IN THE SUPREME COURT OF THE UNITED STATES

No. 09A1121

ROD R. BLAGOJEVICH and ROBERT BLAGOJEVICH, APPLICANTS

v.

UNITED STATES OF AMERICA

ON APPLICATION FOR EMERGENCY STAY
OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Applicants seek a stay of their trial on public corruption charges now scheduled to commence on June 3, 2010. They seek this continuance to permit the parties and the trial court to have the benefit of this Court's decisions in three honest services fraud cases now pending before this Court. Applicants' request should be denied. The court of appeals held that it lacked appellate jurisdiction over applicants' appeal from the district court's denial of a continuance and that the extraordinary remedy of mandamus was not warranted. Those rulings are correct and present no issue warranting this Court's review. The district court noted that the evidence underlying the honest services fraud counts is

the same as that underlying the bribery, extortion, and racketeering counts, so that the evidentiary flow of the trial will not be affected by the outcome of the honest services cases. And the court protected against any prejudice to the defendants by limiting opening statements to discussing the evidence to be presented at trial and by barring the parties from using the term "honest services" during their opening statements. Any remaining claims of prejudice can be fully addressed on appeal from a final conviction. Accordingly, a stay of the district court's discretionary decision to proceed with the trial is not warranted.

STATEMENT

1. Applicant Rod Blagojevich is the former Governor of the State of Illinois. He was first elected in 2002 and reelected in 2006. Applicant Robert Blagojevich, his brother, was chairman of Friends for Blagojevich, which was established as a campaign committee with the purpose of supporting the election of Rod Blagojevich. On February 4, 2010, a grand jury sitting in the Northern District of Illinois returned a second superseding indictment that charged Rod Blagojevich with misuse of his political office for his own financial benefit, as well as for the financial benefit of his family members and associates. The indictment charged some of those family members and associates, including Robert Blagojevich, with assisting Rod Blagojevich in the misuse of his political office. According to the indictment, in

return for personal financial benefits, Rod Blagojevich made appointments to state boards and commissions, awarded state contracts and grants, allocated state investment funds, signed legislation and issued executive orders, and agreed to appoint a United States Senator.

Specifically, the indictment charged Rod Blagojevich with 24 counts of criminal conduct: one count of participation in the conduct of a racketeering enterprise, in violation of 18 U.S.C. 1962(c); one count of conspiracy to participate in the conduct of a racketeering enterprise, in violation of 18 U.S.C. 1962(d); six counts of attempted extortion and conspiracy to commit extortion, both in violation of 18 U.S.C. 1951(a); two counts of federal-funds bribery, in violation of 18 U.S.C. 666(a)(1)(B); two counts of conspiracy to commit bribery, in violation of 18 U.S.C. 371; one count of making false statements in a matter within the jurisdiction of the Federal Bureau of Investigation (FBI), in violation of 18 U.S.C. 1001(a)(2); and eleven counts of honest services wire fraud, in violation of 18 U.S.C. 1343 and 1346. The indictment also charged Robert Blagojevich with five counts of criminal conduct: two counts of attempted extortion and conspiracy to commit extortion, one count of conspiracy to commit bribery, and two counts of honest services wire fraud.

2. In June 2009, the district court set the trial date for June 3, 2010. The trial is scheduled to last approximately four

months. On April 15 and April 27, 2010, applicants moved for a continuance of the trial date. See, e.g., Pet. App. 104-108. They argued that the continuance was necessary so that they could have the benefit in conducting their trial defense of this Court's decisions in Black v. United States, No. 08-876 (argued December 8, 2009); Weyhrauch v. United States, No. 08-1196 (argued December 8, 2009); and Skilling v. United States, No. 08-1394 (argued March 1, 2010). Pet. App. 104-105. Those cases raise issues concerning the proper elements of an honest services fraud offense and the constitutionality of the honest services fraud statute, 18 U.S.C. 1346.

The district court denied the motion for a continuance and a subsequent motion for reconsideration. Pet. App. 118, 127. The court did not state its reasons at that time, but it had previously stated those reasons in denying earlier motions for a continuance. In its oral denial of those motions on March 17, 2010, the court noted the complete factual overlap between the conduct at issue in the honest services counts and the bribery, extortion, and fraud counts. Id. at 84 ("The facts which the government contends are proved by the evidence are going to be the same no matter what the charges are."). Accordingly, the court determined that it was not necessary to await this Court's honest services decisions. Ibid. ("[T]here might be some case somewhere in which basically a ruling of a higher court construing a substantive criminal statute might

entirely alter the nature of the way the case is presented. That will not occur here.").

