No. 10-3964

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GEORGE H. RYAN SR.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On appeal from the U.S. District Court for the
Northern District of Illinois, No. 10-cv-5512
Hon. Rebecca R. Pallmeyer, Judge, Presiding

SUPPLEMENTAL MEMORANDUM OF PETITIONER-APPELLANT GEORGE H. RYAN

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INTRODUCTION

Ryan is entitled to relief under 28 U.S.C. § 2255 because the jury was directed to convict him for noncriminal conduct. Nothing in *Davis v. United States*, 417 U.S. 333 (1974), *Engle v. Isaac*, 456 U.S. 107 (1982), *United States v. Frady*, 456 U.S. 152 (1982), or *Bousley v. United States*, 523 U.S. 614 (1998), is inconsistent with this proposition.[1]

Davis afforded section 2255 relief when a judicial decision following the affirmance of the petitioner's conviction indicated that his "conviction and punishment [were] for an act that the law does not make criminal." 417 U.S. at 346. *Engle*, *Frady*, and *Bousley* concerned application of the "cause and prejudice" standard of *Wainwright v. Sykes*, 433 U.S. 72 (1977), to procedurally defaulted objections—objections offered on collateral review that were not made (or that were made and then abandoned) earlier.[2]

The government has not asserted any procedural default of Ryan's objections to the "*Bloom*," "conflicts of interest," or "state law" instructions, all of them instructions whose errors the District Court acknowledged. There was, in fact, no default.[3]

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[1] An unofficial written transcript of the argument in this case is attached as an appendix to this memorandum and is cited as ATr. __. A recording of the argument can be found at http://www.ca7.uscourts.gov/tmp/8F1FFAWB.mp3. Ryan's opening brief is cited as RBr. __. The government's brief is cited as GBr. __. Ryan's reply brief is cited as ReplyBr. __. The appendix to Ryan's opening brief is cited as A-__. The trial transcript is cited as Tr. __.

[2] The Supreme Court has never applied the "cause and prejudice" standard to anything other than defaulted objections. It could not have, for the word "cause" in this standard speaks of cause for the petitioner's default.

[3] The government did assert a default of Ryan's objections to other instructions, and Ryan responded in part by arguing that, because the decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010), marked a "clear break with the past," he had shown "cause" for the default. *See* GBr. 41, 43, 44; ReplyBr. 18-21. See also pages 25-29 *infra*.

This memorandum focuses initially on these three instructions. It emphasizes that no default of Ryan's objections occurred or has been alleged. It then shows that Ryan is entitled to post-conviction relief if the errors in these instructions were not harmless. Because the jury was directed to convict Ryan without finding beyond a reasonable doubt every fact necessary to constitute the offense charged, he has alleged a constitutional defect cognizable in a section 2255 proceeding. In the absence of a showing that the error was harmless, this defect entitles him to a new trial. The memorandum finally turns to Ryan's claim of error in the "financial benefits" instructions, a claim that the government maintains is barred by the "cause and prejudice" standard.

I. RYAN'S OBJECTIONS TO THE *BLOOM*, CONFLICTS OF INTEREST, AND STATE LAW INSTRUCTIONS WERE NEVER DEFAULTED.

Ryan objected repeatedly at trial to the instructions whose errors the District Court acknowledged. *See* Ryan's Corrected Response to United States' Motion for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations at 2-3, Doc. 322, *United States v. Warner*, No. 02 CR 506 (N.D. Ill. 2005), 2005 WL 5808457; Tr. 22061-150, 22087-109, 22147-54. He objected again to these instructions on appeal. Consolidated Brief of the Defendants-Appellants at 61, *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007) (Nos. 06-3517, 06-3528), 2006 WL 5779217. This Court reviewed and upheld the challenged instructions. *See Warner*, 498 F.3d at 698 (7th Cir. 2007); A-000250-52.

Because *Skilling v. United States*, 130 S. Ct. 2896 (2010), had not yet been decided, the objections to the instructions that Ryan offered at trial were not as fully developed

as those he offers now.[4] When judging whether a litigant has preserved an objection, however, courts are tolerant. *See*, *e.g.*, *Fox v. Hayes*, 600 F.3d 819, 832 (7th Cir. 2010) ("Waiver is not meant as an overly technical appellate hurdle."); *United States v. Messino*, 382 F.3d 704, 714-15 (7th Cir. 2004) (Easterbrook, J., dissenting) (noting the panel's unanimous rejection of the government's claim "that the defendants had not adequately preserved an argument based on *Blakely v. Washington*, 542 U.S. 296 (2004)," explaining that the defendants had advanced arguments based on a precursor of *Blakely*, and declaring, "When precedent is adverse, a few sentences flagging the point suffice to preserve an argument.").[5]

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[4] For example, Ryan argued that "when Congress has intended to incorporate state law into federal criminal statutes, it has done so expressly…, and that clear expression is notably absent from the mail fraud statute." Consolidated Brief of the Defendants-Appellants at 61, *United States v. Warner*, *supra*. He did not object that the laws mentioned in the state law instruction failed to incorporate *Skilling*'s "bribes and kickbacks" standard. One of the holdings of *Skilling*, however, is that honest services convictions may not be predicated on violations of state law. *See* 130 S. Ct. at 2933. The Supreme Court vindicated Ryan's argument.

In this Court, Ryan's opening brief noted both his objection to the government's claim that undisclosed conflicts of interest constituted mail fraud and this Court's ruling on the objection on direct appeal. RBr. 3, 28 n.8. It also noted the argument headings of one of his pre-trial filings: "A *Quid Pro Quo* Is Required Where Mail Fraud Charges Are Predicated on the Receipt of a Campaign Contribution," and "A *Quid Pro Quo* Is Required Where Federal Criminal Charges Are Predicated on Receipt of a Gift." *Id*. at 3. In addition, Ryan made the argument that won a reversal of Jeffrey Skilling's conviction even as the Supreme Court rejected it—that the honest services statute was unconstitutionally vague. *See* Consolidated Brief of the Defendants-Appellants at 60, *United States v. Warner*, *supra*.

No litigant anywhere in the United States appears to have argued prior to *Skilling*—or indeed in *Skilling* itself—that honest services fraud should be confined to schemes to obtain bribes and kickbacks. If a failure to make the precise argument that prevailed in *Skilling* were held to work a procedural default, this default plainly would be excused by the cause and prejudice doctrine. *See* pages 27-28 *infra*.

[5] *Black v. United States*, 130 S. Ct. 2963 (2010), illustrates how little it may take to preserve an objection. Like the defendant in *Skilling*, the defendant in *Black* did not argue at any point that

The Court need not linger over possible differences between the objections Ryan made then and those he makes now, for the government has asserted no procedural default of any sort and has waived any claim of waiver. *See*, *e.g.*, *United States v. Blagojevich*, 612 F.3d 558, 560 (7th Cir. 2010) ("[A]fter the appellants forfeited any opportunity to contest one of the two grounds on which they had lost in the district court … the United States forfeited the benefit of the appellants' forfeiture."); *United States v. Caputo*, 978 F.2d 972, 975 (7th Cir. 1992) (noting that an appellee may "waive[] waiver"); *United States v. Andrews*, 817 F.2d 1277, 1278 (7th Cir. 1987) (holding that the government forfeited *Frady* by failing to raise it: because the defendant had failed to appeal, his default should have barred consideration of issues he could have raised, but "a state may waive reliance on waiver by its inattention to the issue" and the Court found "no reason to depart from the time-honored tradition of considering only those arguments presented to [it]"); *Doe v. United States*, 51 F.3d 693, 698-99 (7th Cir. 1995)

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honest services fraud encompassed only schemes to obtain bribes or kickbacks. He contended only that the honest services statute was inapplicable to an allegedly fraudulent scheme in which a private actor contemplated no economic or other property harm. *See* Brief for Petitioners, *Black v. United States*, *supra* (No. 08-876), 2009 WL 2372920. When the Supreme Court concluded in *Skilling* that the honest services statute reached only schemes to obtain bribes or kickbacks, the Court noted that one of the District Court's instructions in *Black* (the "*Bloom* instruction") was incompatible with its holding. The Court remanded *Black* to enable the Seventh Circuit to determine whether errors in the *Bloom* instruction were harmless. If Black preserved his right to relief from the District Court's erroneous pre-*Skilling* instructions, so—much more clearly—did Ryan.

The fact that *Black* was a case on direct review is immaterial when the issue is *whether* a procedural default has occurred. The difference between direct appeals and post-conviction proceedings arises *after* a procedural default has been found. The standard for relief from a procedural default on direct review (plain error) differs from the standard for relief in a section 2255 proceeding (cause and prejudice). *See Frady*, 456 U.S. at 162-68.

(concluding that a defendant waived the government's waiver of the defendant's waiver); *Engle v. Isaac*, 456 U.S. at 125 n.26 (concluding that a *habeas corpus* petitioner waived the government's waiver of his waiver).

