IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA	)	
	)	No. 05 CR 691
v.	)	
	)	Hon. Amy J. St. Eve
ANTOIN REZKO, et al.	)	

DEFENDANT'S POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Defendant Antoin Rezko, by his attorneys, hereby moves the Court, pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure, moves for a judgment of acquittal on Counts 1, 2, 4- 8, 11-15, 17, 20 and 23-24 of the Superseding Indictment, or in the alternative, for a new trial.[1]

INTRODUCTION

After a trial lasting just over three months, which included fifteen days of testimony from the government's key witness – Stuart Levine – the jury returned a verdict acquitting Rezko on three counts of mail and wire fraud, four counts of aiding and abetting bribery, and one count of attempted extortion. The jury convicted Defendant Rezko of twelve counts of mail and wire fraud (Counts 1, 2, 4-6, 7-8, and 11-15), two counts of aiding and abetting bribery by Stuart Levine (Counts 17 and 20), and two counts of money laundering (Counts 23 and 24).

Despite the jury's verdict, Rezko's conviction cannot stand because there is no evidence beyond the manifestly unreliable testimony of Stuart Levine to support a finding that Rezko

[1]During the pre-trial and trial stages of this case, Rezko presented written and oral motions, made objections, and raised numerous legal issues. While Rezko does not seek to restate those arguments in detail, he does not abandon or waive those arguments for the purpose of post-trial motions and expressly preserves and reasserts each argument herein. Therefore, Rezko adopts and incorporates by reference all arguments and objections that he made throughout the case, including those made in all pre-trial motions, trial objections, jury instruction objections and all trial motions.

knowingly participated in a scheme to defraud or possessed the requisite intent to defraud. Indeed, Levine was the only witness to testify that the alleged scheme existed and that Rezko acted with criminal intent and agreed to participate in the scheme for which he now stands convicted.

In addition, in light of the Supreme Court's recent decision in *United States v. Santos*, 128 S. Ct. 2020 (2008), an order of acquittal should be entered on Counts 23 and 24 because the charged transactions did not involve the net profits of the predicate fraud scheme and, hence, the mail fraud charges impermissibly merge with the fraud offenses of which Rezko was convicted. Independent of the merger issue, the money laundering convictions must still be set aside because the government did not offer any evidence of any transaction intended to conceal or disguise the nature, location, source, ownership or control of the proceeds of the fraud scheme. Finally, Rezko should be acquitted on Count 11 because the government failed to prove the required mailing element of that charge beyond a reasonable doubt.

LEGAL STANDARDS

A. Standard Under Rule 29(c)

Rule 29 requires the entry of a judgment of acquittal where "after viewing the evidence in light most favorable to the United States, the trial court finds that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The Seventh Circuit will uphold a district court's decision to grant a Rule 29 motion, even in the face of a jury's verdict and the government's strong protestations, where the district court finds "no evidence on which a rational jury could have returned a guilty verdict." *United States v. Murphy*, 406 F.3d 857, 861 (7th Cir. 2005). In *Murphy*, the district court relied on the absence of evidence on a crucial element of the offense that was apparently

overlooked by the jury, *i.e.*, whether the defendant knew at the time of the assault that the woman she assaulted was a government witness. *Id.* A similar failure of proof exists here with respect to the knowledge and intent to defraud elements of the charged offenses, as will be argued below.

B. Standard Under Rule 33

District courts have broad discretion to grant new trials pursuant to Fed. R. Crim. P. 33 when "the interest of justice so requires." This arises where, for example, "the substantial rights of the defendant have been jeopardized by errors or omissions during trial," *United States v. Kuzniar*, 881 F.2d 466, 470 (7th Cir. 1989), or where the "weight of the evidence . . . 'preponderates heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.'" *United States v. Washington*, 184 F.3d 653, 657-58 (7th Cir. 1999)(quoting *United States v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989); *see also, United States v. Morales*, 910 F.2d 467 (7th Cir. 1990)("[i]f the complete record . . . leaves a strong doubt as to the defendant's guilt, even though not so strong a doubt as to require a judgment of acquittal, the district judge may be obliged to grant a new trial.").

ARGUMENT

I. A Judgment of Acquittal Should be Entered on Counts 23 and 24 Due to Impermissible Merger and Insufficient Evidence of a Money Laundering Offense.

Rezko was convicted of two counts of money laundering under the "concealment" prong of the money laundering statute. 18 U.S.C. § 1956(a)(1)(B)(i). To obtain a conviction under Section 1956(a)(1)(B)(i), the government was required to prove that Rezko conducted a financial transaction knowing that the property involved in the transaction was "the proceeds of some form of illegal activity" and knowing that the transaction was designed in whole or in part "to

conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *Id.; United States v. Esterman*, 324 F.3d 565, 569 (7th Cir. 2003). The transactions that served as the bases of the money laundering counts were the two checks, each in the amount of $125,000, by which Sheldon Pekin paid to Joseph Aramanda a portion of the finder's fee Pekin received from Glencoe Capital related to an investment placed with Glencoe Capital by the Teachers' Retirement System (TRS).

