. 1989). There, in an indictment returned after *McNally* but prior to the enactment of § 1346, the government alleged that the defendant bribed county commissioners regarding a zoning decision. Because an "honest services" theory was unavailable under *McNally*, the defendant was

charged with mail fraud under a “salary” theory. The Eleventh Circuit upheld the district court’s dismissal of the indictment, rejecting the recharacterization of an intangible rights case as a “salary” case:

[T]he property interest alleged to have been denied the victim here—what the government contends [the county] paid salaries for but did not get—is the “honest and faithful services” of the County Commissioners, an interest *McNally* held to be unprotected by the mail fraud statute. Thus, this “property interest” is indistinguishable from the intangible right to good government described in *McNally* and cannot sustain the mail fraud count.

Id. at 1013-14.

The “salary” theory not only fails to respect Congress’s choice about the scope of the statute, it also fails to account for pre-*McNally* caselaw. Before *McNally*, cases involving election-related fraud were not analyzed as “money or property” cases. Instead, courts considered whether such prosecutions could be brought by examining whether the statute extended to fraud involving intangible rights where no money or property was at issue. *See, e.g., Clapps*, 732 F.2d at 1153; *States*, 488 F.2d at 765-66. Courts (and prosecutors) would not have consistently used the far more controversial “intangible rights” approach if a straightforward “money and property” theory were available.

Indeed, it makes no sense to talk about deprivation of “money or property” in the context of officials’ budgeted salaries. Because the officials’ salaries would have been paid to someone, Defendants’ alleged scheme could not have affected

the amount of the public's expenditure. *See Ingber v. Enzor*, 664 F. Supp. 814, 821-22 (S.D.N.Y. 1987) (salary was budgeted expenditure that would have been paid to someone so public was not deprived of property in voter registration and absentee ballot scheme), *aff'd* 841 F.2d 450 (2d Cir. 1988); *George*, 1987 WL 48848, at *2 (absentee ballot scheme deprived no property because salary was set by statute); *see also Goodrich*, 871 F.2d at 1013 (rejecting allegation that fraud deprived county of officials' salaries where no costs beyond those of "regularly scheduled" business were claimed).

In cases involving false campaign reporting to a state agency, the citizens "los[e] no money or property but only the intangible right to a fair election." *Ratcliff*, 381 F. Supp. 2d at 548 (holding that violations of state election law should be prosecuted under state law, not shoehorned into the mail fraud framework). A finding that the alleged scheme would not have affected the salaries paid should likewise have precluded a mail fraud prosecution here.

Perhaps recognizing that Defendants could not impact the payment of the salary itself, the district court fell back on a "benefit of the bargain" theory, concluding that depriving the public of an honest election also deprives the public of the benefit of its bargain in paying the official's salary. (R.762, Order, J.A. 453.) The district court relied on *United States v. Webb*, 689 F. Supp. 703 (W.D. Ky. 1988), which upheld a "salary" theory by comparing election

misconduct to traditional fraud cases such as the hiring of an “unqualified” surgeon or the purchasing of a “faulty” appliance:

The essence of fraud is that through false representations, the victim has something, whether it be a product, service or an employee, that is of lesser value than the price paid. In civil fraud, the concept is known as the “benefit of the bargain.”

Id., at 707.

But this analogy to civil fraud does not work here. In the election setting, unless the misconduct involves some misrepresentation of a necessary qualification – a judicial candidate falsely claiming to be an attorney, for example – the misconduct does not impact the official’s objective skills or ability to perform the required services. In fact, the candidate may be capable of providing better service than another candidate or than expected by the public. *See Ratcliff*, 381 F. Supp. 2d at 548-49 (rejecting *Webb* analysis and dismissing mail fraud charge because election misconduct did not impact candidate’s qualification).

Indeed, accepting the district court’s “benefit of the bargain” reasoning would make § 1346’s reinstatement of the honest services theory largely superfluous. If the “benefit of the bargain” theory makes this a “salary” case, it would do the same for a public official or private employee who violates a fiduciary duty, as the service provided would be of “reduced value.” But if such

cases are “salary” cases, it was unnecessary for Congress to reinstate the honest services theory to cover them.

Ultimately, the district court mischaracterized the harm caused by election fraud. Such schemes generally do not misrepresent a candidate’s preexisting qualifications, resulting in the public obtaining an official “of lesser value than the price paid.” *Webb*, 689 F. Supp. at 707. Instead, the harm is to the process itself, through selection of a fraudulently rather than honestly elected candidate. That difference is inherently “intangible,” and cannot be artificially translated into a question about “money or property.”

2. The Government Failed To Prove The “Salary” Theory.

Even if the government could prosecute Defendants under the “salary” theory, it failed to prove its case. Under the trial court’s “benefit of the bargain” approach, the government should have been required to prove that Defendants intended to cause the election of candidates who would not provide full value, and that the alleged misrepresentations were material to the deprivation of salary. *See Frost*, 125 F.3d at 354, 361. Even *Webb*, relied on so heavily by the district court, recognized the necessity of proving the salary theory. 689 F. Supp. at 708 (“It is now the responsibility of the United States to prove that these defendants intended to acquire this tangible property of the Commonwealth of Kentucky. If the United States cannot do so, its prosecution will fail.”) Here, the complete dearth of

evidence on these points requires reversal for insufficiency of the evidence. At the very least, the verdicts were against the weight of the evidence, requiring a new trial. *See* Fed. R. Crim. P. 33.

There was no proof that the candidates involved would have provided reduced value or that that was Defendants' intention. If the government brings a mail fraud charge for tricking people into buying faulty goods or using an unqualified surgeon, it must prove the goods are faulty or the surgeon is unqualified. So too, if this kind of "salary" claim were cognizable, the lost value and Defendants' intent would have to be established at trial. Yet the prosecution never even alleged in the indictment, much less demonstrated, that the public would have received less than it bargained for had Hays been elected (or that it did receive less with respect to Newsome), or that Defendants so *intended*. *Cf. United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996) (reversing mail fraud conviction where, despite billing fraud, there was no proof that medical services were, or were intended to be, substandard).