II. THE ERRORS IN THE *BLOOM*, CONFLICTS OF INTEREST, AND STATE LAW INSTRUCTIONS ENTITLE RYAN TO POST-CONVICTION RELIEF.

A. Section 2255, the Distinction Between Constitutional and Non-Constitutional Error, and *Davis*.

Remarks from the bench indicate that some members of the Court may believe that *Frady* blocks even arguments that have not been procedurally defaulted. One judge described *Frady* as saying "that collateral attack absolutely cannot be used to challenge the jury instructions." ATr. 2. Collateral attack, however, can be used to challenge jury instructions, at least when these instructions violate the Constitution. *See*, *e.g.*, *Middleton v. McNeil*, 541 U.S. 433 (2004) (considering and rejecting on the merits a *habeas corpus* claim that jury instructions relieved the state of the burden of proving every element of the offense charged); *O'Neal v. McAninch*, 513 U.S. 432 (1995) (holding that, in a *habeas corpus* action, a court may not place the burden on the petitioner of showing that a constitutionally defective instruction was prejudicial and refining the harmless error standard applicable to instructional error in post-conviction proceedings brought by state prisoners); *Yates v. Evatt*, 500 U.S. 391 (1991) (affording *habeas corpus* relief because a state court instruction unconstitutionally shifted the burden of proof); *United States v. Ross*, 40 F.3d 144 (7th Cir. 1994) (affording section 2255 relief because, after the Seventh Circuit had upheld the petitioner's conviction on direct review, a Supreme

Court decision in another case held erroneous an instruction concerning the *mens rea* required by the statute the petitioner had been convicted of violating).

The comment from the bench about the limits of collateral review probably meant that *mere* instructional error—error *not* amounting to a constitutional violation—may not be cognizable in a section 2255 proceeding. Courts provide section 2255 relief for nonconstitutional errors only when they constitute "fundamental" defects that "inherently result[] in a complete miscarriage of justice." *Reed v. Parley*, 512 U.S. 339, 348 (1994); *Brecht v. Abrahamson*, 507 U.S. 619, 634 n.8 (1993); *United States v. Timmreck*, 441 U.S. 780, 783 (1979).

When the Supreme Court afforded post-conviction relief in *Davis v. United States*, 417 U.S. 333 (1974), it placed the case in the "complete miscarriage of justice" category. Nothing in *Davis* is incompatible with Ryan's position.

The government maintained in *Davis* that the petitioner's claim was not "of constitutional dimension" and that it therefore could not be heard in a section 2255 proceeding. *Davis*, 417 U.S. at 342. Without considering whether the claim was of constitutional dimension, the Supreme Court rejected the government's premise. Even non-constitutional errors are cognizable in section 2255 proceedings when they constitute "fundamental" defects and "inherently result[] in a complete miscarriage of justice." The Court said, "If [his] contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of

justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-47.

In *Davis*, the petitioner alleged that, in light of a recent Court of Appeals decision, the indictment failed to allege a crime; the probability he had been convicted for conduct that the law did not make criminal was 100%. *Davis* did not suggest, however, that relief was limited to this situation. If, in Ryan's case, the likelihood were only 98% that his conviction and punishment were for an act that the law does not make criminal, would relief be denied? Would there be no miscarriage of justice and no constitutional violation? Although *Davis* did not answer these questions, a recent decision of this Court did. *Narvaez v. United States*, No. 09-2919, 2011 WL 2162901, at *2, 2011 U.S. App. LEXIS 11203, at *7-8 (7th Cir. June 3, 2011), found a miscarriage of justice because an improperly applied sentence enhancement might have been responsible for the petitioner's sentence. That the sentencing judge *might* have imposed the same sentence in the absence of the enhancement did not bar section 2255 relief.

Under the rubric of harmless error, the parties have disputed how likely it must be that Ryan was convicted for conduct that the law does not make criminal before section 2255 relief is appropriate.[6] The government argues for the standard applied in

[6] Courts can address this question in two ways: (1) They can declare that an instruction directing conviction for conduct that the law does not make criminal violates the requirement of *In re Winship*, 397 U.S. 358, 363-64 (1970), that all facts necessary to establish guilt be proven beyond a reasonable doubt. They can then examine what effect this erroneous instruction had under a harmless error standard. (2) Alternatively, courts can go directly to the bottom line, examining the circumstances of the case in one step to determine whether there has been a "miscarriage of justice" or whether the erroneous instruction "so infected the entire trial that the resulting conviction violates due process." *See Cupp v. Naughten*, 414 U.S. 141, 147 (1973). These two approaches may not be equivalent, but both require an examination of the record to

habeas corpus actions brought by state prisoners—whether the error had a substantial and injurious effect on the verdict or the court is in doubt about whether it did. *See* GBr. 20-23. Ryan argues for the standard this Court approved for section 2255 proceedings in *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000)—whether it is clear beyond a reasonable doubt that a reasonable jury would have found the defendant guilty absent the error. *See* RBr. 13-15. In section 2255 proceedings, the federal courts occupy the same front-line position that state courts occupy when state prisoners seek post-conviction relief. These courts should not countenance the continued imprisonment of federal prisoners who may be innocent.[7]

Certainly the standard should be no *more* demanding than the one sought by the government. As the likelihood that a prisoner has been convicted of noncriminal conduct approaches 51% or "more probable than not," his continued imprisonment becomes intolerable. A much smaller likelihood of wrongful conviction warrants, not a "get out of jail free" card, but a new trial under appropriate standards.

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determine the likelihood that the defendant was convicted of conduct that the legislature has not made criminal. The Supreme Court and other courts have taken both approaches. For at least the last 25 years, the two-step, "harmless error" approach has been much more common.

[7] Rather than apply the *Lanier* standard to *all* section 2255 proceedings as Ryan has proposed, the Court might hold the *Lanier* standard applicable at least to section 2255 proceedings in which a petitioner alleges that he has been convicted for conduct that is not a crime. This more limited ruling would recognize that "one of the principal functions of habeas corpus is to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Bousley v. United States*, 523 U.S. 614, 620 (1998) (quoting *Teague v. Lane*, 489 U.S. 288, 312 (1989), and *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) (internal quotations omitted)).

The "miscarriage of justice" standard that applies when a section 2255 petitioner alleges a non-constitutional error resembles the "miscarriage of justice" standard that applies when a *constitutional* objection has been procedurally defaulted and the petitioner is unable to show "cause" for his default.[8] The Supreme Court said in *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986):

> We remain confident that, for the most part, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." … But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

A belief that, for one reason or another, Ryan must satisfy a "miscarriage of justice" or "actual innocence" standard may lie behind one judge's suggestion that Ryan must "argue that he has been convicted of something the law does not make criminal. In other words, that on the evidence at trial in light of the later statutory interpretation, the only proper judgment is a judgment of acquittal." ATr.1. The same belief may lie behind a second judge's recommendation that counsel go beyond "details like jury instructions" to discuss whether "the record simply could not under any circumstances support [a] finding that George Ryan has committed the offense that the

[8] The two standards are not identical, although they reach the same result when the evidence is legally insufficient to support a conviction. The miscarriage of justice standard applied to non-constitutional errors focuses on the trial and its outcome. The standard applied to procedurally defaulted claims focuses on the defendant's factual innocence and permits the consideration of evidence outside the record.

Supreme Court has now recognized in *Skilling*. Maybe that is where you need to go." ATr. 3.[9]

These two judges may believe either (a) that Ryan has advanced only non-constitutional objections to jury instructions or (b) that he has defaulted his objections and cannot satisfy the "cause and prejudice" standard. It would be inaccurate, however, to say that Ryan has advanced only non-constitutional objections *or* that he has defaulted his objections *or* that he could not satisfy the "cause and prejudice" standard if he needed to do so.[10]

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[9] In *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004), the Supreme Court wrote:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, *see Bousley*, [523 U.S. at 620-21]. … Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him…[*Id.* at 620, (quoting *Davis*, 417 U.S. at 346)].

The statement that new rules *including new narrowing constructions of federal criminal statutes* apply retroactively must mean that violations of these statutory rules are cognizable in Section 2255 proceedings. Members of this Court may believe, however, that new rules do *not* apply retroactively in the sense that a previously convicted prisoner is entitled to the benefit of these rules in the same way as someone charged today. Although the new rules are made retroactive because a significant risk would otherwise exist that a defendant would "stand[] convicted of an act that the law does not make criminal," these judges may believe that a prisoner who shows only a significant risk that he has been convicted of a noncriminal act has no claim to relief. Instead, the prisoner must establish a *certainty* that he has been convicted of an act that the law does not make criminal. Such a position—denying relief even to someone who *probably* would not have been convicted if the new rule had been in effect—would empty the doctrine that new substantive rules apply retroactively of most of its generally understood content.

[10] Ryan's counsel acquiesced in the second judge's suggestion and went where she said he needed to go. Abandoning his planned argument, he discussed only the sufficiency of the evidence. In a case in which the government's closing argument appropriately conceded the absence of the defining element of bribery and in which its attempted explanation of this concession was lame, Ryan's argument concerning the sufficiency of the evidence is strong. Nevertheless, it was not the argument upon which Ryan's brief principally relied and not an

B. When Instructional Error Violates the Constitution and When It Does Not: Supreme Court Rulings.

One judge attributed to *Frady* the proposition "that incorrect jury instructions are not themselves a violation of the Constitution. They are a violation of a statute maybe but not of the constitution." ATr.2. Ryan's brief, however, noted the constitutional grounding of his argument:

> *Skilling* noted that "*[c]onstitutional* error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory." 130 S. Ct. at 2934 (citing *Yates v. United States*, 354 U.S. 298 (1957) (emphasis added)).