The district court also took steps to prevent any prejudice to the applicants pending this Court's honest services decisions. The court reminded counsel that opening statements would focus not on the law but on the evidence to be presented at trial. Pet. App. 83 (quoting Seventh Circuit pattern jury instruction); id. at 83-84 ("The truth is, in criminal trials, opening statements are devoted to what the evidence will show about what happened. * * * There will not be an opening statement on the law. The instructions on what the law is will be given by me, and they will be given at the close of the evidence."). Consistent with that admonition, the court barred the parties from using the term "honest services" during their opening statements. App., infra, 2a, 8a; see Pet. 7.

3. Applicants filed an interlocutory appeal of the district court's denial of their motion for a continuance, and, in the alternative, they requested a writ of mandamus. The government opposed both forms of relief in the court of appeals. The government separately filed a motion in the district court to certify the appeal as frivolous, to retain jurisdiction to decide pretrial matters, and to proceed with the trial.

a. On May 11, 2010, the district court certified to the court of appeals that the appeal was frivolous. See App., infra, 1a-2a. The court rejected applicants' argument that they would not

have notice of the charges against them until this Court decides Weyhrauch. It explained that, in any multi-count case, some charges might not survive to the end of the case. Here, the court held, the applicants had notice of all charges against them, even if some charges might ultimately be dismissed. Id. at 1a.

The court also reasoned that applicants would not be prejudiced by the possible dismissal of the honest services charges because the opening statements would be limited to discussing the evidence to be presented at trial and the parties would be prevented from using the term "honest services." App., infra, 2a. The court further noted that "[t]he trial will extend well beyond the latest date on which Weyhrauch may be decided" and thus "there will be ample time to draft instructions to the jury and design appropriate closing arguments." Ibid. Finally, the court observed that its denial of the continuance motion was not an appealable final or interlocutory decision under 28 U.S.C. 1291 and 1292. While the court noted that applicants had pointed to other cases granting continuances, they had not demonstrated that those cases were factually analogous; and, in any event, if applicants could establish error in the denial of a continuance, that issue could be raised on appeal and corrected after the trial if applicants were convicted. App., infra, 2a.

b. That same day, May 11, 2010, the court of appeals dismissed the appeal for lack of jurisdiction. Pet. App. 1-2. It

held that the district court's denial of the continuance motion was "neither a final decision nor otherwise immediately appealable." Id. at 2. The court of appeals also denied the mandamus petition. It explained that "[i]f the charges for deprivation of honest services had been the only pending counts," the district court's denial of the continuance motion "might give us pause." Ibid. But because "the defendants face additional charges," a continuance was not necessary. Ibid. The court of appeals further explained that "the defendants cannot demonstrate that the challenged orders are effectively unreviewable at the end of the case," because "[a] challenge to an order denying postponement of a criminal trial can be raised on appeal following resolution of the district court proceedings." Ibid. (citing United States v. Santos, 201 F.3d 953, 958 (7th Cir. 2000)).

ARGUMENT

"Denial of [an] in-chambers stay application[] is the norm; relief is granted only in 'extraordinary cases.'" Conkright v. Frommert, 129 S. Ct. 1861, 1861 (2009) (Ginsburg, J., in chambers) (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). To justify such relief, applicants must show, at a minimum, "(1) 'a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari' * * * ; (2) 'a fair prospect that a majority of the Court will conclude that the decision below was erroneous'; and (3) a

likelihood that 'irreparable harm [will] result from the denial of a stay.'" Id. at 1861-1862 (quoting Rostker, 448 U.S. at 1308) (brackets in original); accord, e.g., Stroup v. Willcox, 549 U.S. 1501, 1501 (2006) (Roberts, C.J., in chambers); Reynolds v. International Amateur Athletic Fed., 505 U.S. 1301, 1301-1302 (1992) (Stevens, J., in chambers); Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). Applicants cannot make any of those showings, and their application for a stay should be denied.