The government also failed to prove that the misrepresentations could or did result in tangible harm. *See Frost*, 125 F.3d at 361 ("[T]o be material, the information withheld either must be of some independent value or must bear on the ultimate value of the transaction.") (citation omitted). The heart of the government's case was the allegation that the Hays and Newsome campaigns

failed to disclose, or misrepresented, campaign finance information on reports filed with the Kentucky Registry of Election Finance (“KREF”). But the government failed to prove that these actions were materially related to the payment of salary to Hays or Newsome. *See Jain*, 93 F.3d at 442 (finding no evidence that physician’s kickback scheme would have been material to patients where it did not affect their service or costs). Relatedly, while KREF is the deceived entity, the “victims” of the scheme are the governmental units responsible for paying the officials’ salaries. Thus “the only parties deceived . . . were not deprived of money or property.” *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 794 (1st Cir. 1990); *see also Frost*, 125 F.3d at 360 (noting disagreement about whether mail fraud convictions may rest of deceiving someone besides ultimate victim, and explaining that in any event the deception must be “causally related to the scheme to obtain property from the victim”). The government simply failed to prove the required connection between the mailings to KREF and the alleged loss of salary.

C. Application Of The Mail Fraud Statute Here Violates Jurisprudential And Constitutional Norms.

The indictment does not allege an offense subject to the “honest services” or “salary” theory of mail fraud. This conclusion, while clear as a matter of statutory interpretation and precedent, is reinforced by jurisprudential and constitutional concerns which operate to ensure the mail fraud statute reaches charged conduct only if Congress has made this clear.

This result is required in the first instance by the traditional rule of lenity. Under that rule, “[w]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.” *McNally*, 483 U.S. at 359-60. The rule of lenity is “especially appropriate” in construing the mail fraud statute, which serves as a predicate act under other criminal statutes. *Cleveland*, 531 U.S. at 25. Here, it is plainly “rational” to read “honest elections” cases as not within either a § 1346 “honest services” theory or a § 1341 “salary” theory, and there is plainly no “clear and definite language” indicating otherwise.

A similar result is dictated by the need to avoid an interpretation of the mail fraud statute that would render it unconstitutionally vague as applied. The void-for-vagueness doctrine requires that statutes “define the criminal 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.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). See *Harris Br.* at 49-51. Here, given the legislative and judicial history, interpreting either § 1341 or § 1346 to apply to an “honest elections” situation would raise serious questions of fair notice, and would create “a real danger of prosecutorial abuse for partisan political purposes.” *Margiotta*, 688 F.2d at 139 (Winter, J., dissenting).

Indeed, the need for a clear statement before applying the mail fraud statute is particularly acute in the context of a state election. The authority to regulate state and local elections is reserved to the states by the Tenth Amendment. *See Oregon v. Mitchell*, 400 U.S. 112, 125 (1970). Accordingly, broadly interpreting the mail fraud statute in this context would not only “subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities,” *Cleveland*, 531 U.S. at 24, it would also fail to honor the Tenth Amendment. *Cf. Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1416 (9th Cir. 1995) (instructing district court to interpret National Voter Registration Act to avoid burdening California’s “retained power to conduct its state elections as it sees fit”); *see also Cleveland*, 531 U.S. at 25 (“unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes”) (quotation omitted).

With regard to both the “honest services” and “salary” theories, Congress has not “convey[ed] its purpose clearly” to include cases involving fraud in state elections. Following *McNally*’s lead, this Court should not inject the mail fraud statute into core state and local matters without a clearer statement than the statute contains. 483 U.S. at 360. Accordingly, Turner’s convictions for mail fraud (Counts 16 and 17) and conspiracy to commit mail fraud (Count 2) should be reversed.

III. THE DISTRICT COURT'S EXCLUSION OF EVIDENCE REGARDING NEWSOME WAS ERRONEOUS.

In accordance with F.R.A.P. 28(i), Turner hereby adopts by reference the evidentiary argument at Harris Br. at 41-44. The exclusion of 404(b) evidence regarding Donnie Newsome's motives and the sources of his campaign funds deeply prejudiced Turner's ability to defend himself against the mail fraud charges related to that campaign.

IV. THE DISTRICT COURT ERRED BY FAILING TO DISMISS THE INDICTMENT DUE TO THE GOVERNMENT'S MISCONDUCT.

In accordance with F.R.A.P. 28(i), Turner hereby adopts by reference the prosecutorial misconduct arguments made by Defendant Harris, as that misconduct also prejudiced Turner. *See* Harris Br. at 53-58. Among other acts, Turner was prejudiced by the prosecutor's failure to advise him of his constitutional rights until near the end of his testimony before the grand jury. (*See* R.556, Motion, Ex. 2, Turner Grand Jury Tr. at 6-9, J.A. 2153-56.)

V. THE DISTRICT COURT ERRONEOUSLY APPLIED THE GUIDELINES AND IMPOSED AN UNREASONABLE SENTENCE.

Because prosecution of the type of election fraud offenses at issue here under the mail fraud statute is uncommon (and improper, *see supra*), the Sentencing Guidelines are poorly calculated to address the offense conduct. As the prosecutor admitted:

[I]t's hard to fit this case neatly within the guidelines. It just doesn't – it's somewhat unusual in the prosecution,

it's unusual in the statutes we use to prosecute it. And so it has sort of a tenor of public corruption, but it was prosecuted as a mail fraud.

(R.1040, Sentencing Transcript at 105, J.A. 2011.) This admittedly unusual prosecution resulted in a poorly crafted sentence for Turner, a first-time offender: 48 months for being a middleman in local election conduct, a sentence far longer than any other defendant received.