RBr. 13 n.4.

The line between instructional error that violates the Constitution and error that does not is sometimes unclear, but when a jury has been directed to convict a defendant for noncriminal conduct and might have done so, the constitutional violation is plain. In *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995), the Supreme Court declared:

> The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We have held that

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argument counsel would have discussed without prompting. Counsel believes that the Court's hesitancy to consider Ryan's objections to the jury instructions may rest on some misconception—perhaps the unfounded belief that misstatements of state and federal statutory law are never more than non-constitutional errors and do not violate the federal Constitution even when they direct juries to convict for conduct that the legislature has not made criminal.

If, however, a state trial judge were maliciously to make up a crime, tell a jury falsely that state law prohibited it, and direct the jury to punish a defendant for committing it, both the state-law error and the due process violation would be plain. The due process violation seems no less clear when the judiciary orders a jury to punish someone for a nonexistent crime (something like "failing to disclose any personal or financial conflict of interest") in good faith. *See Whalen v. United States*, 445 U.S. 684, 690 (1980) (noting the "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress").

> these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

This section examines *Henderson v. Kibbe*, 431 U.S. 145 (1977) (rejecting a claim that instructional error violated the due process clause); *Neder v. United States*, 527 U.S. 1 (1999) (concluding that an instructional error violated the Constitution); *Middleton v. McNeil*, 541 U.S. 433 (2004) (rejecting a claim that instructional error violated the due process clause); *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S.Ct. 530 (2008) (holding an instructional error subject to harmless error review in a *habeas corpus* proceeding); and *Skilling*. It then considers *Frady*, *Engle*, and *Bousley*.

1. *Kibbe*. Together with another man, the habeas corpus petitioner in *Kibbe* robbed a highly intoxicated victim and abandoned him without his glasses, pants, boots, or coat on a roadway during a blizzard. The temperature was near zero, and visibility was obscured by the swirling snow. While seated on the roadway, the victim was killed by a speeding truck. The petitioner was convicted of second-degree murder on the theory that "under circumstances evincing a depraved indifference to human life, he recklessly engage[d] in conduct which create[d] a grave risk of death to another person, and thereby cause[d] the death of another person." 431 U.S. at 147-48 (quoting N.Y. Penal Law § 125.25(2) (McKinney 1975)).

At trial, the court informed the jury that causation was an element of the offense charged but did not elaborate on the meaning of this term. The petitioner neither sought an instruction on causation nor complained about its absence when he appealed his conviction. *Id.* at 148-50.

The petitioner, however, did complain in his federal *habeas corpus* petition. His case preceded development of the cause and prejudice standard, and the Supreme Court ignored his procedural default. The Court noted that an erroneous instruction "by itself" may "rise to the level of constitutional error," but it cautioned that a claim of instructional error ordinarily "'must be viewed in the context of the overall charge.'" *Id.* at 152 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)). It then concluded that, even if the instructions inadequately set forth the applicable New York law, there was no violation of the Constitution:

> The Court has held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, [397 U.S. 358, 364 (1970)]. One of the facts which the New York statute required the prosecution to prove is that the defendants' conduct caused the death of Stafford. As the New York Court of Appeals held, the evidence was plainly sufficient to prove that fact beyond a reasonable doubt. *It is equally clear that the record requires us to conclude that the jury made such a finding*.
>
> There can be no question that the jurors were informed that the case included a causation issue that they had to decide. The element of causation was stressed in the arguments of both counsel. The statutory language, which the trial judge read to the jury, expressly refers to the requirement that defendants' conduct "cause[d] the death of another person." The indictment tracks the statutory language; it was read to the jurors and they were given a copy for use during their deliberations. The judge instructed the jury that all elements of the crime must be proved beyond a reasonable doubt. … It follows that the objection predicated on this Court's holding in *Winship* is without merit.

Id. at 153-54 (emphasis added). The Court added that, because the trial court's instruction on recklessness required the jurors to find that the harm was foreseeable, a

more complete causation instruction "would not have affected their verdict." *Id*. at 156-57.

The Supreme Court plainly did not require a showing that "the record could not under any circumstances support [a] finding that [the petitioner] committed the offense." Had that been the standard, the Court would have ended its opinion with the statement, "As the New York Court of Appeals held, the evidence was plainly sufficient to prove [causation] beyond a reasonable doubt." *Id.* at 153. Rather, the Court probed the record and concluded that the jury not only *might have* but *did in fact* find every element of the offense charged beyond a reasonable doubt. *Id.* at 154-57.

2. Neder. In *Neder*, the trial court's instructions failed to advise the jury of one element of tax fraud—materiality. On at least one count, however, the proof of materiality was overwhelming. The defendant had underreported his income by $5 million, and even the defendant did not argue that anyone could have found this misrepresentation immaterial to a determination of his tax liability. 527 U.S. at 4-6.

The parties agreed that the trial court's failure to advise the jury of an element of the crime constituted constitutional error. The principal issue was whether this defect was a "structural" error entitling a defendant to "automatic" reversal or whether the error could be judged harmless. A bare majority of the Court concluded that the error could be harmless. It then declared applicable the harmless error standard employed to judge constitutional but not non-constitutional errors on direct review—whether the error was harmless beyond a reasonable doubt. *Id.* at 7-20. This ruling assured that the defendant had not been convicted of noncriminal conduct and that every fact

necessary to establish the offense of which he had been convicted had been established beyond a reasonable doubt.

3. *McNeil*. Under California law, a genuine but unreasonable fear of imminent peril negates malice and reduces a killing from murder to manslaughter. Three separate instructions at McNeil's trial correctly described this doctrine, known as the doctrine of "imperfect self-defense," but a fourth said inconsistently, "An 'imminent' peril is one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer *as a reasonable person*." *See* 541 U.S. at 435 (emphasis added). The California Supreme Court acknowledged the glitch. It noted, however, that the prosecutor had correctly described the law in his closing argument, declared that error must be judged in light of the instructions as a whole, concluded that it was not reasonably likely that the jury misunderstood the elements of imperfect self-defense, and held the error harmless. *Id.* at 435-36.

After the Ninth Circuit ordered *habeas corpus* relief, declaring that the erroneous instruction had "eliminated" the petitioner's imperfect self-defense claim, the Supreme Court unanimously reversed. It said, "In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. … Nonetheless, not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Id.* at 437. The Court emphasized that a single instruction should not be viewed in "artificial isolation." The question was whether there was a reasonable likelihood that the jury had applied the challenged instruction in a way that violated the Constitution, and the answer to that

question was no. *Id*. Again, the *habeas corpus* petitioner had not been convicted of noncriminal conduct, and the jury had found every fact necessary to establish her crime beyond a reasonable doubt.

4. *Pulido*. The Supreme Court's most recent consideration of an instructional error in a *habeas corpus* proceeding came three years ago. The petitioner in *Hedgpeth v. Pulido* was convicted of felony murder in a California court. He maintained that the jury instructions would have permitted his conviction even if he decided to join the felony after the murder had been committed. On appeal, the California Supreme Court acknowledged that the instructions misstated state law, but it held the error harmless. *Pulido*, 129 S.Ct. at 531.

The Supreme Court explained what happened next:

> Pulido sought federal habeas relief, which the District Court granted after concluding that instructing the jury on the invalid theory had a "'substantial and injurious effect or influence in determining the jury's verdict.'"… The State appealed, and the Court of Appeals affirmed … On appeal, Pulido argued … that when a jury returns a general verdict after being instructed on both a valid and an invalid theory, the conviction must be automatically set aside, without asking whether the invalid instruction was harmless. The Court of Appeals … agreed with Pulido that instructing the jury on multiple theories of guilt, one of which is legally improper, was "structural" error exempting the instructions as a whole from harmless-error review.

Id. (internal citations omitted).

The Supreme Court reversed the Court of Appeals. It held that, because the instructional error was not "structural," it was subject to harmless error review. *Id.* at 532-33. No justice doubted that the instructional error was cognizable in a *habeas corpus* proceeding, and none disagreed with Justice Stevens' statement in dissent that,

"because the instructions allowed the jury to convict Pulido of felony murder for conduct that does not amount to that offense, their inclusion was constitutional error." *Id*. at 534 (Stevens, J., dissenting).

The *Pulido* majority explained the development of the *Yates* doctrine on which the Supreme Court later relied in *Skilling*: "A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Id.* at 530 (citing *Stromberg v. California*, 283 U.S. 359 (1931), and *Yates v. United States*, 354 U.S. 298 (1957)). The Court continued:

> *Stromberg* addressed the validity of a general verdict that rested on an instruction that the petitioner could be found guilty for displaying a red flag as "a sign, symbol, or emblem of opposition to organized government, or [a]s an invitation or stimulus to anarchistic action, or [a]s [a]n aid to propaganda that is of a seditious character." [283 U.S. at 363-64] … After holding that the first clause of the instruction proscribed constitutionally protected conduct, we concluded that the petitioner's conviction must be reversed because "it [wa]s impossible to say under which clause of the [instruction] the conviction was obtained." *Id.* at 368 … In *Yates* … , we extended this reasoning to a conviction resting on multiple theories of guilt when one of those theories is not unconstitutional, but is otherwise legally flawed.