1. As a threshold matter, applicants cannot demonstrate a reasonable probability that this Court would grant certiorari. The court of appeals dismissed applicants' appeal for lack of jurisdiction and denied their mandamus petition for failure to demonstrate entitlement to extraordinary relief. Neither of those decisions satisfies this Court's criteria for certiorari review.

a. The court of appeals concluded that the district court's denial of the continuance motion was "neither a final decision nor otherwise immediately appealable." Pet. App. 2. Applicants do not argue that the district court's decision was itself final. See Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989) ("In criminal cases, [28 U.S.C. 1291] prohibits appellate review until after conviction and imposition of sentence."). Rather, they argue (Pet. 17-18) that it was appealable as a collateral order under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

Applicants do not, however, point to any decision of any court holding that the denial of a continuance motion is appealable under the collateral order doctrine. Indeed, other courts have held that the denial of a continuance motion is not an appealable collateral order. See, e.g., United States v. Breeden, 366 F.3d 369, 375 (4th Cir. 2004). The court of appeals' jurisdictional ruling thus is not in conflict with any decision of this Court or of any other court of appeals, and further review is not warranted.

b. The court of appeals also concluded that applicants had not demonstrated entitlement to the extraordinary relief of mandamus. That fact-specific ruling is likewise not in conflict with any decision of this Court or of any other court of appeals. Applicants point (Pet. 12-15) to other cases in which stays or continuances have been granted pending this Court's honest services decisions. But applicants do not make any attempt to demonstrate that those cases are factually analogous to this one. Whether to grant a continuance depends on a number of case-specific factors. See, e.g., United States v. Zamora-Hernandez, 222 F.3d 1046, 1049 (9th Cir. 2000), cert. denied, 531 U.S. 1200 (2001); United States v. Gwiazdzinski, 141 F.3d 784, 790 (7th Cir.), cert. denied, 525 U.S. 880 (1998). For that reason, this Court has made clear that district courts are afforded "broad discretion" over continuances, and only an "unreasoning and arbitrary" insistence on

expeditiousness will warrant overturning the denial of a continuance. Morris v. Slappy, 461 U.S. 1, 11 (1983).

In this case, the district court found that a number of factors weighed against a continuance. First, the court recognized that the conduct at issue in the honest services counts is the very same as the conduct at issue in the bribery, extortion, and fraud counts. Pet. App. 84. The opening stages of the trial will thus be unaffected by the presence or subsequent dismissal of the honest services counts in whole or in part. Ibid. ("The facts which the government contends are proved by the evidence are going to be the same no matter what the charges are.").* Second, the district court took careful steps to avoid any potential prejudice to applicants by limiting the parties' opening statements to discussion of the evidence to be presented at trial. Ibid. It even barred the parties from using the term "honest services" during their opening statements. See App., infra, 2a, 8a. Third, the

* In addition to the honest services counts, the indictment charges applicants with bribery and conspiracy to commit bribery, attempted extortion and conspiracy to commit extortion, racketeering and conspiracy to commit racketeering, and the making of false statements to federal law enforcement officers. See p. 3, supra. The alleged scheme at issue in the honest services fraud counts (Counts 3-13) involves the same conduct that underlies the bribery counts (Counts 16, 18, 20, 23), the extortion counts (Counts 14, 15, 17, 19, 21, 22), the state law violations that are the predicate acts for the racketeering counts (Count 1, para. 45), and the false statements count (Count 24). See generally 1:08-cr-00888, Docket entry no. 231 (N.D. Ill. Feb. 4, 2010). Thus, the evidentiary presentation during the opening stages of the trial should not be affected by this Court's honest services decisions.

court noted that the trial will extend well past the end of this Court's current Term, such that the parties and the court will have the benefit of decisions in Black, Weyhrauch, and Skilling for purposes of motions to dismiss or acquit, closing arguments, and jury instructions. Id. at 2a. Applicants do not attempt to show that those case-specific factors weighing against delay apply to the same extent in other cases that have been stayed or continued.

Even if applicants could show that other district courts had stayed or continued similar cases, that would merely demonstrate that lower courts have exercised their discretion in different ways. Because this case arises on the denial of a writ of mandamus, applicants must show much more than that other exercises of discretion are possible. They must establish that in this case the district court so clearly abused its discretion over its trial schedule that they are entitled to extraordinary relief. Applicants do not cite, however, any decision by any court of appeals granting a writ of mandamus or reversing a conviction because of the district court's failure to postpone trial pending this Court's honest services decisions. Applicants rely (Pet. 12-13) on decisions in which a court of appeals has stayed its own mandate or postponed issuing its own decision pending this Court's decisions in the honest services cases. But suspending an appellate proceeding bears little resemblance to staying a criminal trial for which the parties and the court have spent months preparing,

including by reserving an extended period on the court's calendar (and in turn displacing other litigation matters) and by scheduling many witnesses to appear for testimony. A district court has broad discretion to maintain a trial schedule when it can do so without prejudice to the defendants. The extremely deferential standard of review for mandamus, coupled with the inherently fact-specific nature of the district court's decision, makes this case an unsuitable candidate for certiorari, particularly since, absent highly accelerated summary action from this Court, applicants' claims will be moot once this Court renders its decisions in the honest services cases.