The verdict on Counts 23 and 24 must be set aside for two independent reasons. First, the Supreme Court's recent decision in *United States v. Santos*, 128 S. Ct. 2020 (2008), makes clear that the money laundering counts impermissibly merge with the charged fraud scheme because they are based solely on the distribution of the receipts of that scheme. Second, the government failed to present any evidence that the payments from Pekin to Aramanda were designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the fraud. Indeed, the government offered no evidence that Rezko directed, owned or controlled the funds once they were received by Aramanda, no evidence of any subsequent transaction after the funds were received by Aramanda, and no evidence of that the payment to Aramanda was anything other than the distribution of the proceeds of the fraud scheme.

A. The Verdict on the Money Laundering Counts Cannot be Sustained Because the Transactions at Issue Did Not Involve Proceeds of Illegal Activity.

The Supreme Court released its opinion in *United States v. Santos* while the jury was deliberating in this case. At issue in *Santos* was whether the term "proceeds" as used in the money laundering statute refers to net profits or gross receipts. 128 S. Ct. at 2024. The Supreme Court applied the rule of lenity and held that, for purposes of the money laundering statute,

"proceeds" means "profits" and not "receipts." *Id.* at 2031.

In reaching that holding, Justice Scalia specifically addressed the "merger problem" that would exist if the money laundering statute were interpreted in such a way that nearly every predicate offense would also constitute money laundering. *Id.* at 2026. Santos was convicted both of running an illegal lottery and of money laundering. The money laundering charges were based on payouts made to lottery winners, as well as on commissions paid to the individuals who collected bets from gamblers. *Id.* at 2022-23. Recognizing that "few lotteries, if any, will not pay their winners," Justice Scalia concluded that "[i]f 'proceeds' meant 'receipts,' nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning better is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." *Id.* at 2026.[2]

Of course, as the Supreme Court recognized, "[t]he merger problem is not limited to lottery operators." *Id.* Justice Scalia explained:

> For a host of predicate crimes, merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime. Few crimes are entirely free of cost, and costs are not always paid in advance. . . . *And any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of wealth gives his confederates their shares.* Generally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else, would merge with money laundering.

Id. at 2026-27 (emphasis added). The Court proceeded to note that there are "more than 250 predicate offenses for the money-laundering statute, and many foreseeably entail such

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[2]While *Santos* involved the "promotion" prong of the money laundering statute (18 U.S.C. § 1956(a)(1)(A)(I), the phase "proceeds of specified unlawful activity," which was at issue in *Santos*, is common to both the promotion and the concealment prongs of Section 1956(a)(1).

transactions." *Id.* at 2027 (internal citations omitted).

In this case, the predicate fraud offense and money laundering charges plainly merge. The charged fraud scheme was a "wealth-acquiring crime with multiple participants" in which "the initial recipient of wealth" – Pekin – gave his "confederates their shares" by paying a portion of his finder's fee to Aramanda. *Cf. id.* at 2026-27. The payments made by Pekin to Aramanda cannot be the basis of money laundering counts because the fee received by Pekin was not profit to him but merely the gross receipt of the fraud, subject to Pekin's payment of expenses in the form of a kickback to his co-schemers. *Cf. id.* at 2027, n. 4 ("when the 'loot' comes into the hands of the later distributing felon his confederates' shares are (as to him) not profits but mere receipts subject to his payment of expenses"). Thus, under *Santos,* it matters not that Pekin paid the kickback to Aramanda instead of to Levine, Rezko, or any other co-schemer. What matters under *Santos* is that the payment of the kickback was an expense to Pekin and not a transaction involving the net proceeds of the predicate offense.

Santos is entirely consistent with the Seventh Circuit's recent decision in *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008). *Sorich,* of course, clarified that in honest services fraud cases, the "private gain" for which a public office was misused need not be received by a defendant or a co-schemer, but may be received by "another." 523 F.3d at 708-10. In accordance with *Sorich,* the jury was instructed in this case that "a participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrue to others" and that "[o]nly where a public official or employee misuses his official position . . . for the purpose of obtaining private gain for himself or another . . . has the official or employee defrauded the public of his honest services, in violation of the mail or wire fraud statutes. [Dkt. 543, pp. 35, 40.] Accepting for purposes of this argument that the government proved the existence of the alleged scheme

insofar as it relates to Glencoe Capital, what the government proved is that Rezko and Levine schemed with Pekin to misuse Levine's position at TRS for private gain. The private gain was the $250,000 portion of Pekin's finder's fee that Pekin agreed "to pay to individuals chosen by Rezko." (Superseding Indictment, ¶ 6.) Instead of receiving the money himself, the government evidence showed that Rezko chose "another"– Aramanda–to receive the $250,000 from Pekin.[3]