Id. at 531-32.[11] Again, the Court's decision precluded the punishment of a *habeas corpus* petitioner unless it could be said with confidence that the jury had found the facts necessary to establish his guilt beyond a reasonable doubt.

[11] How curious it would be if, only three years after the Supreme Court was considering whether an instructional error was "structural" and subject to automatic reversal in a *habeas corpus* proceeding, the Seventh Circuit were to hold on the basis of a theory not presented by the government that such an error was not subject to *habeas corpus* review at all.

5. Skilling. In *Skilling*, the Supreme Court applied *Pulido*:

> Because the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud—Skilling's conviction is flawed. *See Yates v. United States* … (constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory). This determination, however, does not necessarily require reversal of the conspiracy conviction; we recently confirmed, in *Hedgpeth v. Pulido* … that errors of the *Yates* variety are subject to harmless-error analysis.

130 S. Ct. at 2934. The Fifth Circuit had previously declared that *Pulido* applied *only* on collateral review. It said that, on a direct appeal, Skilling would be entitled to automatic reversal "if any of the three objects of [his] conspiracy offer[ed] a legally insufficient theory." The Supreme Court rejected the Fifth Circuit's position and held the trial court's pre-*Skilling* errors subject to harmless error analysis. *Id*. at 2934 n.46.

6. *Frady*, *Engle*, and *Bousley*. At argument, efforts by Ryan's counsel to explain the constitutional foundation of his objections to the jury instructions were interrupted:

> The arguments you are making look like the kind of arguments that the Supreme Court squarely said in *Frady* cannot be raised on collateral attack.
>
> That's what the D.C. Circuit held in *Frady* and which the Supreme Court reversed.
>
> Okay, if that is your argument, it is inconsistent with both *Frady* and *Engle v. Isaac*.

ATr. 2.

Counsel remains confused. In *Frady*, the D.C. Circuit granted *habeas corpus* relief on the basis of a *procedurally defaulted* objection to a jury instruction because it found the error plain. *See* 456 U.S. at 159. The Supreme Court reversed, declaring that the

standard for relieving a litigant of a procedural default in a *habeas corpus* proceeding is cause and prejudice, not plain error. *Id*. at 167.

The Court described the showing needed to establish "prejudice": "[The petitioner] must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170.[12] This statement had no application to *non-defaulted* objections to jury instructions. The Court also acknowledged the "miscarriage of justice" or "actual innocence" exception to the "cause and prejudice" requirement: "[T]his would be a different case had Frady brought before the District Court affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent." *Id*. at 171. This statement also had no application to non-defaulted errors.

The standard for judging non-defaulted objections remains harmless error. Courts afford relief on *habeas corpus* to petitioners who present *valid*, *non-defaulted*, *constitutional* objections to jury instructions unless the instructional error was harmless. Moreover, a misstatement of the substantive criminal law violates the Constitution when it permits the jury to convict without finding every element of the offense charged

[12] Even when the "cause and prejudice" standard applies, a petitioner need show only an "actual and substantial disadvantage," not that the record could not under any circumstance support a finding that he committed the offense charged. Indeed, even the "actual innocence" exception does not require a showing that the record could not under any circumstance support a conviction. It is enough that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Carrier*, 477 U.S. at 496.

beyond a reasonable doubt—when it authorizes conviction for conduct that the legislature has not made criminal.

Neither *Frady* nor any of the other cases noted by the Court indicate (1) that collateral attack may not be used to challenge jury instructions, (2) that incorrect jury instructions do not violate the Constitution,[13] or (3) that, rather than challenge jury instructions, a *habeas corpus* petitioner must show that the record could not support a finding that he committed the offense charged.

At argument, one judge noted that the government and Ryan's counsel focused on different issues. The government emphasized that a properly instructed jury *might* have found Ryan guilty of honest services fraud under the *Skilling* standard. Ryan's counsel emphasized that the jury in Ryan's case might *not* have. This judge declared that, for her, "the question that this case turns on [is] the proper standard of review." ATr. 12.

Requiring Ryan to show that the record could not support a finding of guilt would leave him in prison although the jury might not have found that his conduct violated any law—indeed, even if the jury *probably* or *almost certainly* did not find him guilty of honest services fraud. It would be enough that, because the evidence was *sufficient*, the jury *might* have found him guilty of criminal conduct. A civilized legal system does not keep people in prison because it has concluded that they might be

[13] In *Engle v. Isaac*, the Supreme Court concluded that one of the petitioner's objections to a jury instruction "state[d] a colorable constitutional claim." 456 U.S. at 122. It held, however, that the claim had been procedurally defaulted.

guilty. As the foregoing discussion reveals, federal law provides a remedy for this intolerable restraint.

In *Bousley*, Chief Justice Rehnquist's opinion for the Court observed:

> [O]ne of the "principal functions of habeas corpus [is] to 'assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'"… [D]ecisions…holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct "'beyond the power of the criminal law-making authority to proscribe,'"… necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal." [*Davis*, 417 U.S. at 346.] … For under our federal system it is only Congress, and not the courts, which can make conduct criminal. … Accordingly, it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on … *Bailey* [a decision narrowing the scope of a federal criminal statute].

523 U.S. at 620-21. *See generally* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

C. *Toulabi* and Other Seventh Circuit Precedent.

This Court has ruled (or at least has proceeded on the assumption) that instructional error of the sort Ryan alleges violates the Constitution. In *United States v. Black*, 625 F.3d 386 (7th Cir. 2010) and *United States v. Segal*, Nos. 09-3403, 09-3684, 2011 WL 1642831, 2011 U.S. App. LEXIS 9038 (7th Cir. May 3, 2011), it considered whether pre-*Skilling* instructional error was harmless. On direct review, the standard employed to evaluate the harmlessness of a constitutional error differs from that employed to evaluate the harmlessness of a non-constitutional error. *Compare Chapman v. California*, 386 U.S. 18, 24 (1967), *with Kotteakos v. United States*, 328 U.S. 750 (1946). *Black* and *Segal* were cases on direct review, and in both, this Court employed the "harmless beyond a

reasonable doubt" standard applicable only to constitutional errors. *See Black*, 625 F.3d at 388; *Segal*, 2011 WL 1642831 at *1, 2011 U.S. App. LEXIS 9038 at * 3 ("*Skilling* holds that an error such as occurred here does not require the reversal of a conviction if it is shown to be harmless beyond a reasonable doubt.").

A half-dozen Seventh Circuit decisions in the years after *McNally v. United States*, 483 U.S. 350 (1987), are on point. *McNally* rejected the intangible rights doctrine and held that only a scheme to deprive a victim of property could violate the mail fraud statute. When prisoners sought relief from pre-*McNally* convictions in section 2255 proceedings, this Court examined the record to determine whether errors in the instructions authorizing their conviction on an intangible rights theory were harmless—that is, whether juries *must* have convicted the prisoners of depriving their victims of property as well. *See Messinger v. United States*, 872 F.2d 217, 221 (7th Cir. 1989) ("[W]e must … examine the indictment, the evidence, and the jury instructions to see if the jury *necessarily* had to convict Messinger for defrauding Cook County of its property right … notwithstanding any intangible rights theory employed") (emphasis added); *Lombardo v. United States*, 865 F.2d 155, 158 (7th Cir. 1989) ("In order to determine whether defendants' convictions should be vacated, it is necessary to determine whether the indictment, jury instructions and evidence produced at trial *required* the jury to find that the defendants schemed to deprive the [victim] of a protectable property right within the scope of *McNally*.") (emphasis added); *Moore v. United States*, 865 F.2d 149, 151, 154 (7th Cir. 1989) (examining "the evidence, the indictment and the instructions" and concluding that that the petitioner's conviction was "clearly based on loss of money or

property"); *United States v. Folak*, 865 F.2d 110, 113 (7th Cir. 1988) ("[T]he government could not logically prove one scheme without proving the other since the elements of the two were identical."); *United States v. Bonansinga*, 855 F.2d 476, 479-80 (7th Cir. 1988) (coram nobis proceeding) (rejecting an argument based on erroneous jury instructions because "what is crucial is that the 'scheme to defraud' was not defined in such a way as to allow conviction for conduct which was not an offense").

*Toulabi v. United State*s, 875 F.2d 122 (7th Cir. 1989), criticized the Court's approach in these cases, prompting Judge Ripple to defend the Seventh Circuit's rulings in a concurring opinion. Judge Easterbrook's opinion for the Court[14] offered the same complaint about his colleagues that he offered about counsel on both sides in this case. Some Seventh Circuit opinions had "not even mentioned the difference between direct and collateral review, examining the record and jury instructions as if the cases were on direct appeal." *Id*. at 124.