2. Applicants have similarly failed to establish the requisite "fair prospect" that this Court would reverse either of the rulings of the court of appeals.

a. The court of appeals' jurisdictional ruling -- i.e., that the denial of a continuance motion is not an appealable collateral order -- is clearly correct. To be appealable under the collateral order doctrine, the challenged order must be effectively unreviewable on appeal from a final judgment. See, e.g., Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 605 (2009) (citing Cohen, 337 U.S. at 546). As the lower courts explained, however, the denial of a continuance motion is reviewable on appeal from a final judgment of conviction. See Pet. App. 2; App., infra, 2a; see also United States v. Harris, 2 F.3d 1452, 1455 (7th Cir.),

cert. denied, 510 U.S. 982 (1993). Again, applicants do not point to any decision of any court of appeals holding otherwise.

b. The court of appeals' mandamus ruling -- i.e., that applicants had not demonstrated entitlement to extraordinary relief on the facts of this case -- is also clearly correct. Applicants cannot show that the district court's decision to proceed to trial was an abuse of its broad discretion, let alone such an obvious abuse of discretion that applicants are "clear[ly] and indisputabl[y]" entitled to the "drastic" remedy of mandamus. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 35 (1980) (per curiam) (internal quotation marks and citation omitted); see Kerr v. United States Dist. Ct., 426 U.S. 394, 402, 403 (1976). The district court grounded its exercise of discretion in a number of case-specific factors: the complete factual overlap between the conduct underlying the honest services counts and the bribery, extortion, and fraud counts; the limits that the court placed on the opening stages of the trial; and the ability of the court and the parties to take into account this Court's honest services decisions during later stages of the trial.

Even assuming that those factors did not adequately justify the district court's discretionary decision, mandamus relief still would not be warranted, because applicants cannot show that they have "no other adequate means to attain the relief [they] de-sire[]." Allied Chem., 449 U.S. at 35. As the court of appeals

explained, "the defendants cannot demonstrate that the challenged orders are effectively unreviewable at the end of the case" because "[a] challenge to an order denying postponement of a criminal trial can be raised on appeal following resolution of the district court proceedings." Pet. App. 2 (citing United States v. Santos, 201 F.3d 953, 958 (7th Cir. 2000)). Applicants claim (Pet. 16) that they will face hardship if they forced to proceed to trial on counts that may later be withdrawn or dismissed, but "it is established that the extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial." Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953) (citation omitted).

In sum, given the complete factual overlap between the counts, the district court's precautions, the length of the trial schedule, and the availability of a remedy if applicants are eventually convicted at trial, the court of appeals correctly concluded that the district court did not so clearly abuse its discretion as to warrant mandamus relief.

3. Finally, applicants cannot show that a stay is necessary to prevent irreparable injury to themselves. As explained above, applicants have the same remedy that is available to any defendant who contends that a continuance was wrongfully denied: an appeal following a final judgment of conviction. Although the lower courts considered and rejected applicants' arguments (Pet. 16-17)

that they will be unable to prepare for trial or that irrelevant evidence may be introduced in the opening stages of the trial, those arguments can be assessed on direct appeal in light of a complete trial record. This Court's review of those arguments, in the absence of such a record, would be premature and is not necessary to remedy the potential injuries that applicants have identified.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

MAY 2010

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Judge Zagel	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 CR 888	**DATE**	May 11, 2010
CASE TITLE	UNITED STATES v. ROD BLAGOJEVICH and ROBERT BLAGOJEVICH		

DOCKET ENTRY TEXT:

The United States' Petition to Certify Defendants' Appeal as Frivolous and Proceed to Trial [353] is granted.

STATEMENT

I have before me a motion to declare Defendants' interlocutory appeal frivolous and so certify this finding to the Seventh Circuit Court of Appeals. I have read a copy of Defendants' pleadings filed in the Court of Appeals, which include not only an appeal but a request for the issuance of a writ of mandamus.