If Pekin's payment of the proceeds of the fraud to "another" is found to constitute money laundering in this case, then virtually every honest services fraud scheme where payment is made to "another" would also violate the money laundering statute. *Cf. Santos,* 128 S. Ct. at 2026. Such a result would be inconsistent with both *Santos* and *Sorich.* The point of the *Sorich* holding was that schemers who share the proceeds with third parties are "no less culpable" than those who share the proceeds amongst themselves. 523 F.3d at 709. It would be paradoxical indeed if a schemer, simply by sharing proceeds with a third party, in fact became more culpable as a money launderer. In rejecting such an outcome in *Santos,* the Supreme Court noted that Congress passed different statutes to criminalize different conduct and worried that if two statutes merge, prosecutors "would acquire the discretion to charge the lesser . . . offense, the greater . . . offense, or both – which would predictably be used to induce a plea bargain to the lesser charge." 128 S. Ct. at 2026. Here, predictably, the government charged both the lesser fraud offenses and the greater money laundering offenses, and obtained convictions on both sets of counts based on the same conduct – Pekin's payment of the fraud proceeds to "another."

[3]Although the indictment alleged that Aramanda "used the money that he received from [Pekin] in substantial part for the benefit of Rezko" (¶ 6(k)), the government presented no evidence at trial of any subsequent transaction undertaken by Aramanda after he received the two payments from Pekin. Even had there been evidence of such subsequent transactions, the money laundering analysis would not change due to the fact that the two money laundering counts are based specifically on the two payments made by Pekin to Aramanda.

Under *Santos*, Pekin's payments to Aramanda are not "proceeds" and hence cannot support a conviction for money laundering. The jury's verdict on Counts 23 and 24 must therefore be vacated.

B. The Government Presented Insufficient Evidence to Prove that the Pekin/Aramanda Transactions Were Designed to Conceal or Disguise.

Independent of the question of whether the payments from Pekin to Aramanda were "proceeds" of the predicate fraud scheme, the verdict on Counts 23 and 24 should be set aside because the government presented no evidence that the two transactions between Pekin and Aramanda were designed to conceal or disguise the nature, location, source, ownership, or control of the funds.

In *United States v. Esterman*, the Seventh Circuit identified "two broad principles" which courts have applied "to define precisely what amount of concealment must occur before mere use of ill-gotten gains becomes money laundering." 324 F.3d 565, 570 (7th Cir. 2003).[4] First, there must be "some separation between the initial transaction from which illegal proceeds were derived and further transactions designed to conceal the source of those proceeds." *Id.* (citing *United States v. Scialabba*, 282 F.3d 475, 476-78 (7th Cir. 2002); *United States v. Seward*, 272 F.3d 831, 836 (7th Cir. 2001) ("[t]he . . . transactions that created the criminally-derived proceeds must be distinct from the money-laundering transaction"); *United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. 1998) ("[M]oney laundering criminalizes a transaction in proceeds, not the transaction that creates the proceeds."). Second, the Seventh Circuit

[4]Prior to *United States v. Cueller*, 128 S. Ct. 1994 (2008), the Seventh Circuit joined other circuits in finding that transportation of illegal funds had to be undertaken in an attempt to create the appearance of legitimate wealth. *See, e.g.*, *Esterman*, 324 F.3d at 572-73. However, the Supreme Court declined to follow *Esterman* on this point and, instead, held that there is no "appearance of legitimate wealth" requirement under the money laundering statute. *Cuellar*, 128 S. Ct. at 2002. This is the only portion of the *Esterman* holding that was altered by *Cuellar*.

"stressed that the mere transfer and spending of funds is not enough to sweep conduct within the money laundering statute." *Esterman,* 324 F.3d at 570 (citing *United States v. Jackson,* 935 F.2d 832, 843 (7th Cir. 1991). The government's evidence in this case flunked both tests.

First, as was set forth in the preceding section, the initial transaction from which the illegal proceeds were derived *is* the alleged money laundering transaction. Accepting the government's evidence, the schemers misused Levine's office for a portion of Pekin's fee, which was paid not to themselves but to "another." The transaction that created the ill-gotten gain was Pekin's payment of a portion of his fee to Aramanda, which is the very same transaction that is alleged to constitute money laundering. The payment of the finder's fee by Glencoe Capital to Pekin cannot be said to be ill-gotten gain, for Pekin was legitimately entitled to that fee. Thus, while the government offered evidence of a fraudulent scheme that generated illegal proceeds, there was no evidence presented of further transactions that a rational jury could conclude were designed to conceal or disguise the nature, source, ownership, location, or control of those funds.

Second, the government failed to present evidence of anything beyond the "mere transfer" of funds from Pekin to Aramanda. *Esterman,* 324 F.3d at 570, 572 ("something more than mere transfer . . . is needed for money laundering"). As was noted above, the government presented no evidence whatsoever to support its allegation that Aramanda "used the money that he received from [Pekin] in substantial part for the benefit of Rezko." (Superseding Indictment, ¶ 6(k).) There was no evidence that Rezko had any ownership, control, or influence over the money once it reached Aramanda or that Rezko expected to benefit in any way from that transfer. Absent evidence that the payments to Aramanda were intended to conceal or disguise Rezko's interest in the funds, the payments from Pekin to Aramanda were simply transfers, documented by checks and a written agreement, of the fraud proceeds to "another." While that

evidence may support an honest services fraud count under *Sorich,* it is not sufficient to sustain a money laundering charge.