Judge Easterbrook concluded that the procedural posture of *Toulabi* "preclude[d the Court] from deciding in today's case how far an appellate court should inquire into the record and instructions of a case on collateral review …" *Id*. He indicated, however, that this review might be limited to whether the indictment stated an offense, whether the evidence was sufficient to allow a reasonable trier of fact to conclude that the defendant committed a crime, and whether an instructional error or other defect so

[14] Ryan's counsel understand the wisdom of not personalizing the actions of this Court by noting the authors of individual opinions. In describing a disagreement *within* the Court and statements made in dictum, however, it seems appropriate to do so.

infected the entire process that the resulting conviction violated due process. *Id*. at 124.[15]

Judge Ripple's concurring opinion reviewed all of the Seventh Circuit's opinions in section 2255 appeals since *McNally*. He declared:

> [T]hey have all recognized, as a fundamental element of their methodology, that the court's task in a section 2255 proceeding is to ensure that the appellant was convicted because he engaged in conduct proscribed by the mail fraud statute. The instructions and the evidence were examined to answer this basic question, not to identify any procedural flaw that, on direct appeal, might have required a new trial. This approach is certainly compatible with the Supreme Court's holding in *Davis* … That case hardly suggests that a section 2255 inquiry must be limited to the indictment.

Id. at 127-28 (Ripple, J., concurring).

According to Judge Easterbrook, the flaws of the Seventh Circuit's post-*McNally* opinions were not attributable primarily to the judges. In *Toulabi*,

> [t]he prosecutor … briefed the issues just as if this were a direct appeal, and Toulabi responded in kind. This is a common sequence in *McNally* cases on collateral attack, and it is then not surprising that when the court—without mentioning the difference between direct and collateral attack—proceeds to conduct a second full review.

Id. at 124 (opinion of the Court).

Judge Ripple responded:

> In its brief, the government argued that … it was impossible for the jury to find the existence of a scheme to deprive the City of intangible rights without also finding the existence of a scheme to deprive the City of property interests. … This is substantially the same analysis that this court's cases have employed in reviewing section 2255 attacks on pre-

[15] *Toulabi* did not consider whether an instruction directing conviction for noncriminal conduct (if not harmless because the jury must have convicted on another theory as well) would so infect the entire process that the defendant's conviction would violate due process.

> *McNally* mail fraud convictions. It is the analysis we should expect to see from the government in future cases as well.

Id. at 128 (Ripple, J., concurring).

Toulabi's discussion of the limitations of collateral review was dictum. The holding of this case was that the petitioner was entitled to section 2255 relief because the government had waived the arguments Judge Easterbrook thought it ought to have made and because "the jury did not necessarily find that Toulabi's scheme deprived Chicago of … property." *Id*. at 126 (opinion of the Court). "We accept the case as the parties have presented it, examining the record and instructions as we would on direct appeal." *Id*. at 124-25.

Whatever the merits of the *Toulabi* dicta at the time of that decision, they do not describe the law of collateral review today. Ryan would be content, however, if the Court were to do what it did in *Toulabi*—accept the case as the parties have presented it and determine whether Ryan might have been convicted for conduct that the law does not make criminal. *See Buchmeier v. United States*, 581 F.3d 561, 563 (7th Cir. 2009) ("The United States thus has forfeited, if it has not waived, any contention that the overall performance of Buchmeier's lawyer was adequate; it has effectively consented to treating this collateral attack as a rerun of the direct appeal.").[16]

III. THE "CAUSE AND PREJUDICE" STANDARD DOES NOT BAR CONSIDERATION OF RYAN'S OBJECTIONS TO THE "FINANCIAL BENEFITS" INSTRUCTIONS.

[16] The government may respond to the Court's request for a supplemental memorandum by making the arguments proposed by members of the Court. This memorandum, however, would not cure the government's earlier failure to present these arguments to the District Court or in its initial brief in this Court.

Ryan maintains that several of the District Court's "financial benefits" instructions directed conviction for conduct that does not constitute bribery or honest services fraud under federal standards—the "campaign contributions" instruction, the "benefits intended to influence" instruction, and the "rewards" instruction.

The government did not suggest in the District Court that Ryan's objection to the "campaign contributions" instruction had been waived or defaulted. *See* A-000015 n.8. It did contend that Ryan waived his objection to the "benefits intended to influence" instruction by failing to offer this objection on appeal and that he proposed the "rewards" instruction at trial himself. *See* A-000340 n.12. The government did not argue in the District Court that Ryan's alleged defaults could be excused only by a showing of cause and prejudice, and Ryan's reply did not suggest that cause and prejudice was the appropriate standard.

The District Court, however, cited two Seventh Circuit cases applying the cause and prejudice standard when it ruled that Ryan's objections could be considered despite his default. *See* A-000015 n.8. In *Waldemer v. United States*, 98 F.3d 306, 308 (7th Cir. 1996),[17] this Court noted *Engle v. Isaac*'s declaration that the futility of asserting a federal constitutional claim does not amount to cause for failing to raise an objection. It then declared, "This principle—which preserves a state court's right to rethink a decision that may conflict with federal constitutional law—is inapposite in cases, like this one, where the federal defendant faces seemingly intractable *federal* precedent that

[17] The District Court mistakenly cited this case as appearing in 106 F.3d at page 729. Another ruling in the same case appears there.

his constitutional objection would be futile." *Waldemer*, 98 F.3d at 308. In *Bateman v. United States*, 875 F.2d 1304, 1308 (7th Cir. 1989), the Court declared that that the Supreme Court's decision in *McNally* "did indeed represent the type of startling break with past practices so as to excuse procedural default" under the cause and prejudice standard.

Ryan's opening brief in this Court noted the government's allegations of procedural default and reiterated the District Court's reasons for reaching the merits of his claims. *See* A-000015 n.8; RBr. 39. The government then invoked the cause and prejudice standard for the first time. GBr. 41. Ryan might have responded that the government waived application of this standard by failing to propose it to the District Court, *see Doe*, 51 F.3d at 698-99, but he did not. Instead, after noting that the government had waived any claim of waiver with respect to the "campaign contributions" instruction, Ryan argued that the cause and prejudice standard allowed consideration of his objections to the other two instructions.

At argument, a judge declared, "*Bousley* holds that there is no cause in a situation like this." ATr. 9. *Bousley*, however, declared:

> While we have held that a claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause for a procedural default, …petitioner's claim does not qualify as such. The argument that it was error for the District Court to misinform petitioner as to the statutory elements of § 924(c)(1) was most surely not a novel one. … Indeed, at the time of petitioner's plea, the Federal Reporters were replete with cases involving challenges to the notion that "use" is synonymous with mere "possession."

523 U.S. at 622.

No litigant anywhere in the United States appears to have argued prior to *Skilling*—or indeed in *Skilling* itself—that honest services fraud should be confined to schemes to obtain bribes and kickbacks. *See Skilling*, 130 S. Ct. at 2940 (Scalia, J., concurring in part) ("Until today, no one has thought … that the honest-services statute prohibited only bribery and kickbacks."). The Supreme Court has expressly recognized that "cause" for a default exists when one of its decisions "'overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.'" *Reed v. Ross*, 468 U.S. 1, 17 (1984) (quoting *United States v. Johnson*, 457 U.S. 537, 551 (1982)). Following *McNally*, this Court and others excused procedural defaults under the cause and prejudice standard because that decision marked a "clear break with the past." *See* ReplyBr. 20. *Skilling* was no less a "clear break" than *McNally*.

Ryan's alleged forfeiture of his objections to the financial benefits instructions matters when the question is whether the errors in these instructions themselves warrant setting aside his conviction, but Ryan's alleged default does not matter when the issue is whether errors in the *Bloom*, conflicts of interest, and state law instructions were harmless. Again, the government has never suggested that Ryan waived his objections to these instructions. Instead, it has contended that the instructional errors were harmless *because* the jury must have found a violation of the financial benefits instructions and so must have found bribery. If the jury could have found a violation of the financial benefits instructions *without* finding bribery, the government's harmless error argument fails. It fails even if Ryan would be barred from asserting the errors in

the financial benefits instructions as an independent basis for setting aside his conviction. The Court may find it necessary to consider whether the financial benefits instructions encompassed more than bribes to resolve the harmless error issue regardless of any question of waiver.

CONCLUSION

The parties have fairly and responsibly briefed and argued this case, focusing on the sorts of instructional issues that this Court and others have addressed in countless post-conviction proceedings. The Court should decide this case on the basis of the issues they have presented.[18] Instructions that direct conviction without proof beyond a reasonable doubt of conduct that the legislature has made criminal violate the

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[18] One judge criticized government counsel for failing to argue that Ryan's post-conviction petition was untimely. He observed that no Supreme Court decision making *Skilling* retroactive had extended the otherwise applicable statute of limitations. "What you seem to be thinking here is that if you're confident the Supreme Court will declare it retroactive then we just don't bother with details like the Supreme Court actually declaring it retroactive. And that is certainly not how this court has interpreted 2255(f)(3) in the past." ATr. 8.