The request for an extraordinary writ is of no jurisdictional significance in this court. Petitions for prohibition or mandamus lie entirely within the discretion and authority of the Court of Appeals. Absent a decision to issue the writ, the District Court proceeds in accordance with its own considered decisions.

The filing of a notice of appeal is different. Such a notice ordinarily divests the District Court of its jurisdiction. Established precedent recognizes that, for tactical reasons, a party that wishes to delay proceedings in the trial court might use the notice of appeal to divest the trial court's jurisdiction and thus succeed in obtaining the desired delay even if it loses its argument on appeal.

Whenever this might occur,[1] the Court of Appeals holds that a District Court has the discretion to determine that the appeal is frivolous. If the judge so finds, he or she "may certify to the court of appeals that the appeal is frivolous and get on with the trial." *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989); *Kusay v. U.S.*, 62 F.3d 192, 194 (7th Cir. 1995).

Here, the grounds for appeal are two. First, there are the rulings with respect to the impact of *U.S. v. Weyhrauch* pending on grant of certiorari June 29, 2009 to the Court of Appeals for the Ninth Circuit. *See U.S. v. Weyhrauch*, 548 F.3d 1237 (2008). I declined to rule on motions to dismiss the "honest services" counts until *Weyhrauch* was decided. The thrust of Defendants' argument was that they would not know what charges they were to face until *Weyhrauch* was decided, in violation of the due process requirements of notice. The argument is a makeweight. A defendant is entitled to notice of all the charges he may have to face. Any defendant charged in a multi-count indictment is in precisely the same position as Defendants here. Not all of the charges necessarily survive to the end of the case. The prosecution may withdraw a charge because it sees its evidence as inadequate, or a court may acquit on one or more counts before the case goes to

STATEMENT

a jury. Notice is required of all charges the prosecution brings; precise notice of which ones will be submitted for decision is not mandated. So, Defendants have notice, but this is not the end of the issues they argued.

It was said that the possibility of dismissal of "honest services" counts would leave them unable to construct an opening statement. I ruled that opening statements were not a place for legal arguments, in keeping with the jurisdiction of this Circuit. The office of opening statements is to predict what will be shown when the evidence is complete, all to assist the jury to put testimony and evidence in context as they hear it. I barred the use of the phrase "honest services,"[2] in opening statements of all parties. The trial will extend well beyond the latest date on which *Weyhrauch* may be decided. If "honest services" counts remain in the case, there will be ample time to draft instructions to the jury and design appropriate closing arguments.

Not one of my rulings is an appealable final decision under 28 U.S.C. § 1291, nor are they collateral orders suitable for interlocutory appeal under 28 U.S.C. §1292. In criminal cases, interlocutory appeals are ordinarily limited to questions of bail or double jeopardy, neither of which is applicable here. In the Court of Appeals Defendants have argued that in seven other cases District Judges have postponed trials to await the Supreme Court's decision in *Weyhrauch*. The Defendants have provided this paper to me. These cases may well be distinguishable on various grounds. One example would be a case in which the facts do not permit the levy of charges not based on "honest services." Another example would be changed circumstances that made continuance of a long set trial a better option for the Court's docket. But none of this matters. Even if all of the other cases contained an identical superseding indictment, the citation to other judges' rulings does not support a conclusion that this appeal is non-frivolous. Decisions to grant or deny continuances are within the broad discretion of the trial judge. *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *See United States v. Smith*, 866, 871 (7th Cir. 2009). That one judge would grant a continuance and another deny it in similar cases does not even establish that one judge must be wrong and the other right under the abuse of discretion standard.

Second, I have denied a continuance of a trial date which was set many months before June 3. If I have erred and there is a conviction, the remedy is appeal. *See Mohawk Indus., Inc. v. Carpenter*, 130 S.Ct. 599, 605 (2009). A decision on a continuance is not based entirely on concrete facts. The trial judge may consider, among many other factors, the abilities of the lawyers to cope with changes in law, the novelty of the facts and law, the social and economic cost of postponement, the effect on the fairness of the trial and the public interest, broadly defined. *See United States v. Williams*, 576 F.3d 385, 388 (7th Cir. 2009); *United States v. Miller*, 327 F.3d 598, 601 (7th Cir. 2003). Speaking hypothetically, the recognition that another judge looking at all the factors in this case could decide to grant continuance does not establish that this appeal has the slightest merit. Neither my decision nor the hypothetical judge's could be appealed, prior to the end of trial, on non-frivolous grounds.