In *Cuellar v. United States* – the second of two significant money laundering cases decided by the Supreme Court while the jury in this case deliberated – the Supreme Court held that to sustain a money laundering conviction the government must prove that "the purpose – not merely the effect – of the [transaction] was to conceal or disguise a listed attribute [*i.e.*, the nature, location, source, ownership, or control of the illegal proceeds]. 128 S. Ct. 1994, 2005 (2008).[5] Cuellar was convicted of money laundering based on evidence that money from drug sales was concealed in a hidden compartment of the defendant's vehicle as he traveled from the U.S. to Mexico. *Id.* at 1997-98. The Court found that "merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money." *Id.* at 2003. Rather, the Court concluded, the statute's use of the word "design" requires the government to prove that the purpose of the transportation was to conceal or disguise a listed attribute of the funds. *Id.* at 2004-05 ("*how* one moves the money is distinct from *why* one moves the money") Because the government failed to introduce sufficient evidence that the purpose of Cuellar's trip to Mexico was to conceal or disguise a listed attribute of the funds, his conviction was reversed. *Id.* at 2006.

Cuellar further supports the conclusion that the "mere transfer" of funds from Pekin to Aramanda is not sufficient to sustain the verdict in this case. Not only was there no evidence

[5]Although *Cuellar* involved the "transportation" provision of the money laundering statute, 18 U.S.C. § 1956(a)(2)(B)(I), the relevant concealment language is identical to that contained in the financial transaction provision at issue in this case, 18 U.S.C. § 1956 (a)(1)(B)(I). In the absence of clear evidence that Congress intended otherwise, the use of the identical language in these two provisions of the money laundering statute is a strong indication that they are to be given the same interpretation. *See, e.g.,United States v. Ness*, 466 F.3d 79, 81, n. 1 (2nd Cir. 2006).

that Rezko had any interest in the proceeds, which the payment to Aramanda had the effect of concealing, but there was also no evidence presented that the purpose of the payment from Pekin to Aramanda was to conceal or disguise any attribute of the funds. Indeed, absent evidence that the payment to Aramanda was something other than an altruistic effort by the schemers to benefit "another," *cf. United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005), there is no basis for the jury to have concluded that Pekin's payments to Aramanda were designed to conceal or disguise anything. As a result, the verdict on counts 23 and 24 must be vacated.

II. The Government Failed to Establish All Elements of Mail or Wire Fraud Beyond a Reasonable Doubt.

The mail fraud statute prohibits devising a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," and executing that scheme by use of the mails or wires. 18 U.S.C. §§ 1341, 1343 and 1346. To obtain a conviction for mail or wire fraud, the government was required to prove beyond a reasonable doubt that Rezko: (1) knowingly participated in a scheme to defraud; (2) had the specific intent to defraud; and (3) used the mails or wires in furtherance of the scheme. 18 U.S.C. §§ 1341, 1343 ; *United States v. Henningsen*, 387 F.3d 585, 589 (7th Cir. 2004). Even when assessing the evidence admitted at trial in the light most favorable to the government, the mail and wire fraud charges cannot be sustained in this case because the proof is lacking with respect to one or more of these essential elements of the offense.

A. Based on the Lack of Evidence of Rezko's Knowledge and Intent to Defraud, the Court Should Enter a Judgment of Acquittal, or in the alternative, Grant a New Trial

To obtain a conviction of mail or wire fraud, the government was required to prove beyond a reasonable doubt that Rezko knowingly participated in a scheme to defraud the people

of the State of Illinois and the beneficiaries of the Teacher's Retirement System of Illinois (TRS), with the specific intent to defraud. *Henningsen*, 387 F.3d at 589. In presenting its case, the government relied solely on the testimony of Stuart Levine in an attempt to prove that Rezko knowingly agreed to join with Levine and other alleged co-schemers (many of whom were not called to testify) in a broad scheme to misuse Levine's position on two state boards, engage in corrupt deals with investment firms, create an asset management fund, and obtain a kickback from a hospital seeking a permit to build a new facility. The government's theory of the scheme to defraud encompassed two aspects–the misuse of Levine's position on the Planning Board to obtain a kickback from Mercy Hospital and the misuse of Levine's position on TRS to obtain kickbacks of finders' fees from investment firms seeking to do business with TRS and other state investment boards. No witness other than Levine testified that Rezko acted with criminal intent or knowingly agreed to participate in either aspect of the charged scheme. The fact that Levine's account of Rezko's knowing participation in the charged scheme remained uncorroborated throughout trial was not surprising in light of the inherently unreliable nature of Levine himself.

