IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GEORGE H. RYAN, SR.	)	No. 10-3964
	)	
Petitioner-Appellant,	)	Appeal from the United States
	)	District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
UNITED STATES OF AMERICA	)	
	)	10 CV 5512
Respondent-Appellee.	)	Honorable Rebecca R. Pallmeyer

GOVERNMENT'S CIRCUIT RULE 54 STATEMENT

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this statement pursuant to Rule 54 of the Circuit Rules of the Seventh Circuit.

INTRODUCTION

A jury convicted former Illinois Governor George Ryan of, among other things, seven counts of mail fraud based on an indictment that alleged both honest services and money-property fraud. Following the Supreme Court's decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010), Ryan filed a motion under 28 U.S.C. § 2255, challenging his mail fraud convictions and claiming that certain jury instructions given at his trial permitted the jury to convict him of honest services fraud without finding that his scheme involved bribes and kickbacks, that is, based on conduct that did not constitute a crime in light of

Skilling. The district court denied Ryan's motion, *Ryan v. United States*, 759 F. Supp. 2d 975 (N.D. Ill. 2010), finding any error concerning the honest services theory presented to the jury harmless beyond a reasonable doubt, and this Court affirmed, *Ryan v. United States*, 645 F.3d 913 (2011).

This Court concluded that Ryan's claims were procedurally defaulted, and found that it was appropriate for the Court to take up the issue of procedural default notwithstanding the government's forfeiture of that defense. *Id.* at 915-16, 917. Citing *Engle v. Isaac*, 456 U.S. 107 (1982), and *United States v. Frady*, 456 U.S. 152 (1982), the Court applied the cause and prejudice standard, and found no cause for Ryan's default. *Id.* at 915-17. The Court further concluded that Ryan was not entitled to a judgment of acquittal in light of *Skilling* because, among other things, on the record at trial, the inference that certain payments to Ryan were bribes or kickbacks "verge[d] on the inescapable." *Ryan*, 645 F.3d at 919. Ryan petitioned for certiorari, and the Supreme Court vacated the judgment and remanded to this Court for further consideration in light of *Wood v. Milyard*, 132 S. Ct. 1826 (2012).

For the reasons explained below, *Wood* does not affect the outcome of this case. First, this Court properly exercised its discretion to invoke Ryan's procedural default because the government forfeited, but did not waive, the defense, and this is an extraordinary case. Second, even if the government

waived the affirmative defense of procedural default, thereby precluding this Court from considering it for the first time on appeal, because the conclusion that Ryan accepted bribes "verges on the inescapable," this Court (and the district court before it) correctly concluded that Ryan's petition for collateral review was without merit.

ARGUMENT

I. This Court's Decision is Consistent with *Wood v. Milyard*.

A. The *Wood* Decision

Wood involved federal habeas review of a state conviction, where one issue was whether the habeas petition was timely. In its preanswer to Wood's habeas petition, the State represented to the district court that "Respondents will not challenge, but are not conceding, the timeliness of Wood's [federal] habeas petition." *Wood*, 132 S.Ct. at 1830. Subsequently, in its full answer to the petition, the State correctly stated the relevant issue—whether Wood had pending a "properly filed" application for state postconviction relief that tolled the applicable statute of limitations—and asserted that it was "arguable" that Wood had abandoned his postconviction application and, thus, that the statute of limitations was not tolled. *Id.* The State went on to repeat, "Respondents are not challenging, but do not concede, the timeliness of the petition." *Id.* at 1831-32.