The court struggled to give a coherent treatment to Turner's offenses within the Guideline scheme, applying § 2B1.1—a broad guideline that applies to a variety of property offenses.⁷ To § 2B1.1's base offense level of 6, the district court imposed a *14-level enhancement* based on the amount of "intended loss," using the 4-year salaries of the offices at issue as the relevant quantity.⁸ But intended loss, while an appropriate measure of culpability for theft or fraud offenses in which pecuniary harm is integral and ascertainable, is ill-suited to an election-fraud case, where the primary harm springs not from quantifiable pecuniary loss, but from interference with democratic processes. As such, Guidelines that focus on election-related offenses do *not* include a salary-based loss enhancement. And even if "loss" is an appropriate consideration here, the

⁷ Unless otherwise noted, Guidelines citations are to the 2002 edition, which applies to this case. *See* U.S.S.G. § 1B1.11.

⁸ The court's calculations are detailed in R.1021 Revised Calculations, J.A. 2586.

district court's application of the concept was misguided, resulting in a 14-level "loss" enhancement for Turner based on the full amount of Hays' would-be salary, but no "loss" enhancement for Hays himself.⁹

Even if the district court's loss analysis were proper under the Guidelines, the 48-month prison sentence is nonetheless "unreasonable" under 18 U.S.C. § 3553, which gained increased prominence under *United States v. Booker*, 125 S. Ct. 738 (2005). Under *Booker*, the Guidelines have been transformed from rigid limitations into one of many factors to be considered in sentencing decisions. *Id.* at 765-66; *United States v. Webb*, 403 F.3d 373, 381 (6th Cir. 2005).

Applying this multi-factor § 3553 analysis, even if the court's loss calculation is correct under the Guidelines, the sentence imposed cannot be viewed as "reasonable" in light of the substantially more lenient sentences that apply under Guidelines that specifically target election fraud. Likewise, the "nature and circumstances" of the offense and the "history and characteristics" of the defendant reveal a defendant who played a subordinate role in the offenses, did not use his own funds in any of the offense conduct, received no identifiable benefit from that

⁹ This Court "reviews de novo the district court's legal interpretation of the Guidelines, including mixed questions of law and fact." *United States v. Settle*, 2005 U.S. App. LEXIS 13117, at *2 (6th Cir. Jul. 1, 2005). "The determination of what types of loss can constitute the loss attributable to [defendant's] offense for purposes of his offense level under U.S.S.G. § 2B1.1(b)(1) is a question of law subject to de novo review." *United States v. Tate*, 2005 U.S. App. LEXIS 11266, at *6 (6th Cir. Jun. 10, 2005).

conduct, and has a strong history of contributions to his family and community.

Further, the 48-month sentence creates disparities with similar cases and leads to a sentence far “greater than necessary” to serve the purposes of sentencing.

A. The District Court Erroneously Treated The Full Salary Of The Involved Offices As Intended Loss.

The district court concluded that Turner’s offense levels for Counts 2, 16 and 17 should be enhanced by 14 levels under § 2B1.1(b) for “intended loss” measured by the 4-year salary and benefits of the offices. This calculation extends “intended loss” too far, resulting in a sentence with little relation to Turner’s culpability. Although the government supports this methodology, it has cited no case—and we are aware of none—in which the offense level for an election-related offense was increased based upon the full salary of the sought-for position.

1. Use Of Salary As “Intended Loss” In An Election Fraud Case Is Inconsistent With § 2B1.1 And Other Guidelines.

Section 2B1.1 provides for an increase in offense level based on “intended loss.” *See* § 2B1.1, cmt. n.2(A)(ii); § 2C1.7, cmt. n.3. Intended loss includes only “the pecuniary harm that was intended to result from the offense.” § 2B1.1, cmt. n.2(A)(ii). “Pecuniary harm” is defined as “harm that is monetary or that otherwise is measurable in money,” and “does not include . . . non-economic harms.” § 2B1.1, cmt. n.2(A)(iii).

As this emphasis on “pecuniary harm” suggests, the concept of intended loss is best suited to cases involving run-of-the-mill, out-for-a-dime fraud, where the question is simply “how much” the perpetrators meant to fraudulently obtain from their victims. Typical applications of the concept thus lead to an increase in the offense level based on how much money was sought to be embezzled, *United States v. Omori*, 1996 U.S. App. LEXIS 33020, at *9 (9th Cir. Dec. 12, 1996), how much property was sought to be fraudulently obtained, *United States v. Weber*, 1994 U.S. App. LEXIS 3480, at *17 (6th Cir. Feb. 24, 1994), or how much harm was intended to the lender from a fraudulently obtained loan, *United States v. Moored*, 38 F.3d 1419, 1427 (6th Cir. 1994). In those situations, the harm centers on the victims’ actual or intended pecuniary loss, making intended loss an appropriate measure of the defendant’s culpability.

Turner’s situation is far different. What is alleged is the improper influence of an election. And what was sought to be obtained was an office—not for Turner, but for candidates he supported. The “victim” is society generally, and the fundamental harm is not pecuniary, but the unquantifiable harm from election of a candidate via a campaign involving fraudulent means. This is precisely the sort of “non-economic harm” that is *not* the basis for intended loss. See § 2B1.1, cmt. n.2(A)(iii).