Unlike other provisions of the Antiterrorism and Effective Death Penalty Act, which speak of new rules "made retroactively applicable to cases on collateral review by the Supreme Court," *e.g.*, 28 U.S.C. § 2254(e)(2), the statute of limitations applicable to Ryan's case allows a prisoner to file a section 2255 petition within one year of a Supreme Court decision recognizing a new right if that right "has been made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). This language omits the words "by the Supreme Court." The very judge who criticized government counsel authored the opinion in *Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001), which held that, under a provision like this one, "district and appellate courts, no less than the Supreme Court, may issue opinions 'holding' that a decision applies retroactively to cases on collateral review." *Id*. at 673. The Court noted that "permitting a district or appellate court to make the retroactivity decision for an initial petition may be essential to put the question before the Supreme Court for final resolution," *id*., and it said, "Just as a district court possesses jurisdiction to determine its own jurisdiction, it must possess the authority to determine a precondition to the timeliness of an action." *Id*. at 674; *see also Narvaez*, 2011 WL 2162901 at *2, 2011 U.S. App. LEXIS 11203 at * 7-8 (holding a Section 2255 petition timely because it was filed within one year of two Supreme Court decisions clarifying the meaning of the term "violent felony").

Constitution, and allegations of this sort of error are cognizable in section 2255 proceedings. The "cause and prejudice" standard has no application to non-defaulted objections. When instructions have directed conviction for noncriminal conduct and the petitioner has not defaulted his objections, the question before a *habeas corpus* court is whether the instructional error was harmless.

Respectfully submitted,

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ORAL ARGUMENT

DATE: May 31, 2011

GEORGE RYAN V. UNITED STATES OF AMERICA – 10-3964

Seventh Circuit Court of Appeals

ORAL ARGUMENT

DATE: May 31, 2011

GEORGE RYAN CASE – 10-3964

Seventh Circuit Court of Appeals

Albert W. Alschuler for Defendant Ryan
Laurie J. Barsella for the Government

COURT 1	Our next case for argument this morning is Ryan against the United States. Mr. Alschuler.
Mr. Alschuler	Good morning and may it please the court. The jury instructions in this case marked four paths to conviction for honest services fraud and three of them told the jury to convict for conduct that is not criminal.
COURT 1	Mr. Alschuler, I am puzzled why we are talking about jury instructions in this case. Your brief proceeds as if this were a re-run of the direct appeal, but of course it isn't. It's a collateral attack and my understanding of the Supreme Court's opinions in Davis and Bousley is that they don't allow challenges to jury instructions – belated challenges to jury instructions. They allow the person in prison to argue that he has been convicted of something the law does not make criminal. In other words that on the evidence at trial in light of the later statutory interpretation the only proper judgment is a judgment of acquittal. But I don't understand you to be arguing that on the evidence at trial the only proper judgment was a judgment of acquittal so I wonder what we have got here, if anything.
Mr. Alschuler	First, the government has not suggested that these issues are not properly before this court. I think it has waived any point based on the cases cited by the court and, second, it is a constitutional violation – section 2255 affords relief to anyone who is in prison in violation of the Constitution or laws of the United States.
COURT 1	Well, Mr. Alschuler do you disagree with what I have said, I believe, is the holding of Bousley and Davis.
Mr. Alschuler	Well, I don't recall the holding of Bousley and Davis and they were not

cited by the government and I --

COURT 1 No, oddly - oddly they haven't been. The argument that you're making is an argument that the Supreme Court rejected 9 to nothing in the United States against Frady which said that collateral attack absolutely cannot be used to challenge the jury instructions.

Mr. Alschuler Well, we are not simply challenging the jury instructions, Your Honor.

COURT 1 No, you are challenging rulings on evidence too.

Mr. Alschuler No, we are saying that George Ryan was convicted --

COURT 1 Look, Mr. Alschuler,

Mr. Alschuler -- in violation of the Constitution.

COURT 1 Mr. Alschuler -- Mr. Alschuler, trying to talk over a question from the bench won't do you any good. The arguments that you are making look like the kind of arguments that the Supreme Court squarely said in Frady cannot be raised on collateral attack. Now, am I misunderstanding Frady.

Mr. Alschuler My recollection -- I have Frady once upon a time and my recollection of that case is dim. Uh, We are saying that George Ryan was convicted in violation of the Constitution. It is --

COURT 1 Right, I understand that. That's what the D.C. Circuit held in Frady and which the Supreme Court reversed.

Mr. Alschuler No, the Supreme Court has said --

COURT 1 It said that incorrect jury instructions are not themselves a violation of the Constitution. They are a violation of a statute maybe but not of the Constitution. And the Supreme Court has said more often than I care to remember that just getting the law wrong does not entitle one to collateral attack.

Mr. Alschuler Again, we are suggesting more than that the District Court got the law wrong. The law is that if the jury instructions permitted conviction on the basis of an invalid theory – permitted conviction of somebody who may be innocent then that is a Constitutional violation. It is a violation --

COURT 1 Okay, if that is your argument, it is inconsistent with both Frady and Engle against Isaac. Now, if you have got an argument that your position is

compatible with those cases, I'd love to hear it.

COURT 2 Which I think means if you are arguing in fact that going beyond details like jury instructions is this a situation where the record simply could not under any circumstance support finding that George Ryan has committed the offense that the Supreme Court has now recognized in Skilling. Maybe that is where you need to go.

Mr. Alschuler Well, we certainly do argue that the evidence is insufficient to establish bribery in this case. Uh-- what are the alleged bribes? They all relate to transactions with two people – Larry Warner and Harry Kline. The only mail fraud counts that remain standing involve contracts and leases that benefited Warner and Kline. And what were the supposed bribes? Well, Warner, a long-time friend and political associate, was both a lobbyist and insurance adjuster and he failed to charge an insurance adjustment fee when Ryan's apartment flooded on Christmas Day. He also held two political fundraisers for Ryan, paid for the band at Ryan's daughter's wedding, gave other benefits to members of Ryan's family and split some of his lobbying fees with other Ryan associates. While Ryan was Secretary of State, his office entered into contracts with three of Warner's lobbying clients and leased two properties in which Warner had interest.

COURT 2 But you know there was a lot of – um – evidence at the trial suggesting that this flow of benefits to Ryan and his friends was in return for favorable official action and I want to put campaign contributions off to one side because a great deal of it had nothing to do with campaign contributions. I don't see why it was not entirely permissible for the jury to infer that there was an exchange going on and I want to use that word as opposed to Latin phrases or other things that tend to get confusing. That there was an exchange. You know, I'll throw this business your way – you'll give me benefits.

Mr. Alschuler The touchstone of bribery is a quid pro quo exchange.

COURT 2 An exchange - let's just say an exchange.

Mr. Alschuler All right, but an exchange at the time that the benefits are received. Every definition of "bribery" looks to the moment when the benefits are received and, as of that moment, the official is either guilty or not guilty.

COURT 2 Well I'm not sure that that's right. I mean, there is this sort of what you could call stream of benefits or the government called it a meal plan in its argument and this stream of benefits theory suggests that at the time the benefit is received it's understood that when the opportunity arises the other

half of the transaction will happen.

Mr. Alschuler — And, we agree that that is sufficient.

COURT 2 — Okay, so --

Mr. Alschuler — If there is an understanding that at the moment the benefit is received that George Ryan will provide some unspecified benefit to Larry Warner - that is a bribe.

COURT 1 — Can't that be inferred from what happens later – that subsequently the Secretary of State kind of goes out of his way to do things that favor these individuals. That gives rise to an inference.

Mr. Alschuler — Doing someone a favor who has done a favor for you is not bribery. There has to be an agreement of some sort, implicit or explicit, at the time the benefit is received.

COURT 2 — Well, that is what Judge Tinder is saying. Why can't the jury infer from the lack of any other plausible explanation that there was such an agreement. You're only answer is well they were friends and that is not maybe that is a permissible inference but I don't see why it is a necessary inference.

Mr. Alschuler — Well, go back to that hypothetical case we suggested in our brief. The governor has a benefactor named "Ben." Ben has given the governor a stream of benefits. He has supported the governor's political campaigns, he has contributed to a private fund to purchase furniture for the governor's mansion, he's entertained the governor and his spouse at Ben's ranch. Until now, Ben has never asked the governor for anything but now Ben's brother is seeking a government position and Ben tells the governor that his brother would be a fine appointment, the governor does appoint Ben's brother. The evidence shows no more. Should Ben and the governor be convicted of honest services fraud and sentenced to as much as 20 years in a federal penitentiary. Should this case even reach the jury. A prosecutor might call this the functional equivalent of bribery and it might have been. Ben might have cultivated the governor's favor with the thought that he might at sometime want a favor. The governor might have appointed Ben's brother because he wanted to encourage future contributions. One hand might have been washing the other, yet, that characterization toots only one horn of the dilemma – the benefits that Ben gave the governor didn't seem to be bribes when they were given.

COURT 2 — Well --

Mr. Alschuler — We want people to contribute to political campaigns. We want them to buy furniture for the governor's mansion. We don't think that public officials can't be entertained by their friends.

COURT 2 — But you're assuming the answer to a lot of questions and I think going back to what Judge Easterbrook was first saying. If the evidence in this record would have permitted a jury to find that there was the kind of agreement – this is an exchange for that in this case – then I am not sure how this is an appropriate case for us to do anything but affirm in.