Levine was a government witness like no other. As the key prosecution witness, Levine's account was the foundation of the government's case against Rezko. This alone did not make Levine unique. However, his years of habitual drug use, a past filled with innumerable prior crimes and bad acts (for which he has not been prosecuted), and a pattern of corruption and deception dating back decades are likely unprecedented for a cooperating witness in this district. Indeed, Levine admitted that for his entire adult life he was a felon, a con man, a liar, a thief, and a chronic abuser of illegal drugs. (Tr. 1207-08; 1259-61.) Levine admitted numerous times that he had not been truthful in his testimony before the jury. (*E.g.*, Tr. 1208; 1258-59; 1262;1378 1874.) Moreover, Levine struggled repeatedly to keep his story straight, changed his story

numerous times on the witness stand, and could not recall key dates and events that were the foundation of the government's case against Rezko. (*See, e.g.*, Tr. 1208; 1256-59; 1262; 1874; 2011-13; 1477-79; 2275-80.)

Levine's inconsistency did not come as any great surprise given his extensive abuse of illegal drugs and his overwhelming incentive to lie. Levine admitted to years of drug binges fueled by huge quantities crystal methamphetamine, cocaine and ketamine, and evidence introduced at trial showed that he used drugs before key meetings and conversations about which he offered uncorroborated testimony at trial.[6] Levine's history of illegal drug use offered only one of many incentives for him to cooperate with the government. Levine was facing a term of imprisonment of natural life after he was charged in this case, and he faced the specter of a government investigation of his secret life of drugs and drug buddies. Levine struck a deal with the government in which the government agreed that Levine's sentence should be 67 months. (DX Levine Plea; Tr. 3046.) As was evidenced at trial repeatedly by the 157- page composite FBI 302 and over 900 pages of agents' notes, it took over eight months for Levine to get his initial story straight. However, even after months of preparation and supposed cooperation, Levine continued to change his story and, at trial, he admitted to still not being completely truthful with the government after agreeing to cooperate. (Tr. 1430; 1509.) Levine's untruthfulness while testifying, his history of drug abuse, and his countless bad acts all serve to highlight the habitual inability of the government's key witness to be truthful and the inherent

[6] For example, evidence was introduced at trial that driving into downtown Chicago on his way to the April 21, 2004 Planning Board Meeting, Levine used his cell phone to contact John Ringwalski, one of Levine's sources of crystal meth, as he would routinely do when he was picking up crystal meth. (Tr. 2438-40). Likewise, there was evidence of credit card statements that showed Levine had participated in drug binges leading up to key events that he would later testify about (*see, e.g.*, Tr. 1808-09.)

insufficiency of Levine's uncorroborated testimony to sustain a criminal conviction.

While there were witnesses that may have corroborated collateral parts of Levine's story, there was not one witness that corroborated the essential elements of intent and knowledge. Not only was there no testimony at trial that established Rezko's criminal intent, there were no recordings or documentary evidence that supported such a finding. Indeed, the documentary evidence and the other witnesses' testimony support the finding that Rezko did *not* possess the requisite knowledge or intent to join Levine's scheme to defraud. The government failed to produce evidence sufficient to prove beyond a reasonable doubt that Rezko knowingly joined the scheme or possessed the requisite intent to defraud. Because these two elements were not sufficiently prove, a judgment of acquittal should be entered on the mail and wire fraud counts, as well as the corresponding counts charging Rezko with aiding and abetting Levine's bribery.

As the Seventh Circuit noted in *United States v. Bailey*, 859 F.2d 1265, 1273-74 (7th Cir. 1988), and as is particularly appropriate with respect to Rezko:

> To convict [the defendants], the government could not simply show that they participated in a transaction that turned out to be part of a fraudulent scheme. The government also had to show [the defendants'] wilful participation in [the] scheme with knowledge of its fraudulent nature and with intent the that illicit objective be achieved." *United States v. Price*, 623 F.2d 587, 591(9th Cir. 1980); *see also, United States v. Pearlstein*, 576 F.2d 531, 537 (3rd Cir. 1978); *United States v. Stull*, 743 F.2d 439, 442 (6th Cir. 19840. "The requisite mental state in a prosecution for fraud is a specific intent to defraud and not merely knowledge of shadowy dealings." *United States v. Piepgrass*, 425 F.2d 194, 199 (9th Cir. 1970).

In *Bailey*, the Seventh Circuit reversed the mail fraud convictions of two of the defendants, finding insufficient evidence of knowledge and intent to defraud. *Bailey*, 859 F.2d at 1273-74. The Court explained that even though the government presented evidence that defendants may

have suspected or even known that the loan transactions they were entering into were not "standard operating procedure," it was not sufficient proof that the defendants acted with the requisite knowledge and intent to defraud to allow the convictions to stand. *Id.*

As in *Bailey*, there was insufficient evidence presented at trial to prove that Rezko knowingly participated in a scheme to defraud. While there was certainly evidence that Rezko was heavily involved in political fundraising for various campaigns, that he played an important advisory role to Governor Blagojevich's administration, including communicating the administration's agenda to certain state boards including the Planning Board; and that he discussed with certain individuals (*i.e.*, Michael Winter and Chuck Hannon) the practice within the investment industry to pay finders in connection with investments made by public and private pension funds: none of that evidence presents sufficient proof to satisfy the elements of mail and wire fraud beyond a reasonable doubt.