In these circumstances, basing “intended loss” on the salary of the office does not correlate with culpability. If there is any reasonable “numeric” way of assessing culpability in this context, it would measure the extent to which the election was tainted. For example, a defendant who exerted pervasive fraudulent influence on an election might be sentenced more severely than a defendant whose fraudulent conduct was more limited. Indeed, this measure of culpability is employed by the recently implemented Guideline addressing illegal federal campaign contributions. *See* § 2C1.8(b)(1) (2004) (using the “value of the illegal transactions,” not the salary of the affected office, to determine offense level). If such a measure were used here, because the claimed illegal contributions in the Hays campaign totaled \$21,000, and those in the Newsome campaign totaled \$20,000, (R.382, Superseding Indictment, J.A. 178, 186), the § 2B1.1 loss table would lead to an aggregate 6-level increase on Counts 2, 16, and 17 after grouping.¹⁰

The district court, however, created a scheme in which illegal contributions of \$10 and \$100,000 to a state campaign result in identical sentences. This

¹⁰ While use of the “value of the illegal transactions” would relate to culpability, § 2B1.1 lacks any express reference to this type of measure. One basis for employing this measure would be if the amount of the illegal contribution were viewed as a proxy for “gain.” *See* § 2B1.1, cmt. n.2(B) (allowing “gain” to be used as an alternative measure of loss if loss “cannot reasonably be determined”); *cf.* § 2C1.1, cmt. background (noting amount of bribe as possible proxy for gain to payer of bribe).

approach would also require more severe sentences for tainting elections in states that happen to pay a higher salary for comparable positions. It makes no sense that the sentence for a defendant who illegally contributes \$10,000 to a Kentucky gubernatorial campaign would receive a lesser sentence than a defendant who illegally contributes \$10 to a New York gubernatorial campaign simply because New York's governor earns a higher salary. (See Danitz, *Governor's Paychecks Vary Widely* (Jan. 23, 2001), at <http://www.stateline.org>.) (listing New York's governor's salary as \$179,000 and Kentucky's as \$99,657.12).

The district court's use of the salary over the full term of office compounds this anomaly. Under that methodology, \$100 illegally contributed to a candidate for a 6-year \$40,000-per-year dogcatcher position would be treated more severely than \$100,000 illegally contributed to a 2-year, \$70,000-per-year state legislative position. It is difficult to believe the Sentencing Commission intended this, particularly given the Guidelines' goal of ensuring uniformity and proportionality of sentences. *See, e.g.*, U.S.S.G. Ch. 1, Pt. A, intro. cmt. (Congress's two important objectives are "narrowing the wide disparity in sentences imposed for similar criminal offenses," and imposing "appropriately different sentences for criminal conduct of differing severity").

The salary-based measure of intended loss also leads to offense levels that cannot be squared with those imposed by Guidelines that *do* specifically address

sentencing for election fraud. Section 2H2.1, “Obstructing an Election or Registration,” does not provide for any adjustment based on salary. If that provision applied here, the pre-adjustment offense level on Count 2 would be 12, as opposed to the calculation here of 20 (6 under § 2B1.1 plus 14 for intended loss). *See also* § 2C1.5 (assigning offenses involving payments to obtain appointive office an offense level of 8, with no salary-based adjustment).

The district court’s application of § 2B1.1 is also inconsistent with sentencing practice regarding fraud in *federal* elections. Prior to 2003, the Guidelines did not specifically address such fraud. Some cases were brought under the then-applicable fraud Guideline, § 2F1.1 (later replaced by § 2B1.1), but salary was not used to measure loss. Indeed, prosecutors sometimes invoked the amount of illegal contributions as a “loss equivalent,” without mentioning salary as a factor. *See United States v. Hsia*, 131 F. Supp. 2d 195, 206 (D.D.C. 2001); *United States v. Mariani*, 212 F. Supp. 2d 361 (M.D. Pa. 2002) (finding no “loss” in federal illegal contribution case sentenced under § 2F1.1, but departing upward based on amount of contributions).

Guideline 2C1.8, added in 2003 to address illegal contributions to federal campaigns, also does not reference salary. Tellingly, “[t]he Commission opted against simply amending an existing guideline because it determined after review that the characteristics of election violation cases did not bear sufficient similarity

to cases sentenced under any existing guideline.” U.S.S.G. Amend. 656. Because it addresses precisely analogous conduct, and because there is no indication that it represents a shift in the Commission’s thinking, this provision guides proper application of § 2B1.1 to state elections. *See United States v. Rubin*, 999 F.2d 194, 198 (7th Cir. 1993); *United States v. Tisdale*, 7 F.3d 957, 967-68 (10th Cir. 1993).

Section 2C1.8 represents the Commission’s judgment that offenses involving illegal contributions are *not* well suited to be handled via general guidelines such as § 2B1.1, and that the relevant amount is *not* salary, but the amount of illegal contributions. Had Turner’s conduct involved a federal rather than state election, and had he been sentenced under § 2C1.8, it would result in a level of 14 (base level of 8 adjusted by 6 levels based on the amount of illegal transactions) rather than 20. Although it is exceedingly difficult to believe that the Sentencing Commission intended a higher sentence for *state* election fraud prosecuted under the general vehicle of the mail fraud statute than comparable *federal* election fraud prosecuted under the Federal Election Campaign Act, that is the inevitable result of the district court’s reasoning.

2. Turner Did Not Intend Loss Of The Officials’ Full Salaries.

Intended loss is “the loss the defendant subjectively intended to inflict on the victim.” *Moored*, 38 F.3d at 1427. Here, the government presented no evidence at trial or sentencing that Turner had any intent to cause financial harm to Kentucky

or the Counties involved. The government was not creating extra posts for Hays or Newsome where additional costs would be incurred—the salaries would be paid to someone in any event. Demonstrating an intent to have certain candidates elected thus falls far short of demonstrating an intent to cause pecuniary harm in the full amount of their anticipated salaries. *See United States v. Sapoznik*, 161 F.3d 1117, 1121 (7th Cir. 1998) (obtaining office of police chief under false pretenses did not cause city to lose full salary as it would have had to pay *some* police chief).

Even if Harris' intent can be imputed to Turner, there is no evidence that Harris himself intended to impose a pecuniary loss on the government. Harris's alleged motive for illegally supporting Hays was a personal one—anger with the wife of Hays' opponent. (*See* R.719, Trial Tr. 3-31, 186-189, J.A. 830, 868-71.) Indeed, the Government's own evidence indicated that Harris was disappointed in Hays' opponent and desired to see a better candidate elected. (R.757, Trial Tr. 9-75, 76, J.A. 1595, 1596.)