Mr. Alschuler — Well, I don't think that's a reasonable inference. In the closing argument, the definition of "bribery" as I say is a quid pro quo exchange. In Evans against the United States, the Supreme Court said the offense is complete at the time when the public official receives a payment in return for his engagement to perform specific official acts.

COURT 2 — And the jury could have thought in this case that just such an agreement is in place.

Mr. Alschuler — Well, the government didn't even make that argument to the jury.

COURT 2 — Well, they said they weren't doing the narrow. That is why I would rather not talk about quid pro quo. They said though that, you know, the governor's office was for sale. They said that George Ryan was --

Mr. Alschuler — They wanted to imply that there was some reciprocity that was the equivalent of bribery.

COURT 2 — Well, right, let's just say that they suggested to the jury that it could infer from the evidence in front of it that there was, in fact, an agreed exchange going on where the temporal moments of fulfilling that agreement might have been a little different but that there was an agreement.

Mr. Alschuler — How did Ryan reciprocate this friendship with Warner, the government asks. Government business is how he did it. $3,000,000 worth of government business. Was it a quid pro quo? You may not want to talk about quid pro quo but the Supreme Court has in every majority concurring and dissenting opinion in every bribery case they have used those words. Was it a quid pro quo? No it wasn't. Have we proved a quid pro quo? No we haven't. Have we charged a quid pro quo? No we haven't. We have charged an undisclosed flow of benefits back and forth and I am going to get to the instructions in a minute folks but that is what we have charged and in several other statements the government conceded the absence of the defining element of bribery.

COURT 2 Now, of course, in Skilling, the Supreme Court cites with approval the Whitfield, Ganum (ph), and Kemp cases which are stream of benefits cases.

Mr. Alschuler And we don't quarrel with the stream of benefits theory at all. It can be inferred. It can consist of a stream of benefits but at the time some benefit is received there has to be an agreement to do something in return and I don't see any evidence that there was in this case. There are other explanations that are at least equally plausible that are innocent.

COURT 2 But why is that the standard? Isn't the standard as long as the jury could find that there was this kind of exchange then we're at least this isn't --

Mr. Alschuler As long as the jury could find – that is correct. And a reasonable jury cannot infer guilt, you know, when there are more plausible explanations consistent with innocence.

COURT 2 But you're inviting us now to be the jury and we can't do that. Actually, we can't even do that on direct appeal and we certainly cannot on 2255.

Mr. Alschuler I mean I am astonished that you think I am asking you to take the place of the jury in this case when the jury in this case did not find bribery. When the jury was instructed on three theories of things that are not criminal and when the government all but displaying reliance in a bribery theory in its closing argument. The government now says that when it told the jury that it did not need to find a quid pro quo it meant that the jury did not have to find an express promise to give a specific benefit for a specific official action. And so --

COURT 2 Let me just ask you though. I mean this jury does have taking the instructions as a whole an instruction on personal and financial benefits. The record has a lot of evidence about that in it. The jury is told that there is an exchange element to it so I am not sure that the jury found in your client's favor. It didn't acquit on those counts.

Mr. Alschuler No, it did not acquit on those counts although there is no reason to believe that they found guilt on that theory.

COURT 2 Well, the District Court saw that quite differently. The District Court thought that the only reason that they could have come to the conclusions they did was because underneath it all was this kind of impermissible bribe or kick-back situation.

Mr. Alschuler Right uhm, and that was plainly wrong. The instructions permitted

conviction on the undisclosed conflict theory that the government emphasized from the beginning of trial to the end.

COURT 2 — But that's an instruction – I don't want to put words in Judge Easterbrooks' mouth here, but I think if we are beyond a point merely about the instructions and we are just looking at whether this is a person who is sitting in a federal prison for something that the law does not make criminal. That's Bousley. That's Davis. You know Bousley is the case that comes along after Bailey on the gun point. Then that's a problem but that in our post-Bailey and Bousley cases we looked at the full record to see if that kind of miscarriage of justice was happening. And if there was even an uncharged possibility that suggested the law had been violated. Somebody carried a gun instead of using the gun, we did not give relief.

Mr. Alschuler — Well, as I say, the government did not rely on any of those cases in its brief and, I hope, that if the Court is thinking about relying on those cases they will give me a chance to file a supplemental brief and discuss them. I mean, as I think about them, I think Bousley was a guilty case. It applied to -- it was when a guilty plea waived the objections but as I say my recollection of those cases is dim. Well, I would like to reserve the remainder of my time for rebuttal. Thank you.

COURT 1 — Certainly Mr. Alschuler. Ms. Barsella.

Ms. Barsella — May it please the court. I'll begin by just saying that the government did not make a specific reference at all to the issue that Judge Easterbrook brought up and we do apologize for that. Obviously any forfeiture on our part does not bind the court and, if the court does want to have additional briefing on those points, we will be happy to submit them.

COURT 1 — Ms. Barsella, I have a question not only about this subject which the government seems quite mysteriously to have forfeited and it is very strange because this is a subject that was important enough to the United States that the Solicitor General took it to the Supreme Court in Frady and now the United States having won Frady the U.S. Attorney in Northern Illinois just ignores it. But I don't understand why we are here at all. This petition was filed more than 2 years after Ryan's conviction became final and appears to be untimely. But with respect to that issue it seems like the United States has not forfeited. The United States has waived and I don't get it. 2255 F(3) says that the time restarts if the Supreme Court makes a new decision and "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." What decision of the Supreme Court has made Skilling retroactively applicable to cases on collateral review?

Ms. Barsella — I believe below we did look at that issue and it was determined that when a statute is now newly interpreted so as to make one interpretation no longer law that we believe that F(3) did allow the 2255 --

COURT 1 — But that's not what the statute says. The statute says that the decision has to be made "retroactively applicable to cases on collateral review." Now what you seem to have thought and I won't press this further because this is something the government – untimeliness is an affirmative defense which seems to have been waived. What you seem to be thinking here is that if you're confident the Supreme Court will declare it retroactive then we just don't bother with details like the Supreme Court actually declaring it retroactive. And that is certainly not how this court has interpreted 2255 F(3) in the past.

Ms. Barsella — I do apologize for the fact that we misinterpreted that – we thought that in light --

COURT 1 — Did you misinterpret it or is this just a Department of Justice wide position?

Ms. Barsella — No, it isn't. When we analyzed this below in the District Court we were satisfied that he could raise it in light of the Supreme Court's decision in Skilling and we were obviously mistaken.

COURT 2 — The only reason that that baffled me is – I did some thinking about this as well – is that the only way I could reconstruct your thinking which did not appear anywhere was by thinking of Davis and Bousley and that is why I was surprised at the lack of discussion.

Ms. Barsella — In any event, the District Court did correctly determine that Skilling does not affect George Ryan's conviction. This was a bribery kickback case and any error was harmless because a reasonable jury could not have found Ryan guilty ---

COURT 1 — Why are you back to arguing harmless error. That's the approach that both Engle against Isaac and Frady expressly reject.

Ms. Barsella — Well, Judge Easterbrook. The fact is, as I think the court has picked up, the facts in this case clearly showed a bribery kickback scheme – a flow of benefits bribery kickback scheme – and the defense's argument regarding our jury arguments on the issue of quid pro quo are just simply incorrect.

COURT 2 — Well, I don't know about that. I mean the government went out of its way, understandably since Skilling hadn't been decided yet, to tell the jury that it

didn't have to find a quid pro quo. That it was enough to find undisclosed conflict, it was enough to do all of these other things, which was a responsible argument at the time it just doesn't happen to be where you want to be today. And I'm not so sure that the record is so crystal clear and so I would like some discussion about what you think the proper standard of review is. Uh, one possibility is we just sit around and look at the record to see if we can find anything that would support a jury verdict. Another possibility is we have to say could a reasonable jury, properly instructed with the reasonable doubt standard, etc., do this. There is the Breck (ph) standard floating around out there. There is Lanier. I think we need your view on what the standard is.

Ms. Barsella — Our view is that the Breck standard should apply here because this is a collateral review and --

COURT 1 — You're contradicting Frady again but go ahead.

Ms. Barsella — It seems to me that the finality --

COURT 1 — Frady said the right standard if there is any standard is cause and prejudice and Bousley holds that there is no cause in a situation like this but go ahead.

Ms. Barsella — It seems to me that a higher standard needs to apply. That certainly the Chapman standard of beyond a reasonable doubt should not be applicable at this stage and that certainly, at a minimum, in order to reverse the court has to find that there was substantial and injurious effect on the verdict and in this record there just wasn't.

COURT 2 — Mr. Ryan's point, as I understand it, is that he may have done quite a few bad things. He may have violated state law in all sorts of ways. He may have violated other laws but, he argues, as I understand it, what he did not do is violate the honest services branch of the fraud statute and that's what he was charged with. That's why we have indictments, that's how people structure their defenses so just because he may done other evil things in life isn't enough to keep him in prison for something that he didn't violate.