The incredible and unbelievable nature of Levine's testimony is perhaps best demonstrated in connection with the Planning Board and Mercy Hospital kickback. Levine testified on direct examination that he and Rezko agreed that Levine would seek a $1 million dollar kickback from Jacob Kiferbaum in return for arranging Mercy Hospital's CON application to be approved by the Planning Board. According to Levine, it was Rezko who decided the amount of the bribe. (Tr. 2269; 2271-73.) Of course, there was no documentary evidence or other witnesses' testimony to support this account – only Levine's word.

Not surprisingly, there was overwhelming evidence produced at trial that discredited Levine's testimony and disproved the notion that Rezko had any knowledge of the $1 million dollar kickback that Levine schemed to receive from Kiferbaum. For example, Levine admitted on cross-examination that he had a long history of receiving kickbacks from Kiferbaum. And,

despite Levine's testimony that it was Rezko who fixed the amount of the Mercy kickback, Levine admitted on cross-examination that the same formula (5% of the total contract price) he used for each of the previous kickbacks he received from Kiferbaum was the same formula used to calculate the Mercy bribe. (Tr. 2272-78.) Despite this admission, Levine testified before the jury that it was Rezko who had set the amount of the bribe and that he and Rezko had discussed the Mercy bribe before Levine approached Kiferbaum. (*Id.*) However, Levine's account at trial was directly inconsistent with his sworn statements before this Court as part of his written plea agreement (DX Levine Plea, p 20.) and during his plea allocution (Tr. 2278-86), in which he stated that he and Kiferbaum had agreed on the bribe amount prior to informing Rezko.

In addition, the documentary evidence, Title III recordings, and other witnesses contradicted many aspect of Levine's story. Probably the most obvious contradiction is found in Levine's own recorded conversations leading up to the April 21, 2004 Planning Board meeting. Levine testified at trial that he and Rezko agreed to split the Mercy bribe and for that reason they were working together to ensure that the Planning Board approve Mercy's CON application. Levine testified that he and Rezko discussed the Mercy bribe at their Standard Club dinner on April 14, 2004, and that Rezko assured Levine that he would talk to Tom Beck, the President of the Planning Board, to make sure Mercy was approved. However, Levine's own testimony and the telephone calls Levine has with Tom Beck, Steve Loren and Kiferbaum the days leading up to the all-important vote, completely belie Levine's account. (*See, e.g.*, 2296-97; 2327-35; 2383-86; 2417-28; 2460-63; 2479-81.)

According to Levine himself, he had to remind Rezko about the Mercy CON during the Standard Club meeting. This alone contradicts Levine's account, for it is implausible that Rezko would need to be reminded about the Mercy vote if he had $750,000 riding on whether the

Mercy CON was approved by the Planning Board a week later. Levine's account of the Mercy bribe is also contradicted by his own statements on the Title III calls that he had with Beck, Loren and Kiferbaum leading up to the April 21, 2004 Planning Board meeting. Specifically, the recorded calls demonstrate that Levine was in near panic mode the two days prior to the Planning Board meeting once he learned from Beck that Mercy's CON may not be approved at the upcoming meeting. (Tr. 2328-31.) Levine had numerous calls in which he tried to convince Beck that the vote should go forward on April 21. While Beck told Levine that Rezko had indicated the Blagojevich Administration supported Mercy, in none of the conversations between Levine and Beck did Beck state that Rezko directed him to approve Mercy's application in April. (Tr. 2330-31.) During none of these calls did Levine tell Beck that he and Rezko has a personal interest in the Mercy CON. Indeed, Levine admitted at trial that Beck was unaware that Levine stood to receive a kickback if the Mercy application was approved. (Tr. 2332.)

In an effort to convince Beck that Mercy needed to be approved at the April Planning Board meeting, Levine asked Loren to prepare talking points in support of the Mercy CON application. Like Beck, Loren was unaware that Levine has a personal stake in the outcome of the Mercy vote. (Tr. 2497.) Levine spent the two days before the Planning Board meeting going over the Mercy application and pursuing Beck in an effort to sell the idea that Mercy should be approved at the April meeting. At the same time, Levine spoke with Kiferbaum, who expressed Mercy's concern that there are not enough votes to get the CON approved. (Tr. 2296.) Unlike a person who is assured that the fix is in, Levine spent the night before the Planning Board meeting on the phone with Loren reviewing the merits of Mercy's application so that he could be ready to convince the Planning Board to vote for Mercy. (Tr. 2418-28.) What's more, Levine's irrational behavior at the public Planing Board meeting the next day–including standing up and

lobbying Dr. Almanaseer to change his vote from pass to yes–completely belies the government's theory that Rezko had a large financial interest in the Mercy application. It confounds logic that a person who controlled the Planning Board and had such a large payout riding on its vote would leave the vote to chance. The evidence simply does not support that Rezko knew about the Mercy bribe. Indeed, Levine boasted to Kiferbaum and Loren following the Planning Board meeting that he pulled off the vote and that "[he] kept everything together" for Mercy–facts which also contradict Rezko's alleged knowledge of the bribe and control of the Planning Board. In fact, Levine told Loren that Rezko didn't "give a shit" about Mercy getting approved. (Tr. 2478-80.)