Under these circumstances, there is no basis for using the full salaries as the "intended loss." This measure might make sense if the scheme had involved a plan to obtain election for Hays and Newsome, then take the full salary without fulfilling any of the accompanying duties. Here, however, the only conclusion supported by the evidence is that Defendants' intent was that Hays and Newsome would assume the sought-after positions and carry out their duties. While the

officials' salaries might be the *possible* loss that *could* have been caused by the defendants' conduct, "[t]he amount of possible loss is just one element of proof to be considered, along with all other evidence, on the issue of intended loss." *United States v. Wells*, 127 F.3d 739, 746 (8th Cir. 1997).

The district court effectively concluded that the entire salary is an appropriate measure of intended loss because a fraudulent campaign "taints" the officeholder, entirely devaluing his service. (R.1041, Sentencing Transcript at 43-45, J.A. 2020-22.) But this is inconsistent with the Guidelines' treatment of other types of fraud. If, for example, an officeholder commits fraud in carrying out her duties, the measure of loss is the harm involved in the fraudulent transaction. *See, United States v. Parsons*, 109 F.3d 1002, 1006 (4th Cir. 1997) (loss to the government from postmaster's fraudulent expense claims based on amount of those fraudulent claims). There is no assumption that the fraud "taints" the official and thus makes the loss from the fraud equal to the official's full salary.

United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998) is instructive. Reviewing the restitution owed by a police chief convicted of racketeering, the court observed that while the chief may have obtained his position under false pretenses, the city "would not have 'saved'" the money spent on his salary, as "[i]t still would have needed a police chief." *Id.* at 1121. What the city "lost" was not the chief's salary, but "the difference in the value of the services that he rendered

[the City] and the value of the services that an honest police chief would have rendered.” *Id.* Given the difficulty of estimating that quantity, the Seventh Circuit approved the district court’s approximation that the chief’s services were worth 75% of the salary. *Id.* at 1115, 1122; *see also United States v. DiPace*, 41 F. App’x 947, 950 (9th Cir. 2002) (finding “no evidentiary basis” for using entire salary to measure loss from mail fraud).

Although this Court has explained that loss is the “loss the defendant subjectively intended to inflict on the victim,” *Moored*, 38 F.3d at 1427, the district court “reject[ed] the notion that Turner or Harris must have subjectively intended the loss . . .” (R.1041, Sentencing Transcript at 44-45, J.A. 2021-22.) Instead of considering what pecuniary loss Turner or his codefendants intended, the district court relied on “crediting against loss” concepts. (*Id.* at 42-45, J.A. 2019-22.) The concept of “credit against loss” allows an offender to reduce “loss” by certain amounts returned to the victim. § 2B1.1, cmt. n.2(E). The district court deemed “instructive” Application Note 2(F)(v), providing that no “credit” is available for services provided by someone “falsely posing as a licensed professional,” and viewed that note as supporting use of the full salaries as intended loss here. (*Id.* at 44, J.A. 2021.)

But where the question is *intended* loss, the focus is not on whether a “credit” against loss is available (there is, after all, no actual loss against which to

“credit”), but on what the defendant *intended*. If a defendant fraudulently obtains money or property but means to repay it, the *intended* loss—“the loss the defendant subjectively intended to inflict on the victim”—is *zero*, and this has nothing to do with crediting. *Moored*, 38 F.3d at 1427; *see also United States v. Wolfe*, 71 F.3d 611, 617 (6th Cir. 1995); *United States v. Oligmueller*, 198 F.3d 669, 671 (8th Cir. 1999) (intended loss zero where defendant intended to repay fraudulently obtained loans). Application Note 2(F)(v) to § 2B1.1, which the district court cited, focuses on situations involving *actual* loss—“services were fraudulently rendered to the victim by persons falsely posing as licensed professionals,” § 2B1.1, cmt. n.2(F)(v)—not on interpreting “intended loss.”¹¹

The Seventh Circuit’s decision in *United States v. Schneider*, 930 F.2d 555 (7th Cir. 1991), illustrates the importance of intent. After the defendants there were convicted of fraudulently seeking to obtain federal construction bids, the government unsuccessfully proposed that the defendants’ offense levels should be adjusted based on the full bid amounts. While such a measure might make sense for a “true con artist” who “means to pocket the entire contract price without rendering any service in return,” it made no sense where “fraud is committed in order to obtain a contract that the defendant might otherwise not obtain, but *he*

¹¹ Further, Hays and Newsome were plainly not “falsely posing as licensed professionals.”

means to perform the contract (and is able to do so) . . .” 930 F.2d at 558 (emphasis added). Using the full \$142,400 bid amount, the Seventh Circuit observed, would lead defendants who fraudulently obtained a contract with the intention of providing the contracted-for service to be punished just as severely as a con artist who “intended to winkle \$142,400 from a senile old lady”—a result that the court deemed “irrational.” 930 F.2d at 559. This Court has followed the path laid out in *Schneider*, calling its logic “compelling.” *Moored*, 38 F.3d at 1428 (district court was incorrect to treat face amount of fraudulently obtained loan as intended loss, where the government did not prove that the defendant did not intend to repay).

The parallel here is clear—there is no evidence that Hays or Newsome intended to take their official salaries “without rendering any service in return,” or that Turner intended them to do so. Accordingly, use of the full salaries as a measure of intended loss is “irrational.” *Schneider*, 930 F.2d at 559.

The jury’s conclusion that Turner conspired to obtain the “salary and emoluments” of the offices does not, contrary to the district court’s belief, (R.1041, Sentencing Transcript at 41, J.A. 2018), require use of the full salaries as intended loss. Even if that conclusion could be viewed as indicating that Turner intended *some* “pecuniary loss,” it says absolutely nothing about the *amount* of that loss. Indeed, the district court’s conclusion that a salary theory was viable here was *not*

based on deprivation of the entire salary, but on the view that the fraud sought to deprive the citizens of the “benefit of their bargain” because a fraudulently elected candidate would provide less value than an honestly elected one. (R.762, Order, J.A. 453); *see supra* at 28-29. The court’s own reasoning in the statutory context thus contradicts its rationale during sentencing.

