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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

REPLY BRIEF OF THE PETITIONER-APPELLANT GEORGE H. RYAN

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STATEMENT OF FACTS

Ryan's opening brief noted two principles of appellate review that the government does not dispute: (1) In judging the sufficiency of the evidence, a court must consider the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor. RBr. 48 (citing *United States v. Macari*, 453 F.3d 926, 936 (7th Cir. 2006)).[1] (2) An inquiry into harmless error, however, is "almost the polar opposite of a sufficiency of the evidence review," and any suggestion that the evidence should be viewed in the light most favorable to the government would "flatly contradict" the required inquiry. RBr. 15 (citing *United States v. Cappas*, 29 F.3d 1187, 1194 n.4 (7th Cir. 1994)).

A court judging a question of harmless error may not assume that the jury credited contested government evidence unless the jury must have credited that evidence to reach the verdict it did. *See United States v. Holmes*, 93 F.3d 289, 294 (7th Cir. 1996) ("[T]he record makes clear that there is sufficient evidence of guilt to support a verdict of guilty, but we cannot be sure whether the jury relied upon that evidence…"); *United States v. Walls*, 225 F.3d 858, 867 (7th Cir. 2000) (although there was "no doubt whatsoever" of the adequacy of the evidence of intent, the jury might have resolved this issue in the defendant's favor).

[1] Ryan's opening brief is cited as RBr. The government's brief is cited as GBr.

In its "Statement of Facts," the government assumes that the jury must have credited all of its evidence. This statement recites, not facts, but evidence the accuracy of which was sharply disputed. For example:

- The government reports that, in a conversation with Donald Udstuen, Lawrence Warner declared, "I will take care of George." GBr. 5. The government recites this alleged statement several times, GBr. 5, 10, 27-28, 35, 51, and places it first on a list of "evidence of bribery." GBr. 28.

  The only source of this evidence, however, was Udstuen, who faced serious criminal charges himself. Tr. 11595-97, 11821-24, 23095, 23263-64. Udstuen admitted committing perjury on prior occasions, Tr. 11728, 11781-82, 11819-21, acknowledged lying to hundreds of people, Tr. 23265-66, recognized that his testimony at trial about Warner's statement differed substantially from his testimony before the grand jury, Tr. 11944-49, and acknowledged that he failed to question Ryan about benefits Ryan received from Warner when Udstuen recorded a telephone conversation at the government's behest in an effort to obtain incriminating evidence. Tr. 11952-72, 11982-87, 12326-28. Ryan argued forcefully that Udstuen was unworthy of belief, Tr. 23251-52, 23263-66, and only the jurors know whether they believed him.[2]

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[2] Udstuen also provided the only evidence that Ryan knew and approved of Warner's sharing of lobbying fees with Udstuen. Even if Ryan did approve of this fee sharing, however, his action did not have the sinister significance the government attributes to it. *See* GBr. 4-5, 6, 8-9, 10, 28, 29, 51.

As the government notes, Warner became a lobbyist only after Ryan was elected Secretary of State. GBr. 4. The lobbyists whom the government called as witnesses acknowledged that their clients often hired them because of their association with and access to particular public officials. Tr. 6103, 6108, 6115, 6118-21, 6192 (Robert Cook); 12822-24, 12924 (Roger Kiley). Warner may have believed that his long association with Ryan would make him attractive to clients. Upon learning of Warner's plans, however, Ryan might have suggested that it would be unfair for only Warner to profit as a lobbyist when "no one had done more for Ryan than Udstuen." *See* GBr. 4. Warner then might have agreed, with Ryan's approval, to share his lobbying fees with Udstuen. No evidence suggests that Ryan expected Udstuen, a veteran lobbyist, to share these fees without sharing the work.

Of course a bribe need not be paid to the public official who agrees to provide a benefit in return. This official might say, "Give the money to my friend Don or to the Red Cross." It is bizarre, however, for the government to suppose that Ryan's request for an equitable division of fees between longtime friends had the same meaning that a request to take a share of the fees

- The government reports that Ryan told a subordinate official "falsely" that a security decal on license plates was needed for public safety, GBr. 6, but of course the jury might have concluded that Ryan meant what he said.[3]

- The government declares that "[t]he state overpaid by about $246,583 over the course of the first five years of the Bellwood lease," GBr. 7, and that it "overpaid for [the Joliet] lease by $296,485." *Id.* A real estate appraiser called by the government did offer these conclusions. Tr. 11041-45, 11015-21. Defendants' expert appraiser, however, testified that the State paid $7,233 less than the market rate for the Joliet lease and $31,723 less than the market rate for the Bellwood lease. Tr. 20025-39, 20073-76. No one can know whether the jury believed that the state paid too much for any of the leases Ryan approved.

The mistaken assumption that the jury must have credited all of its evidence pervades the government's argument. This Court may not treat the government's "Statement of Facts" as accurate when it judges whether errors in the jury instructions were harmless.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT ITS *BLOOM* INSTRUCTION, STATE LAW INSTRUCTION, AND CONFLICTS OF INTEREST INSTRUCTION WERE INCONSISTENT WITH *SKILLING*.

A. The *Bloom* Instruction.

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for himself would have. Ryan's approval of Warner's division of lobbying fees appeared to be designed to ensure that longtime associates treated each other fairly—that is, if Ryan approved the division at all.