The documentary evidence introduced at trial only bolsters the conclusion that Rezko was not a knowing participant in the fraud. Most significant are the draft consulting agreements between Dr. Robert Weinstein and Kiferbaum Construction, which were drawn up by Steve Loren at Levine's direction. (*See* DX WER Consulting 1; DX WER Consulting 2.) Levine admitted on cross-examination that he had directed bribes and other kickbacks to Weinstein numerous times in the past in order to have Levine's interest in the money concealed. The Mercy kickback was no different. Levine testified that, shortly after Kiferbaum was awarded the contract with Mercy, he directed Loren to draft a consulting contract. (Tr. 2304.) The purpose of the consulting agreement was to put in place a mechanism by which Kiferbaum could pay Levine the bribe through Weinstein. (Tr. 2304-05.) Significantly, the terms of the draft contract have the entire amount of the bribe going to Dr. Weinstein on Levine's behalf and make no mention of any money going to Rezko or a nominee of Rezko. (Tr. 2307-2309.) Within a week of the Planning Board vote to approve Mercy, Levine and Weinstein directed Loren to amend the draft contract in order to memorialize Levine's bribe arrangement with Kiferbaum. (Tr. 2492.)

The updated draft was changed to include a total payout of $1.7 million dollars, which reflected not only the amount of the Mercy bribe but also the amount remaining on an earlier bribe that Kiferbaum owed to Levine from a Chicago Medical School contract. (Tr. 2492-93.) Thus, the jury convicted Rezko despite the fact that there is not one document that shows that Rezko stood to receive any portion of the Mercy kickback, and despite the fact that Levine, Weinstein, Loren and Kiferbaum created documents that prove Levine directed the entire bribe be paid to Weinstein for Levine's subsequent benefit.

Like the insufficient evidence of Rezko's knowledge and intent of Levine's misuse of his position on the Planning Board, the government failed to present sufficient evidence for a jury to find that Rezko had the requisite criminal intent regarding Levine's misuse of this position on the TRS Board. Here again, whatever proof the government offered that Rezko knowingly participated in a fraudulent scheme to misuse Levine's position on the TRS Board rested entirely on Levine's uncorroborated and inherently unreliable testimony.

Perhaps the most obvious evidence of Rezko's lack involvement in the TRS aspect of the scheme is the fact that the government conceded that, as of the date of the Standard Club meeting on April 14, 2004, Rezko had no idea that Levine, with whom he had allegedly been scheming for nearly a year, stood to receive finder's fees from numerous transactions. This fact is corroborated by calls the government introduced and played at trial. Specifically, on April 17, 2004, Levine told Bill Cellini that during the Standard Club meeting Levine told Rezko "about stuff that he knew nothing about." (Tr. 1254-55.) Moreover, on May 8, 2004, Cellini relayed to Levine a suggestion by a third party that Rezko and Kelly had legal problems related to campaign fundraising. (Tr. 2709-11.) Levine responded to Cellini with a clear exculpatory statement, asking "What problems do they have?" and stating that "they [meaning Rezko and

Kelly] haven't done anything at [TRS]." (Tr. 2710.) In context, these statements indicate that, contrary to Levine's testimony that he and Rezko had been scheming for nearly a year to control TRS, Rezko had not asked for any consideration related to TRS and knew nothing about Levine's efforts to share in finder's fees from TRS transactions. While Levine apparently had delusions of future grandeur, the government failed to introduce any evidence that corroborated Levine's claim that Rezko agreed to participate in Levine's scheme.

In addition, there was not one TRS employee or Board member, other than Levine, who testified that he even knew Rezko – let alone that Rezko had exerted any influence and pressure on TRS. Likewise, there were no witnesses that corroborated Levine's account that he and Rezko were sharing in finder's fees from TRS transactions. Instead there was only evidence that supported collateral aspects of Levine's story. For example, there was testimony from Hannon and Winter that Rezko discussed with them each the prospect of working as a finder for investment firms that were seeking investments from TRS and other investment boards. However, there was no evidence introduced that corroborated Levine's testimony that Rezko did this with the knowledge that Levine was abusing his position of the TRS Board for Levine's own gain.

For the foregoing reasons, the Court should enter a judgment of acquittal with respect to Counts 1-2, 4-8, 11-15, 17 and 20 on the ground that there was insufficient evidence to prove beyond a reasonable doubt that Rezko possessed the requisite knowledge and intent to defraud. Alternatively, the Court should order a new trial on the ground that the record in this case, polluted as it is by the inherently unreliable testimony of Levine, leaves such a strong doubt as to Rezko's guilt that it would be a miscarriage of justice to let the verdict stand.