Strikingly, Hays—the defendant who would actually have *obtained* the salary if elected—was also sentenced under § 2B1.1, but his sentence was *not* adjusted for intended loss. The district court’s sole justification for this drastically different treatment was that Hays (who was indicted and sentenced together with Turner and Harris, but tried separately), was convicted only on the “honest services” and not the “salary” theory. (R.1039, Sentencing Transcript at 25, J.A. 2007.)

Nothing in the Guidelines, the mail fraud statute, or the jury instructions justifies giving such weight in the “loss” determination to the fact that the Turner jury checked both the “honest services” and “salary and emoluments” boxes on the verdict form, while the Hays jury only checked the former. Ultimately, the district court’s application of § 2B1.1 underscores and intensifies the problems with applying the mail fraud statute to the conduct here. Having fit what is really an “honest elections” case into a “salary and emoluments” mold, the district court then improperly made that salary the cornerstone of Turner’s sentence.

B. Turner’s Four-Year Sentence Is Unreasonable Under 18 U.S.C. § 3553(a).

Even if the district court’s guideline calculation is correct, the four-year sentence imposed on Turner is unreasonable. “The Court of Appeals review sentencing decisions for unreasonableness” under the factors set forth in 18 U.S.C. § 3553(a). *Booker*, 125 S. Ct. at 765-67. “[I]n determining reasonableness,” the Court “consider[s] not only the length of the sentence but also the factors evaluated and the procedures employed by the district court in reaching its sentencing determination.” *Webb*, 403 F.3d at 383. A reasonable sentence should be “sufficient, *but not greater than necessary*, to comply with the purposes [of sentencing].” § 3553(a) (emphasis added). Turner’s sentence does not satisfy these standards.

1. Nature And Circumstances Of The Offense—§ 3553(a)(1).

a. The Loss Calculation Overstates Culpability.

For several reasons, the nature and circumstances of the offenses do not support the 48-month sentence imposed on Turner. First, a 14-level “loss” enhancement with little relationship to Turner’s culpability drives the sentence, and leads to an offense level far greater than would apply under Guidelines that specifically address election-related misconduct, including the Guideline for federal election fraud. *See supra* at 39-42. Thus, even if the salary-based loss calculation is a proper application of the Guidelines, it significantly overstates the

seriousness of the offense, particularly in light of the Commission’s judgment that in election-fraud cases, the appropriate measure of culpability is the amount of the illegal contribution, not the amount of the official’s would-be salary. *See* U.S.S.G. §§ 2C1.8, 2H2.1; *supra* at 41-42. The sentence here, to be “reasonable,” should be no more than the sentence that would be available under those provisions. *See Booker*, 125 S. Ct. at 761 (“uniformity does not consist simply of similar sentences for those convicted of violations of the same statute . . . , [but] more importantly, of similar relationship between sentences and real conduct”).

Importantly, the Guidelines themselves recognize that § 2B1.1’s loss table may “substantially overstate[] the seriousness of the offense,” and contemplate downward departures in such instances. § 2B1.1, cmt. n.15(B). Here, the district court declined to depart downward on this basis, instead noting that the argument would be “considered” in the § 3553 analysis. (R.1041, Sentencing Transcript at 48, J.A. 2025.) To the extent that the Court did consider the argument in its § 3553 analysis, its analysis was unreasonable.

Rather than addressing whether a salary-based loss measure was an appropriate measure of culpability here, the district court opined only on the general seriousness of election fraud. The court described “the harm to our democratic process” as “immeasurable” and as “far exceed[ing] any calculation that could be identified under any form of an advisory sentencing guideline

system.” (R.1041, Sentencing Transcript at 97, J.A. 2043.) This simplistic analysis provides no help. Turner disputes neither the seriousness of election fraud, nor that its harm is difficult to measure. But the Guidelines’ purpose is to quantify harm from a variety of offenses. The relevant question is whether the salary of the office appropriately measures the harm from this offense. The answer, under both the Guidelines and under § 3553, is no.

b. Turner’s Motivation And Subordinate Role Call For Leniency.

Another aspect of the “nature and circumstances of the offense” that calls for leniency is the prosecution’s failure to identify any gain to Turner from his alleged efforts. “Under § 3553(a) and the decisions of the Supreme Court, a sentencing court may properly consider a defendant’s motive.” *United States v. Ranum*, 353 F. Supp. 2d 984, 990 (E.D. Wis. 2005). A defendant’s culpability is mitigated if he did not act for personal gain. *Id.*; see also *United States v. Walters*, 87 F.3d 663, 671 (5th Cir. 1996) (“Since Mr. Walters himself did not receive any of the misappropriated funds . . . the guideline calculation therefore overstates the seriousness of his own involvement.”); *United States v. Broderson*, 67 F.3d 452, 459 (2d Cir. 1995) (downward departure in fraud case in part because defendant did not profit personally).

Here, not only did Turner not receive any share of the salaries treated as “loss,” but he also did not receive *any* identifiable pecuniary benefits for his

involvement. Nor is there any allegation that he received, or expected to receive, any sort of *quid pro quo* from Hays or Newsome. To the extent that the government's evidence suggested anything about Turner's motivations, it portrayed a man who shared an interest in politics with his employer and, at that employer's behest, became involved in fraudulent campaign activity.

In light of Turner's subordinate role, his culpability is also overstated by the 3-level "manager or supervisor" enhancement imposed. The district court concluded that this enhancement was warranted in light of Turner's role in arranging for straw contributors. (R.1041, Sentencing Transcript at 96, J.A. 2042.) Even if that conclusion is correct under the Guidelines, it remains the case that in the overall offense conduct, Turner's role was comparatively limited. Turner did not attend or participate in the supposedly critical meeting of political figures regarding the Hays race, or in the meetings with Hays' campaign manager or consultants. (R.719, Trial Tr. 3-32, J.A. 831; R.961, Trial Tr. 12-135-140, J.A. 1660-65.) From start to finish, the government portrayed Turner as Harris's pawn, doing his bidding, at his instruction, with his money. (*See, e.g.*, R.966, Response, at 6-7, J.A. 2584-85 (government representing that "everything . . . Turner has done in this case" "emanated from Ross Harris").) *Cf. United States v. Koczuk*, 166 F. Supp. 2d 757, 759 (E.D.N.Y. 2001) (affording reduction for minimal role to

defendant who “was merely [a co-defendant’s] employee . . . who primarily took orders from [that co-defendant]”).