The district court dismissed certain of Wood's claims for failure to exhaust state remedies, and denied two substantive claims on the merits. *Id.* at 1831. On appeal, the Tenth Circuit denied the petition as untimely without addressing the merits. *Id.* The Supreme Court reversed, concluding that the State had knowingly and intelligently waived the statute of limitations defense, and that the court of appeals abused its discretion by relying on the statute of limitations in the face of the state's waiver. *Id.* at 1829-30, 1833-35. In reaching this conclusion, the Court emphasized the difference between waiver and forfeiture, and applied familiar definitions of those terms: failing to preserve an argument is forfeiture; waiver occurs when a party knowingly and intelligently relinquishes the argument. *See id.* at 1832, n.4. The Court found that the State had made a knowing and intelligent choice to relinquish the right to assert a timeliness defense, and held that, although a court may, on its own motion, and in an exceptional case, raise a timeliness defense a party has forfeited, it may not resurrect such a defense where a party has intentionally waived it. *Id.* at 1829-30, 1832-35 & nn. 4-5.

B. Under *Wood*, this Court Has the Discretion to Invoke Ryan's Procedural Default.

1. The Government Did Not Waive Procedural Default.

This Court has already characterized the government's position on procedural default in this case as a forfeiture, not a waiver, and recognized its

authority to raise procedural default despite the government's forfeiture. *Ryan*, 645 F.3d at 917-18 (noting, in raising procedural default notwithstanding the government's failure to assert the defense, that "[o]n collateral review . . . a court may elect to disregard a prosecutor's forfeiture, because the Judicial Branch has an independent interest in the finality of judgments"). Wood neither altered the familiar definitions of forfeiture and waiver applied by this Court, nor limited the Court's authority to consider forfeited defenses on collateral review. *See Wood*, 132 S. Ct. at 1832 n.4; *Ryan*, 645 F.3d at 915. Thus, *Wood* in no way undermines the Court's exercise of discretion in this case.

This Court's treatment of the government's position as a forfeiture rather than a waiver was correct. The first time the government addressed whether Ryan had defaulted his *post-Skilling* challenges to the honest-services theory presented through jury instructions was in its post-argument, supplemental memorandum. R. 38. In that filing, the government never discussed—and therefore could not have waived its right to assert—the default upon which the Court based its decision, namely, Ryan's default of instructional challenges by failing to advocate a construction of §1346 narrower than the Court's construction of the statute in *United States v. Bloom*, 149 F.3d 649 (7th Cir 1998).

This Court found that Ryan procedurally defaulted his challenges to the honest services instructions by seeking, and failing to object to, jury instructions that explained the honest services statute in accord with this Court's decision in *Bloom*. *Bloom* held "that a public official deprives the public of its intangible right to honest services . . . if he secretly misuses his position . . . for personal gain," *Ryan*, 645 F.3d at 915. Ryan never made the arguments made by other litigants, such as Jeffrey Skilling and Conrad Black, that *Bloom* was wrongly decided, or "that § 1346 is best understood to be significantly more limited than *Bloom* held"; to the contrary, Ryan advocated, at trial and on appeal, for rulings consistent with *Bloom*'s understanding of § 1346. *Ryan*, 645 F.3d at 915-16. Thus, this Court held that Ryan procedurally defaulted the argument, accepted by the Supreme Court in *Skilling*, that *Bloom*'s construction of § 1346 was overly broad. The government never addressed or expressed a "clear and accurate understanding" of this defense, and never signaled an intent to forgo reliance upon it. *See Wood*, 132 S. Ct. at 1835. Accordingly, the government did not waive, but merely failed to preserve, or forfeited, this defense. *See Kontrick*, 540 U.S. at 458 n.13 (waiver "is the intentional relinquishment or abandonment of a known right") (quotations omitted).