B. There Was Insufficient Evidence to Prove the Mailing Charged in Count 11 Beyond a Reasonable Doubt.

Count 11 of the Superseding Indictment charged a mail fraud violation based on a letter Jacob Kiferbaum supposedly mailed to Mercy Hospital on or about November 25, 2003 "soliciting the construction contract for the proposed hospital and offering to help Mercy get approval from the Planning Board." That letter was admitted into evidence through Mr. Kiferbaum's secretary, Rhonda Howard, as 'Government Exhibit 11-25-03 Kiferbaum Letter" (hereinafter referred to as "Kiferbaum Letter"). Rezko was convicted on Count 11 despite the fact that there was no evidence that the charged mailing was, in fact, mailed. This failure to prove the use of the mail is fatal to a mail fraud conviction. *See United States v. Swinson*, 993 F.2d 1299, 1302 (7th Cir. 1993)(finding that the government failed to establish that the usual business practice was followed concerning the alleged mail fraud incident.); *United States v. Brooks*, 748 F.2d 1199, 1203 (7th Cir. 1984); *Mackett v. United States*, 90 F.2d 462, 464 (7th Cir. 1937)(finding that evidence was insufficient to establish a mailing where the "testimony was merely the conclusion of the witness" who gave contradictory testimony on cross-examination). This Court should make the same finding and enter a judgment of acquittal on Count 11.

At trial, the only evidence presented by the government related to the mailing of the Kiferbaum Letter was the testimony of Rhonda Howard, who was Kiferbaum's secretary. During her direct examination, Ms. Howard testified that it was her routine practice to mail letters such as the Kiferbaum Letter. On cross-examination, however, Ms. Howard admitted that she did not type or mail the letter, that she made inquiries around her office as to who prepared the letter, and that even after those inquiries she could not say how or by whom the letter was prepared or sent. Moreover, Ms. Howard testified that the letter departed from routine practice in a number of ways. First, whoever typed the letter did not type his or her initials at the bottom

of the letter, as Ms. Howard testified was routine practice. Second, whoever typed the letter used "C:" to designate a copy recipient, whereas Ms. Howard stated it was routine practice to use the "cc:" designation. Finally, Ms. Howard recognized that the letter contained language related to "securing of the Certificate of Need" that was not contained in the standard form letter routinely sent to prospective customers. Ms. Howard further testified that while it was her practice to designate on the letter if any enclosures or attachments accompanied the letter, she did not know if it was the practice of whoever drafted the letter to include a similar designation, and she could not state with certainty whether or not the letter accompanied any attachments of the type that would likely not be mailed.

"The use of the mails element of mail fraud may be proved by direct or circumstantial evidence." *Brooks*, 748 F.2d at 1202 (7th Cir. 1984). Proof of standard office practice can be admitted as proof of the mailing "so long as the circumstances proven directly support the inference and exclude all reasonable doubt to the extent of overcoming the presumption of innocence." *Id.; see also Swinson*, 993 F.2d at 1301 (7th Cir. 1993).

Here, even taking the evidence in light most favorable to the government, there simply was insufficient evidence to exclude reasonable doubt as to whether the Kiferbaum Letter was mailed. There was no direct evidence provided as to this mailing. Neither the government nor Ms. Howard could locate the individual who mailed the letter, and the government chose not to call Mr. Kiferbaum, who signed the letter, or anyone from Mercy Hospital who could testify as to how the letter was received. As a result, the jury was left with only circumstantial evidence introduced by way of Ms. Howard's testimony. However, while Ms. Howard testified as to the standard office practice of Kiferbaum Construction, she admitted that the Kiferbaum Letter deviated from normal practice in several respects, and she could only speculate as to who created

the letter and whether the letter was mailed. Given that the government's only witness could not state whether or not the letter was mailed and admitted that the letter deviated from normal office practice in several respects, there was not sufficient evidence to exclude reasonable doubt as to whether the Kiferbaum Letter was mailed. *See Brooks*, 748 F.2d at 1204 (reversing conviction and finding that "testimony proved no more than a probability that the mails had been used" where one witness "could not be certain that . . . claim form had been returned in the mails" and another witness testified merely to his organization's usual practice"). In *Brooks*, the government's witness testified that documents similar to the one at issue in that case were "very rarely" sent in any way other than through the mail. 748 F.2d at 1203, n.7. Even that evidence was held not to be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that a mailing occurred. *Id.* at 1204.

No rational jury could conclude beyond a reasonable doubt based on the testimony of Ms. Howard that the Kiferbaum Letter was mailed. Accordingly, the Court should vacate the verdict on Count 11.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Rezko's prior arguments and pleadings, the Court should enter a judgment of acquittal on Counts 1, 2, 4- 6, 7-8, 11-15, 17, 20 and 23-24 of the Superseding Indictment. In the alternative, the Court should grant Rezko a new trial on those counts.

Dated: September 19, 2008

Respectfully submitted,

ANTOIN S. REZKO

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CERTIFICATE OF SERVICE

I, Mariah E. Moran, an attorney, certify that I caused copies of ***Defendant's Post-Trial Motion for Judgment of Acquittal Or, In the Alternative, For a New Trial*** to be filed and served via the Court's CM/ECF System on this 19th day of September, 2008.

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