Ms. Barsella — Well, Judge, we believe that the evidence was very strong that he did violate the honest services statute and he did it in spades and he did it over a long period of time and the government didn't say when it was talking about a quid pro quo what the government was saying is exactly what the record reflects which it was using the term quid pro quo to mean a specific quid pro quo – a one for one quid pro quo. The government explained that this was not like a menu where each item has a separate price. It did explain that it was meal plan where you paid an ongoing price and you got

to take what you wanted. That message was brought across and that was not an original use of the term quid pro quo. That is how the parties were using it throughout this entire trial. So the government was talking about an exchange and the government told the jury that George Ryan sold his office. They made that argument over and over again.

COURT 2 But how do we know that the jury found that. There are two possibilities. The jury may have found that there was a pre-existing agreement between Mr. Ryan and Mr. Warner, for example, or Mr. Ryan and Mr. Kline that in a sense Mr. Ryan would be on retainer for them and would shoot benefits their way whenever the chance arose. Or it may have been that they were really just good buddies and he did that without, you know, any particular payment for it. He just did it.

Ms. Barsella The defense made that exact argument. The defense told the jury that if they found that George Ryan was giving these governmental benefits to his friends and that it was only based on friendship that they must acquit. Or that if the personal benefits that he was receiving were just gifts given out of friendship then they must acquit. We never challenged that at all. Instead in fact what we said is that he was selling his office brick by brick. We said in the first 10 minutes of our argument that George Ryan that by handing out these governmental benefits to people and in return getting the personal benefits for himself and his family and his friends that he was selling his office and you might as well put a "for sale" sign on it. And in many of the points in our argument that is the point that we made and the evidence supported. With regard to Larry Warner, the evidence was very clear and both through the testimony of Donald Udston (ph) but also through all the events that happened afterwards that corroborated what Donald Udston said because what Donald Udston said is that from the very beginning when he was first elected what George Ryan did was that Larry Warner decided that he wanted to go into lobbying for the very first time in his entire life. And that he was going to do that so that he could capitalize on his relationship with George Ryan and the arrangement that Warner told Udston he had worked out with George Ryan is that Udston would be cut in and would get a cut and it was Udston who was a very close personal friend of George Ryan.

COURT 2 Don't you think most lobbyist do that. It seems to me every time the presidency changes parties in Washington a new group of people move over to K Street so that they can go over to the Congress because they have personal relationships.

Ms. Barsella That's fine but what was – what Larry Warner told Don Udston is that the arrangement would be that he would cut in Udston, who was a close friend

of Ryan, not of Warner. He and Warner did not know each very well at all and that he would take care of George. And so that is how it began and over the course of the next 5 years the pattern was apparent. Because George Ryan worked very hard to make sure that Larry Warner got contracts, got leases, that his clients got contracts and leases, and Larry Warner, over the years, then gave back to George Ryan and did that in the form of financial benefits for Ryan's family and for Ryan's friends and this was in addition to all the evidence that the jury heard about George Ryan's relationship with Harry Kline and Ron Swanson because with Harry Kline that was the guy who was giving Ryan the free vacations in Jamaica. That relationship only began when he started giving George Ryan the free vacations in Jamaica after George Ryan was elected Secretary of State.

COURT 2 Apparently there is not much of an exchange for that though. I guess there is one time when the currency exchange fees go up which I understand the industry had wanted for a long time and there is another instance of renting some South Holland property if I am remembering correctly.

Ms. Barsella But these were very lucrative for Harry Kline and Harry Kline asked for the rate increase while he was giving George Ryan the benefit – the free vacation. And that is when he first asked for the rate increase

COURT 2 And I bet you wouldn't have been making a different argument if he had waited 6 months after the Jamaica vacation. I mean $1,000 actually, I have to say, sounds a little cheap to go to Jamaica anyway but that's neither here nor there.

Ms. Barsella And that's one of the things that we told the jury is that, over the years, George Ryan did sell his office on the cheap. He took all sorts of benefits – whatever size he could get. But more importantly with regard to Harry Kline, this relationship was an annual thing. Every year he got his free vacation from Harry Kline. And less than 2 years after the rate increase George Ryan just a couple of weeks before he went to Jamaica again for the annual vacation that's when he told the Secretary of State employees that they had to give Harry Kline a lease and he made sure that they gave him that--.

COURT 2 That's one of the leases he signed personally.

Ms. Barsella Yes, that is. And so when he was then in Jamaica just a few weeks later and they were sitting around the picnic bench talking about the South Holland lease George Ryan had already gotten it in motion so George Ryan's benefit to Harry Kline was already in progress. They were talking about it and then George Ryan came back after collecting his personal benefit and he made

sure that lease not just was signed with Harry Kline but the terms of the lease were whatever Harry wanted. I mean it couldn't have been clear that George Ryan was there to repay Harry Kline, not to look out for the interests of the citizens of the State of Illinois and that's the way it was argued to the jury. When the government was talking about that exact episode what the government said is that when George Ryan went to his underlings and told his underlings that he had to do a lease with Harry Kline and to make sure that the underling told George when the lease was almost done. The way the government argued it – the government told the jury he wanted to know when the lease was done so I can tell Harry that I am reciprocating for his generosity to me from Jamaica. That was the theme of this case. But there was a pattern here. It wasn't just Jamaica. There was a pattern that whenever George Ryan got a free vacation or his family got a free vacation, he reciprocated and indeed gave governmental benefit to the benefactor. The jury saw that with regard to the Ron Swanson trip to Cancun. He and Ron Swanson go off to Cancun and, as soon as George Ryan gets back, Ron Swanson gets the Lincoln Towers lease. The jury saw that when Ron Swanson paid for one of Ryan's daughter to have a trip to Disneyworld. As soon as the daughter gets back, now Ron Swanson gets a make-work contract at McPier.

COURT 2 — So, I'm going to just summarize and to say to listen to your argument you are highlighting things in the record that could have supported a properly instructed jury to find on honest services fraud while Mr. Alschuler is highlighting the aspects of the record that might have persuaded a properly instructed jury that there is no offense here and that's where I really come right back down to the question that this case turns on the proper standard of review.

Ms. Barsella — We do believe it is a higher– I mean a lower standard from the government's perspective than certainly a direct appeal because there is an interest in finality of judgments. The evidence was --

COURT 2 — Well, both Brett and Frady say that.

Ms. Barsella — That is true and so certainly it has to be more than a reasonable possibility and, in this case on this record, there was much more than a reasonable possibility that George Ryan was properly found to have sold his office, to have given out government benefits in return for the personal benefits that he obtained from his benefactors. If there are no other questions, then --

COURT 1 — It looks like there are none. Thank you Ms. Barsella. Anything further Mr. Alschuler.

Mr. Alschuler — Skilling says that Constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a verdict that may rest on an invalid theory. I apologize to the Court for not having re-read Frady in many years and as I understand the Court's interpretation of Frady, it stands for the astonishing proposition that the government could have conceded that there was no bribery in closing argument and the jury would plainly have convicted on the basis of conduct that is not criminal and still Ryan would have to remain in a penitentiary. I am – That's an astonishing proposition if when I look at Frady again --

COURT 1 — It is not the proposition. Mr. Alschuler it is not proposition any member of this court has attributed to Frady.

Mr. Alschuler — All right, well then I don't know what the Frady standard is but if it is that the jury might have convicted on an invalid theory then I think we have established that.

COURT 2 — Well it's a cause and prejudice ---

Mr. Alschuler — I think the jury probably convicted on an invalid theory. It almost certainly did not find a bribe or kickback on this case in light of the government's concessions in oral argument and in light of its failure to even mention the financial benefits instructions during its closing argument. The government now says that when it told the jury it did not need to find a quid pro quo it meant that the jury did not have to find an express promise to give a specific benefit for a specific official action and so when the Supreme Court said a quid pro quo was needed the court didn't mean an express promise for a specific benefit but when the government's argument spoke of a quid pro quo and said that none was needed it did mean an express promise to give a specific benefit.

COURT 2 — So what do you do with the instructions that the jury was given saying don't convict if you think it was just friendship. Don't convict if you think it was a gift. The jury did convict.

Mr. Alschuler — There is no such instruction, Your Honor. The only instruction that mentions friendship concerns a provision of Illinois law ---

COURT 2 — There is a good faith instruction. There is a good faith instruction. If he did these things in good faith.

Mr. Alschuler — There is a good faith instruction. That good faith is inconsistent with an intent to defraud but the only mention of friendship comes in the context of an Illinois statute that prohibits gifts from lobbyists and other prohibited

sources and it says that it does not prohibit gifts made on the basis of friendship. It doesn't say that failure to disclose a gift made on the basis of friendship can't be the basis for a conviction on a conflict of interest theory. It doesn't say that Ryan can't be convicted simply for favoring friends in the award of government benefits. And again the good faith instruction the jury could find that Ryan did not act in good faith because he failed to disclose conflicts of interest or because he awarded contracts to his friends. So neither instruction precludes conviction on the basis of friendship. If there are no other questions, I will thank the court for its attention.

COURT 1 Thank you very much Mr. Alschuler and we will give both sides an opportunity to re-read Frady and a few other cases. We would welcome supplemental memos within 14 days addressing the bearing of four Supreme Court decisions – Davis against the United States 417 US 333; Engle against Isaac 456 US 107; United States against Frady 456 US 152; and Bousley against the United States 523 US 614. The case will be taken under advisement after the separate memos have been received. Thank you very much.

END OF HEARING