What the government did say about procedural default in its supplemental memorandum was, as this Court previously determined, mistaken. The

government maintained, based on *Black v. United States*, 130 S. Ct. 2963 (2010), that it was not necessary for a defendant to argue that § 1346 was limited to bribes and kickbacks in order to preserve a challenge to the honest services instructions and, therefore, Ryan's failure to make that argument did not amount to procedural default. R. 38 at 12. This Court's subsequent opinion, however, made clear that the crucial question was whether Ryan had argued, as Black had done, that the scope of the statute was more limited than this Court had held in *Bloom*. *Ryan*, 645 F.3d at 915-16. In light of this Court's opinion, the government's consideration of a different question—whether preservation of Ryan's *Skilling* claim required Ryan to argue that § 1346 was limited to bribes and kickbacks—demonstrates that the government misapprehended what was necessary to preserve a challenge to the honest services instructions, and thus the government's contention that Ryan had not procedurally defaulted his challenge to the instructions was an "inadvertent error," rather than a "deliberate decision to proceed straightaway to the merits." *See Wood*, 132 S. Ct. at 1834 (quoting *Day v. McDonough* 547 U.S. 198, 211 (2006)). This type of mistaken assertion of law is not a waiver, because a waiver must be both knowing and intelligent. *See Wood*, 132 S. Ct. at 1832 n.4; *Kontrick*, 540 U.S. at 458 n.13; *Olano*, 507 U.S. at 733.

The Supreme Court's decision in *Day v. McDonough* is instructive. In that case, in response to a habeas petition, the State failed to take into account "controlling Eleventh Circuit precedent" and, as a result, mistakenly calculated tolling time and wrongly asserted that the petition was timely. *Day*, 547 U.S. at 202-03. In fact, the petition was untimely. *Id.* at 203. Under these circumstances, the Supreme Court held that the district court, on its own initiative, could dismiss the petition as untimely in spite of the position taken by the State. *Id.* at 203, 209. While the Court cautioned that it "would count it as an abuse of discretion to override a State's *deliberate waiver* of a limitations defense," *id.* at 202 (emphasis added), the Court concluded that there had been no "intelligent waiver" because the State's legal position was based on a mistaken calculation of the elapsed time. *Id.* at 202.

Just as the State in *Day* wrongly asserted that the petition was timely as a result of mistake of law and fact, the government in this case wrongly asserted that Ryan had not procedurally defaulted his claim as result of its mistake about what was necessary for Ryan to preserve his claim. Here, as in *Day*, there was no knowing and intelligent waiver.

Wood stands in contrast. In *Wood*, the State acknowledged that it had an "arguable" statute of limitations defense, and expressed a "clear and accurate understanding of the timeliness issue," but "declin[ed] to interpose a statute of

limitations defense," and "deliberately steered the District Court away from the question and towards the merits. . . ." 132 S. Ct. at 1835. This, as the Court held, was a waiver: a knowingly and intelligent choice to relinquish an arguable defense. Here, the government made no such choice to forgo an arguable claim and gave no indication of its intent to do so but, instead, took the position that there was no meritorious procedural default defense based on a misreading of *Black*. Thus, the government forfeited, rather than waived, Ryan's procedural default.[1]

2. This Is an Exceptional Case.

The Supreme Court has repeatedly held that courts may consider forfeited defenses that "are founded on concerns broader than those of the parties." *See*

[1] Although the government contended in both the district court and on direct appeal that Ryan had procedurally defaulted challenges to the specific jury instructions he proposed or agreed to at trial, that contention did not amount to an implicit waiver of the default defense upon which the Court based its decision. *See generally, Perruquet v. Briley*, 390 F.3d 505, 516 (7th Cir. 2004) (stating, in *dictum*, that a party may waive a procedural default defense implicitly, for example, by asserting the defense against certain claims and failing to assert it against others). As explained above, whether implicit or explicit, a waiver must be knowing and intelligent. *See id.* The government's contention that Ryan defaulted challenges to the particular instructions he proposed or agreed to at trial in no way signaled an intent to forgo the broader claim of procedural default related to Ryan's advocacy of *Bloom*'s construction of § 1346. To the contrary, as discussed above, the government's failure to preserve that issue was inadvertent. As the government's response to Ryan's petition for certiorari makes clear, the position of the United States is that Ryan defaulted his post-*Skilling* claims, as this Court determined. *Ryan v. United States*, S.Ct. No. 11-499, Brief for the United States in Opposition at 13-15 (available at: http://www.justice.gov/osg/briefs/2011/0responses/2011-0499.resp.pdf).