For these reasons, I certify to the Court of Appeals that Defendants' appeal is frivolous. I retain jurisdiction; therefore I will proceed to hear pre-trial motions and to enter orders with respect to those motions and other matters relevant to the case.

In any event, there is time before the start of the trial on June 3, 2010 for the Court of Appeals to dispose of the appeal and the petition for mandamus after fair consideration of whatever merits they may have.

The petition to certify to Defendants' appeal as frivolous is granted.

1. "This" includes not only notice of appeal filed to obtain delay; "this" includes any appeal on any grounds found to be frivolous.

2. I did not bar opening statements that the evidence would show a defendant's "honesty."

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Government,	No. 08 CR 888
vs.	Chicago, Illinois
Rod Blagojevich, Robert Blagojevich,	April 21, 2010
Defendants.	12:11 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Government, vs. Rod Blagojevich, Robert Blagojevich, Defendants.	No. 08 CR 888 Chicago, Illinois April 21, 2010 12:11 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

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THE CLERK: 2008 CR 888, United States versus Blagojevich, et al.

MR. SCHAR: Good afternoon, Judge.

Reid Schar, Chris Niewoehner and Carrie Hamilton on behalf of United States.

MR. INGBER: Good morning, Your Honor.

Michael Ettinger and Cheryl Schroeder on behalf of Robert Blagojevich.

MR. ADAM: Sam Adam for Rod Blagojevich. Mr. Blagojevich is present in the court.

THE COURT: I see him.

There are several motions which are before me, some sealed, some not sealed. I'm probably not going to rule on them today because there's another case that has occupied a great deal of my time, the thing that is responsible for all of the equipment you see in the courtroom. I'll probably issue written opinions with respect to these sometime next week.

The motion with respect to the continuance by defendant Robert Blagojevich, which was filed some time ago.

Does the government want to respond to that in writing or does it just want to respond to it orally?

MR. SCHAR: We'll just respond to it orally, Judge.

As I understand the motion, it is basically a repeat of the prior motion that relates to an argument that somehow the trial should be delayed pending the outcome of certain cases before the Supreme Court.

As I read the motion, there was actually no indication of how resolution of those would somehow change arguments.

And without repeating all the things that Your Honor said last time, it's clear that at least by the time trial begins, it's going to be the issue of the facts which aren't going to change under any circumstances.

So the government's position is that we should move forward to trial on June 3rd. Obviously, to the extent that the Supreme Court addresses those types of charges, that will be addressed in the jury instructions that will come clearly after those -- the trial will go well beyond the time period of the Supreme Court case.

MR. ETTINGER: Judge, there is a difference, and I put down the factual distinction between the defendants in that were charged factually in two

counts of honest services, wire fraud. And if the Supreme Court holds honest services unconstitutional, we're no longer charged with that underlying conduct in those two counts. That's the big difference.

THE COURT: I don't believe that opening statements will be and I don't think they would be appropriately addressed to legal theories.

Most opening statements operate on the premise that the prosecution says the defendant or defendants have done something wrong, usually argued in moral rather than legal terms. And the defendant says either no, I didn't or says it can't possibly be proved beyond a reasonable doubt.

For purposes of clarity, to make life simpler for everybody, I will bar the government from using the phrase "honest services" in its opening statement. That way if somebody uses it, it won't be the government.

With respect to the motion of Robert Blagojevich for severance, the government has responded to this.

Do you want to make a brief oral reply?

MR. ETTINGER: No, Your Honor.

THE COURT: I'm denying severance here. And

the reason I'm denying severance here is because I do not think that the defendant Robert Blagojevich has a viable claim that he is prejudiced being tried without severance.

15PM In my view, this is a case where the majority of the evidence will be addressed, directed against his brother and not him. In my experience, this usually is favorable to the defendant against whom there is lesser evidence.

16PM Moreover, as I understand the allegations that the government has made, you're dealing with a course of conduct that has a much shorter duration than that alleged against the other defendant, which also I think works in his favor.

16PM I simply don't think he's prejudiced by this. And, in fact, from my point of view, he is slightly advantaged by it. So the motion for severance is denied.

Anything any of the parties want to raise?

17PM MR. NIEWOEHNER: Your Honor, there is the Government's motion on striking the attorney-client privilege. I imagine that's one of the ones you were suggesting.