Mr. Turner’s claimed role in both campaigns was primarily that of a conduit, delivering money from one to another. (*See* R.764, Trial Tr. 13-127, J.A. 1707 (AUSA Taylor stating that “Turner was used as a conduit”).) In the Hays campaign, Turner is alleged to have acted as intermediary between Harris and various straw contributors. (R.382, Superseding Indictment, J.A. 177.) In the Newsome campaign, the sole allegation regarding Turner is that he delivered checks from Harris to Newsome on two occasions, both “at the direction of Ross Harris.” (*Id.* at 14, J.A. 186.) Indeed, Turner’s role as an intermediary in the offenses is similar to that of a “mule” in a drug conspiracy—a role recognized as “minor” under § 3B1.2. *See* § 3B1.2, cmt. n.3(A).

Moreover, as the district court recognized, Turner was not involved in or charged with any of the “vote-buying” aspects of the conspiracy. (*See* R.781, Trial Tr. 18-181, J.A. 1867.) The circumstances in this case, in short, make Turner less culpable than the usual defendant who commits these offenses.

2. Turner’s History And Characteristics—§ 3553(a)(1).

In this case, Turner’s spotless history and character recommend a short sentence. Turner’s age when he committed these offenses, his record of consistent employment, his remarkable past and present financial and emotional contributions

to his family and to nonrelatives whom he has treated as family, and his consistent commitment to charitable and public service in his community, combine to warrant leniency in sentencing. *See supra* at 4.¹²

The district court apparently gave these factors some weight in the § 3553 analysis, noting that Turner is a “hard-working, financially responsible and dedicated citizen” who “enjoys a positive standing in his community,” who is “loved and respect by family and friends,” and who “has done much for others.” (R.1041, Sentencing Transcript at 96, J.A. 2042.) Apparently based on Turner’s personal characteristics, the district court did impose a sentence slightly below the advisory guideline range. (*Id.* at 97, J.A. 2043.) That sentence is nonetheless unreasonable in light of the court’s failure to appropriately consider the other factors discussed herein and the fact that the resulting sentence is “greater than necessary” to achieve § 3553’s sentencing purposes.

¹² *See, e.g., United States v. Ward*, 814 F. Supp. 23, 24 (E.D. Va. 1993) (departing downward where first crime at 49); *United States v. Jones*, 158 F.3d 492, 498-99 (10th Cir. 1998) (“exemplary employment history” and community service were grounds for downward departure); *United States v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1990) (nine-year employment record, coupled with another factor, grounds for downward departure); *United States v. Cooper*, 394 F.3d 172, 177 (3d Cir. 2005) (downward departure based on mentoring several youth); *United States v. Hutchison*, 11 F. App’x 411, 412-13 (6th Cir. 2001) (downward departure based on community service).

3. Purposes Of Sentencing—§ 3553(a)(2).

Under § 3553(a), a sentence should be “sufficient, but not greater than necessary, to comply with the purposes” of sentencing set forth in § 3553(a)(2).

None of these purposes recommend a lengthy sentence here.

First, neither the “seriousness of the offense” nor the need to “provide just punishment” require a lengthy sentence. § 3553(a)(2)(A). Although Turner recognizes the significance of the offenses of which he was convicted, they nonetheless involve only the flow of funds into a political campaign, not any attempt to influence voters’ or office holders’ decisions. Further, there is no allegation that the funds involved were Turner’s. Also, given Turner’s education and employment history, sentencing serves no purpose of “providing the defendant with needed educational or vocational training . . . or other correctional treatment.” § 3553(a)(2)(D).

Nor is a significant sentence necessary “to afford adequate deterrence to criminal conduct” or “to protect the public from further crimes of the defendant.” § 3553(a)(2)(B) and (C). The district court recognized that Turner is unlikely to recidivate, but indicated that his 48-month sentence was an appropriate “deterrence to criminal conduct of this nature” by others. (R.1041, Sentencing Transcript at 97, J.A. 2043.) But the felony convictions and negative publicity surrounding this case would be powerful deterrents to similar offenses by others, regardless of the

sentence. Equally true, if the goal is to “send a message,” it makes little sense to use Turner as the medium, while imposing much lower sentences on the candidates who would directly benefit from fraudulent campaign practices. *See infra* at 59.

4. Avoiding Unwarranted Sentencing Disparities—§ 3553(a)(6).

Although the objective of § 3553(a)(6) is “to eliminate unwarranted disparities nationwide,” *United States v. LaSalle*, 948 F.2d 215, 218 (6th Cir. 1991) (internal quotations omitted), the district court notably failed to address the disparities created by Turner’s sentence. *See Webb*, 403 F.3d at 383 (sentence may be unreasonable when the court “neglects to ‘consider’ the other factors listed in 18 U.S.C. § 3553(a)”).

The potential for disparity here is apparent from the Guidelines themselves. Turner’s adjusted offense level under § 2B1.1 (prior to other adjustments) was 20. In contrast, an offender with no criminal history who engages in election-related fraud, but is sentenced under § 2H2.1, receives an offense level of 12. Similarly, under § 2C1.8, an offender who made the same illegal contributions claimed here to a *federal* election and was convicted under the Federal Election Campaign Act would receive an adjusted offense level of 14. *See* § 2C1.8 (2004); *supra* at 43.