Wood, 132 S. Ct. at 1833; *Day*, 547 U.S. at 205; *Granberry v. Greer*, 481 U.S. 129, 132–35 (1987). Procedural default is such a defense, *Day*, 547 U.S. at 205, and courts of appeals, including this Court, "have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a § 2255 petitioner's procedural default. . . ." *Id.* at 206 (collecting cases); *see also Kurzawa v. Jordan*, 146 F.3d 435, 440 (7th Cir. 1998). *Wood* likewise made clear that when the government forfeits a defense, the court of appeals has discretion to raise the defense on its own initiative in an exceptional case. *Wood*, 132 S. Ct. at 1834. For the reasons set forth in this Court's previous opinion, this is such a case.

Courts deciding whether to raise procedural default on their own initiative have considered interests such as finality, comity, and judicial efficiency. *See Kurzawa*, 146 F.3d at 440; *United States v. Wiseman*, 297 F.3d 975, 979-80 (10th Cir. 2002). As this Court previously recognized, in this case societal interests weigh heavily in favor of requiring Ryan to demonstrate cause and prejudice to excuse his procedural default. *Ryan*, 645 F.3d at 915, 917-18. In addition to the "interests in the finality of judgments, and in inducing parties to focus their energies on the trial and initial appeal," *Ryan*, 645 F.3d at 915, which generally are at stake on collateral review, this Court's decision rightly emphasized the extraordinary circumstances peculiar to this case: a trial that lasted more than

six months, *United States v. Warner*, 498 F.3d 666, 674 (7th Cir. 2007); a direct appeal that produced more than 100 pages of judicial opinions from four judges, *Ryan*, 645 F.3d at 918; and a 39-page district court opinion denying Ryan's § 2255 petition, *Ryan v. United States*, 759 F. Supp. 2d 975 (N.D. Ill. 2010). The judicial resources already expended on this matter and the compelling interest in finality make this an exceptional case in which the Court's reliance on procedural default is appropriate.

In addition, before relying on procedural default, this Court followed the procedure the Supreme Court has prescribed, giving the parties fair notice and an opportunity to present their positions in the form of supplemental memoranda, and considered the factors relevant to the exercise of its discretion. *See Wood*, 132 S. Ct. at 1833-34; *Day*, 547 U.S. at 210. Ryan suffered no significant prejudice from the delayed focus on procedural default, and this Court properly determined that the interests of justice would be better served by considering whether Ryan defaulted. *See Day*, 547 U.S. at 210. In addition, as in *Day*, "nothing in the record suggests that the [government] strategically withheld the [procedural default] defense or chose to relinquish it." *Id.* at 211.

In sum, under *Wood* and prior applicable precedent, this Court properly exercised its discretion to invoke Ryan's procedural default, correctly found that there was no cause for Ryan's default, and correctly determined, based on the

trial record, that there was no basis for relief on the ground of actual innocence. Accordingly, the Court's prior decision should stand.

II. Even in the Absence of a Finding of Procedural Default, Ryan is Entitled to No Relief Because the Evidence Established that He Accepted Bribes or Kickbacks.

Even if this Court were to find that the government waived the defense of procedural default, or were to exercise its discretion to consider the merits of Ryan's petition, affirmance would still be appropriate because, as this Court has already found, the evidence overwhelmingly supports the conclusion that Ryan accepted bribes or kickbacks.