THE COURT: Right.

MR. NIEWOEHNER: We did want to just bring

out a couple of additional wrinkles.

As you are undoubtedly aware, the defense hasn't filed anything in response to your invitation to file a response for a privilege log.

So just a couple of additional facts for Your Honor. There is no engagement letter between Mr. Quinlan and any entity associated with Mr. Blagojevich, or Mr. Blagojevich personally, or the Friends of Blagojevich, or any other entity that might exist.

There is no billing records, which you have in a situation of a full-time government lawyer being paid as such talking with the governor of Illinois.

So in terms of the privileges that are out there and any showing by the defense--and it would be their burden to demonstrate any attorney-client privilege--we don't think it's there.

We point again, your Honor, to the state waiver that was made. There was the waiver that the defense has made in the context of tapes and documents relating not just to Mr. Quinlan but also Mr. Sorosky and also the two of them together. There are some conversations where Mr. Sorosky and Mr. Quinlan are together, so in that respect, Your

Honor, I think you now have the facts you need to make your determination.

THE COURT: I understand that. Although, I believe that Mr. Sorosky has indicated that he wants to make perhaps an ex parte offering with respect to this.

MR. SOROSKY: Your Honor, Sheldon Sorosky, S-o-r-o-s-k-y.

On that issue, I think we could resolve that very readily. Perhaps in the next court date you'll have an answer. I don't think that will be a stumbling block to proceed.

THE COURT: Okay. That's fine.

Anything any other party wants to raise?

MR. SCHAR: Judge, obviously, we do have motions pending. Something was filed yesterday by the defense. I don't know if that is a full response to the motions that we have pending, that we filed, or whether they intend to file anything else. But, obviously, I don't know if you are going to set any additional dates, but I think that's all the government has at this point.

THE COURT: What I'm going to do is set this for another hearing one week from today.

There is one other matter which I'm raising

myself. As a general rule, it's my practice to avoid reading or listening to anything about any case which is in my courtroom.

I do, however, instruct my law clerks to look at whatever there is and to give me anything that they think I should know about. And a law clerk gave me a print version of some statements made last night by one of the defendants.

I did look at it. I sought the advice of another judge who thought that the issue ought to be addressed briefly so that at least some clouds will lift.

There's some aspects of any trial that I think aren't fully understood by all the parties to this case. There are rules which limit or bar the admission of evidence. Because one party wants the evidence, the rules may still bar it. Everyone understands this.

What may not be understood is that evidence may be excluded even if no one objects to it. There was a complaint publicly voiced that the only thing that I think the speaker thought that prevents the admission of certain evidence is that the prosecutor intended to object to it or might object. And this is not true.

The parties to a case can ask for admission of evidence so they can object to it. The only person who can admit it is me.

Ordinarily, evidence which is not objected to is admitted, but this is not always true. Particularly in cases in which we ask a large number of private citizens to put their lives aside for months at a time and sit on a jury. And regardless of the absence of objection, I will not allow the time of these jurors to be needlessly consumed by evidence the introduction of which is contrary to the principles of evidence or simply irrelevant.

There is a rule, centuries old, that a prosecutor may use a defendant's prior statements against a defendant so long as these statements are relevant and material.

The defendant, too, can use his own prior material and relevant statements but only if one or two conditions are met: The first is is that the defendant's statements are necessary to give a proper understanding of the words that the prosecutor has introduced into evidence.

This means if the prosecutor introduces part of a conversation, the defendant may be able to introduce some portion of the rest of the same

conversation to clarify meaning. This doesn't happen very often but it can happen.

The second way for a defendant to put into evidence his own recorded statements, is for the defendant to take the witness stand so that he offers the recorded statements to corroborate his defense. And the reason that this is possible is that the defendant can be cross-examined about these prior statements.

Even if this occurs, the defendant's prior statements must still meet the test of relevancy, materiality, or the Rule 403 standards which can basically be summed up in the context of this case as the rule against putting in evidence that's wasteful of time.

The Court decides all these questions, not the defendant, his lawyers, nor the prosecutor.

And, in fact, a proposal was made by one of defense counsel that the way to proceed with various recordings in this case was to give each lawyer the right to play any tape at least once. It's a rule that I can't accept because I cannot remit to the discretion of the lawyer the question of admissibility of evidence. The Court decides the questions.

Now, I understand at this stage that there's a tendency for parties, particularly defendants in a criminal case, to see themselves on one side and a prosecutor on the other. This is not at all unique. Probably applies 90 percent of the time. But it's not a complete picture.