Further, sentences in other cases involving election-related misconduct are far shorter than Turner’s. *See, e.g., United States v. Slone*, 43 F. App’x 738, 742 (6th Cir. 2002) (three-year probation for conspiracy to commit vote fraud); *United*

States v. Howard, 774 F.2d 838, 840-41 (7th Cir. 1985) (five-year probation for 23 election-fraud related counts); *United States v. Olinger*, 759 F.2d 1293, 1295 (7th Cir. 1985) (five-year probation for two counts of vote fraud); *United States v. Bowman*, 636 F.2d 1003, 1005 (5th Cir. 1981) (two-year probation for three counts of conspiracy to buy votes); *United States v. Mendez*, No. 2:04-CR-00101 (S.D. W. Va. Jan. 31, 2005) (five-year probation for former sheriff charged with two counts of conspiracy to buy votes); *United States v. Hrutkay*, No. 2:04-CR-00149 (S.D. W. Va. Apr. 20, 2005) (one-year imprisonment for mail fraud related to vote buying); *United States v. Raymond*, No. CR.04-141-01-JD (D.N.H. Feb. 8, 2005) (five months for conspiracy in plot to jam phone lines during 2002 federal election); *United States v. Stipe*, No. 1:03-CR-00128 (D.D.C. Mar. 22, 2004) (five-year probation for fraud involving campaign contributions).

Indeed, Turner's sentence leads to a notable disparity *with a related case*. The defendants in *United States v. Newsome*, No. 7:03-CR-00019 (E.D. Ky. Dec. 17, 2004), involving conduct similar to that here, received sentences far shorter than Turner. A jury convicted Newsome, a sitting public official (and one of the candidates whose campaign is at issue here), of three counts of conspiracy and vote buying. He was sentenced to eighteen months imprisonment, and was put on probation after serving only part of his sentence. In the same case, Willard Smith was convicted of five counts of conspiracy and vote buying and sentenced to

twenty-four months imprisonment; Keith Pigman was convicted of conspiracy to buy votes and sentenced to four months imprisonment. *See id.*, docket nos. 158, 194, & 249.

Turner's 48-month sentence also creates disparity *within this very case*.

Candidate Hays and his wife Brenda were indicted together with Turner and Harris. In a separate trial, the jury convicted each of them of mail fraud. They were sentenced together with Turner and Harris, but due to vastly different "loss" calculations, *see supra* at 49, received far more favorable treatment at sentencing, with Mr. Hays receiving a 6-month prison term and Mrs. Hays receiving 3 months, as compared to 48 months for Turner. (R.1049, 1050, Judgments, J.A. 753, 763.) Even if these different treatments are viewed as appropriate under the Guidelines themselves, the resulting disparity cannot be viewed as "reasonable."

C. Due Process Prohibits The Drastic Increase In Turner's Sentence Based On Facts Not Found By A Jury Beyond A Reasonable Doubt.

Turner's sentence also gives rise to serious due process concerns. Because the Guidelines are now "merely advisory," a sentencing court may in many circumstances rely on facts not found by a jury without violating the Sixth Amendment. *Booker*, 125 S. Ct. at 750. But *Booker* addresses only the Sixth Amendment right to jury trial, not the Fifth Amendment's due process guarantee of "proof beyond a reasonable doubt."

When there is a potential loss of liberty, due process requires the government to meet its burden of proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 363-64 (1970). This protection extends to sentencing, and prohibits a judge from drastically increasing a defendant's sentence based on facts not admitted by the defendant or proven beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 468-69 (2000); *see also Jones v. United States*, 526 U.S. 227, 243 (1999).

Following *Booker*, courts have recognized the continuing due process constraints on sentencing. *See, e.g., United States v. Barkley*, 369 F. Supp. 2d 1309, 1318 (N.D. Okla. 2005) ("any contested enhancement or departure must be based on facts established beyond a reasonable doubt"); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) ("even if the Sixth Amendment's jury trial guarantee is not directly implicated because the regime is no longer a mandatory one, the Fifth Amendment's Due Process requirement is").

The district court concluded that Turner deserved a significant enhancement on Counts 2, 16, and 17 because he "intended" to cause the government losses exceeding \$400,000 and \$200,000 respectively, and an additional enhancement because Turner was a manager or supervisor of the Count 2 conspiracy. (R.1041, Sentencing Transcript at 52, J.A. 2026.) The court refused, however, to require proof beyond a reasonable doubt of the factual conclusions underlying these

enhancements. (*Id.* at 42, J.A. 2019.) Yet “intended loss” increased the dispositive offense level from 6 to 20, and the “manager or supervisor” adjustment led to a further 3-level increase. As a result of these enhancements, the sentencing range jumped from 0 to 6 months (for an offense level of 6) to 46 to 57 months (for offense level 23).

By any standard, this is a dramatic enhancement. “[T]he potential doubling of one’s sentence . . . [b]oth in terms of absolute years behind bars, and because of the more severe stigma attached . . . is unquestionably of constitutional significance.” *Apprendi*, 530 U.S. at 495. If doubling one’s sentence is “of constitutional significance,” so is the much greater increase here. Indeed, the enhancement conduct so drives the sentence that it is “a tail which wags the dog of the substantive offense.” *Id.* (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)). *See also Mullaney v. Wilbur*, 421 U.S. 684, 700 (1975).

For these reasons, this significant enhancement of Turner’s sentence based on facts not established beyond a reasonable doubt is not permitted by due process. Because “[c]ertain facts like the amount of loss continue to assume inordinate importance in the sentencing outcome . . . they should be tested by our highest standard of proof.” *Pimental*, 367 F. Supp. 2d at 153. At the very least, allowing such substantial enhancements without proof beyond a reasonable doubt would

raise significant constitutional issues and render the resulting sentence
“unreasonable.”

CONCLUSION

Turner’s convictions on Counts 2, 16, and 17 should be reversed, or
alternatively, remanded for new trial in a proper venue. At the least, Turner’s
sentence should be vacated.

Dated: December 6, 2005

Respectfully submitted,

Chad A. Readler *per authorization*
JJJ

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