Ryan claims that the honest services instructions permitted the jury to convict him without finding that his scheme involved bribes and kickbacks, and therefore he might have been convicted based on conduct that is not a crime under *Skilling*. The Supreme Court has held that, for purposes of collateral review, an instructional error requires reversal only if it had a "substantial and injurious effect or influence in determining the verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).[2] Under *Brecht*, it is not enough to find merely a "reasonable possibility"

---

[2] As discussed in the government's response brief, although *Brecht* involved a state habeas petition, its standard should also apply in the context of § 2255 petitions. Ryan's argument, based on *Lanier v. United States*, 220 F.3d 833 (7th Cir.2000), that the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967), should apply lacks merit, given, among other things, that in *Lanier*, the

that trial error contributed to the verdict; for a defendant to be entitled to relief, a court must conclude that, or have grave doubt about whether, the defendant suffered "actual prejudice." Given that the evidence, arguments and instructions as a whole in this case established a paradigmatic bribery scheme in which the only conflicts of interest were the bribes themselves, Ryan has not come close to meeting the *Brecht* standard.

In its prior decision regarding Ryan's § 2255 motion, this Court analyzed "whether, applying current legal standards to the trial record, Ryan is entitled to a judgment of acquittal," *Ryan*, 645 F.3d at 918. After reviewing the record at trial, this Court determined that a jury could have convicted Ryan of honest services fraud using the legal standard set by *Skilling*, *Ryan*, 645 F.3d at 918, and that, indeed, "the inference that [Warner's payments to Ryan were bribes or kickbacks] verge[d] on the inescapable." *Id.* at 919. This determination supports a finding that *Skilling*-related trial errors had no "substantial and injurious effect or influence in determining the verdict," or otherwise caused Ryan actual prejudice, *see Brecht*, 507 U.S. at 637-38; *United States v. Frady*, 456 U.S. 152, 169 (1982), and establishes that there is no substantial risk that

---

parties did not discuss, and the Court did not consider, the applicability of *Brecht*, and given also that this Court previously cited *Brecht* in deciding whether an instructional error warranted relief under § 2255, *see United States v. Ross*, 40 F.3d 144, 146 (7th Cir. 1994). In any event, as discussed below, the errors claimed by Ryan were harmless beyond a reasonable doubt, as the district court found.

any error resulted in Ryan being convicted of an honest services theory that did not meet the requirements of *Skilling*.

This Court credited the district court's review and analysis of the evidence, and found that it demonstrated "why a reasonable jury could find that Ryan sold his offices to the high bidders." *Ryan*, 645 F.3d at 919. As discussed in the government's response brief, the district court conducted a thorough analysis, conservatively applied the demanding standard of *Chapman v. California*, 386 U.S. 18 (1967), and found that any errors in the honest services theory presented to the jury were harmless beyond a reasonable doubt. *Ryan*, 759 F. Supp. 2d at 982-83, 991. Recognizing that the jury had been instructed on both a conflict of interest theory and a legally proper stream of benefits bribery theory, and observing that the conduct underlying both theories was frequently the same, the court engaged in an exhaustive review of the evidence presented on each count and, with respect to each count, analyzed "whether, in order to find Ryan guilty on one theory, the jury must have found him guilty on the other, as well," or in other words, whether the set of facts underlying each mail fraud count for which Ryan was convicted "could have supported a scheme in the indictment *other than* the bribery scheme" and, if so, "whether a reasonable jury could have convicted based on the alternate theory but not on the bribery theory." *Id*. at 992, 997 (emphasis in original). In sum, the district court found that no

reasonable jury, properly instructed, could have convicted Ryan without finding that Ryan accepted bribes or kickbacks. This assessment was fully supported by the evidence.

As described in the government's response brief, the evidence at trial showed that, soon after Ryan was elected Illinois Secretary of State ("SOS"), his close friend Larry Warner, told Don Udstuen, another close friend of Ryan whom Warner did not know well, Tr. 11615, 12244-45, that Warner was going to capitalize on his relationship with Ryan by becoming a lobbyist, that Ryan had endorsed an arrangement by which Warner would share lobbying fees with Udstuen, and that Warner would "take care of George." Tr. 11620-22, 12231. Thereafter, Ryan was instrumental in steering SOS contracts to Warner's lobbying clients and SOS leases to buildings secretly owned by Warner, and through these arrangements, Warner received several million dollars. Warner "took care of" Ryan by bestowing a stream of benefits to Ryan, his family, and his associates, including: more than $400,000 in payments to Udstuen from lobbying fees Warner received for two SOS contracts, Tr. 16907; a $36,000 payment to Art Swanson, another close Ryan friend, from lobbying fees Warner receive for a third SOS contract, Tr. 3102-06, 10667-69; more than $100,000 in loans to a company partly owned by Ryan's brother, a portion of which was never repaid, Tr. 10704-07; 17243-47; a $6000 payment to a fledgling cigar company partly