And since one of the statements that I read used a phrase that is common in boxing, I'm going to pursue some boxing rules. And there are tons of rules about boxing. A lot of them have to do with the equipment, the weight of the gloves, the time of each round. The number of rounds differ sometimes from state to state, differ from amateur to professional boxing. The neutral corner rule, the headbutt rule, the closed glove rule, no hitting on the break after the clinch, those are all commonly acceptable rules.

The thing that's significant about them is, those rules are enforced by the referee, not enforced by the boxers.

For the legal disputes that's going to be resolved in this courtroom for this trial, I am that referee, no one else. I will not permit the legal equivalent of headbutts. I will not allow rules violations by either party. I will enforce the

rules and I will decide whether the rules have been violated.

And even in boxing, the referee can call for headbutts, a trip, a kicking, a bite, a push without complaint by the victim of it.

But any defendant, and, for that matter, the prosecutor in this case, can raise the question with me, as well.

The other point I want to make, since I brought up boxing, is that I don't want anyone to take that analogy for more than its worth. This is not a boxing match. A trial is like a boxing match only in the sense that there is a referee and some people at ringside decide the outcome. Otherwise, it's unlike a boxing match in any way. It has its own special character, and that character has to be understood.

Trials are not designed to prove who is the better lawyer or whether the prosecutor or defendant is a better person or a better battler. Trials are designed to produce justice, not the winner or the loser. I am a referee of something that is not a sporting event and I want all the parties to conduct themselves with this in mind.

One thing I do want to note is that the issue

of who can play what tapes has been addressed in the most general possible terms and that must come to an end.

What I would like the defense to do, and I'm willing to give the defense the right to file this ex parte and under seal, by May 14th I would like a preliminary list of the recordings the defense might wish to play. This is preliminary. It won't be binding on you. You're not committing yourselves to play anything at all. But you're giving me an idea of specifically what's at stake here and what the purpose of recordings not offered by the government might play in this case.

And that's the way we would have to do it under any circumstances because I am not going to decide, as matter of general theory, that recordings, the details of which I don't know, are admissible or even inadmissible. Every piece of evidence has to be judged on its own merits.

The reason I am imposing this on the defense is because it's pretty clear to me now the kinds of recordings that the prosecution wants to put in.

The reason I am permitting the defense to do this ex parte is so that the defense does not surrender its right not to reveal its defense

prematurely. And, obviously, because this is ex parte, it will not be disclosed to the prosecution.

But I don't want to be in the position when the trial starts of having to take off a day or two of the jury's time while I sit here and look at each individual recording and say maybe the defense can offer it, maybe they can't.

And there will be occasions where we will have to pause even for the government, because the government might have a transcript or a recording that the defense objects to, and I will consider it the same way, on its merits.

Doing it that way, I think, will make life easier for everybody.

With that, that's all I have to say.

MR. ADAM, SR.: Judge, may I ask you a question? What form do you want the defense proposal in? Do you want the transcripts?

THE COURT: I want the transcripts.

MR. ADAM, SR.: Transcripts.

THE COURT: I want the transcripts and a short description of why you think it ought to come in.

MR. ADAM, SR.: Yes.

THE COURT: And you don't have to be formal about this, because when we get to the point of actually ruling on these things, it's going to be out in the open for everybody and then we can make the formal record.

Next Friday at --

MR. SOROSKY: Judge, when is the court date? The 29th, did you say?

MR. ADAM, SR.: A week from today, he said.

THE COURT: The 28th at noon.

MR. SOROSKY: Could it be possible the 29th?

THE COURT: The 29th -- let's do it the 30th.

MR. SOROSKY: What time?

THE COURT: Noon.

Anything else?

THE COURT: Thank you.

(Which concluded the proceedings had on this date in the above entitled cause.)

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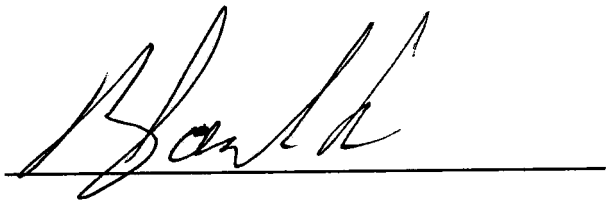
I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER

/s/Blanca I. Lara date



5-3-10

Blanca I. Lara Date