owned by Ryan's son, Tr. 15176-77, 18092; a $5000 loan to Ryan's son-in-law, which was never repaid, Tr. 17092, 17115; free insurance adjustment services for Ryan and his son-in-law, Tr. 15160-63, 15516-19, 17088; and a payment of over $3000 for a band to perform at Ryan's daughter's wedding. Tr. 15604-05.

With respect to Counts Two, Three, Four, Five, Seven and Eight, which related to the relationship between Ryan and Warner, the district court correctly concluded that "the only conflict of interest that Ryan could have concealed was the benefits he was receiving from Warner," and that, "[o]n this record it is not credible that the jury believed Ryan engaged in a pattern of concealment simply because he was doing 'favors' for some friends," and "no reasonable jury that believed [Ryan] concealed benefits and believed he played a role in these transactions could have believed one was not in exchange for the other." *Ryan*, 759 F. Supp. 2d at 1002.

Similarly, the evidence showed that each year from 1993 to 2001, Harry Klein, an Illinois currency exchange owner, gave Ryan and his chief of staff, Scott Fawell, free use of his Jamaica villa, and disguised these benefits by writing checks to Klein and having Klein return the money in cash. Tr. 2832-34; 2838-44, 9421-23, 9432-44. On two occasions, Ryan also received a free week's vacation at Klein's Palm Springs condominium. Tr. 9694. In return for these benefits, Ryan arranged for a currency exchange fee increase which benefitted

Klein, Tr. 2843-44, 2851-53, and directed an SOS official to cancel a less expensive lease in order to move an SOS office to a building owned by Klein. Tr. 3010-11, 5239-40, 6263, 6266-67, 6552, 6557-60, 6635-37.

With respect to this evidence, which related to Count Six, the district court correctly found that "[n]o reasonable jury would have believed that Ryan concealed the benefits he received from Klein, steered a lease to Klein, and accepted illegal benefits from Klein, without also believing those benefits were given with the intent to influence his official action, and that he accepted those benefits with the intent to be influenced." *Ryan*, 759 F. Supp. 2d at1003-04.

Because the district court was correct in concluding that Ryan was entitled to no relief on his § 2255 motion, its judgment should be affirmed, regardless of Ryan's procedural default.

CONCLUSION

The Supreme Court's decision in *Wood* does not undermine this Court's decision to invoke procedural default notwithstanding the government's forfeiture, and has no effect on this Court's finding, supported by the record, that the inference that Ryan took bribes "verges on the inescapable." In light of that finding, and for all of the foregoing reasons and the reasons set forth in the government's response and supplemental briefs, the government respectfully requests that the district court's judgment be affirmed, whether or not Ryan's

procedural default of his post-*Skilling* claims is invoked.

Respectfully Submitted,

PATRICK J. FITZGERALD
United States Attorney

s/Laurie J. Barsella
LAURIE J. BARSELLA
DEBRA RIGGS BONAMICI
MARC KRICKBAUM
Assistant United States Attorney
219 South Dearborn Street, Fifth Floor
Chicago, Illinois 60604
(312) 353-5300

Date: June 22, 2012

Certificate of Service

I hereby certify that on Friday, June 22, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Laurie J. Barsella
LAURIE J. BARSELLA
Assistant United States Attorney
219 South Dearborn Street, Fifth Floor
Chicago, Illinois 60604
(312) 353-5300