[3] The district court concluded that the jury must have found Ryan's statement of opinion "false" because an instruction declared, "Good faith…is inconsistent with intent to defraud." A-000048. The jury might have found, however, that Ryan lacked good faith simply because he failed to disclose a conflict of interest. The government presented no evidence that Ryan's statement of opinion was "false."

The *Bloom* instruction directed the jury to convict when a defendant had violated a fiduciary duty for private gain. The government recognizes that *Black v. United States*, 130 S. Ct. 2963 (2010), held this instruction "incorrect in light of *Skilling*." GBr. 54. It declares, however, that the Supreme Court held the *Bloom* instruction erroneous "at least in part because '[t]he scheme to defraud alleged [in *Black*] did not involve any bribes or kickbacks.'" *Id*. (quoting *Black*, 130 S. Ct. at 2968 n.7).

An allegation of bribery would not have corrected the *Bloom* instruction's misstatement of the law. No factual allegation could have. When the honest services statute authorizes conviction only for scheming to obtain a bribe or kickback, an instruction directing jurors to convict for any breach of fiduciary duty sweeps too broadly.

B. The State Law Instruction.

Similarly, the district court improperly invited the jury to convict Ryan for violating state laws that had nothing to do with bribery—for example, laws forbidding the use of state resources in political campaigns. The government argues that "the purpose of the [state law] instruction was to aid in defining the duties Ryan owed to the people of Illinois." GBr. 53. The duty that matters after *Skilling v. United States*, 130 S. Ct. 2896 (2010), however, is the duty not to accept bribes, which is imposed by the mail fraud statute, not state law.

C. The Conflicts of Interest Instruction.

The conflicts of interest instruction declared it unlawful for a public official to "conceal[] or knowingly fail[] to disclose a material personal or financial interest, also

known as a conflict of interest, in a matter over which he has decision-making power…if the other elements of the mail fraud offense are met." A-000420. Ryan observed that conflicts need not be financial, that they may arise simply from the existence of personal relationships, and that they may consist of legitimate contributions and gifts. He maintained that the instruction required the disclosure of things other than bribes and kickbacks. RBr. 20-22.

The government disagrees, but only because the instruction ends with a reminder that the jury must find the other elements of mail fraud. GBr. 46-47. The government interprets this reminder to refer, not to mailing and the other elements of mail fraud, but to one of the instructions concerning the improper receipt of financial benefits. Unlike several of the other financial benefits instructions, this instruction prohibited only bribe-taking. GBr. 47-48 n.20.

Ryan argued that the government's interpretation makes no sense. A reminder of the need to find the other elements of mail fraud also appears in the *Bloom* and state law instructions. The government interprets the instructions as though the court had said:

> A person commits honest services fraud if he takes a bribe. He also commits honest services fraud if he fails to disclose a conflict of interest *and takes a bribe*. In addition, this person commits honest services fraud if he violates the Illinois law against using state funds in a political campaign *and takes a bribe*. Moreover, an official commits honest services fraud if he accepts a prohibited gift from a lobbyist *and takes a bribe*. And furthermore, he commits honest services fraud if he acts in excess of his lawful authority *and takes a bribe*.

RBr. 27-28 n.8. Ryan noted, "An instruction with this message could have ended after 'a person commits honest services fraud if he takes a bribe' without changing its meaning. The government viewed all of the court's references to undisclosed conflicts of interest and to state law as senseless surplusage." *Id*.

The government offers no response to Ryan's charge of misconstruction except "the Seventh Circuit said so." It points to two sentences of *United States v. Warner*, 498 F.3d 666, 698 (7th Cir. 2007). *See* GBr. 47. These sentences came near the end of a long opinion amidst the Court's discussion of whether the honest services statute was unconstitutionally vague—an issue that, in light of existing precedent, Ryan had raised with little hope of success. Because the government had not argued that the conflicts of interest instruction encompassed only bribes, Ryan did not argue that it encompassed more. The Court's interpretation of this instruction was its own, and prior to *Skilling*, whether the conflicts of interest instruction reached only bribes was not a question of much significance.

Skilling, however, has placed this question at the center of this case. Ryan respectfully asks this Court to reconsider its suggestion that the "other elements" reminder limited the conflicts of interest instruction to bribes.

The law of the case doctrine "is not an 'inexorable command,' but is to be applied with good sense." RBr. 27-28 n.8 (quoting *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981)). A recognized exception to this doctrine applies when "controlling authority has since made a contrary decision of law applicable to the issue," *White v. United States*, 371 F.3d 900, 902 (7th Cir. 2004), and although *Skilling* may not be directly contrary to this

Court's interpretation of the "other elements" language, it has transformed the legal landscape in which the question has arisen and made its resolution far more significant.[4]

II. THE ERRORS IN THE *BLOOM* INSTRUCTION, STATE LAW INSTRUCTION, AND CONFLICTS OF INTEREST INSTRUCTION WERE NOT HARMLESS.

A. The Standard of Review: This Court Should Adhere to the "Harmless Beyond a Reasonable Doubt" Standard of *Lanier v. United States*.

The government asks the Court to apply in this Section 2255 proceeding the standard for judging the harmlessness of a constitutional error that *Brecht v. Abrahamson*, 507 U.S. 619 (1993), applied in *habeas corpus* proceedings brought by state prisoners. The *Brecht* standard asks whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id*. at 631.

As the government acknowledges, this Court applied a different standard in *Lanier v. United States*, 220 F.3d 833 (7th Cir. 2000). In *Lanier*, a Section 2255 proceeding, the Court declared that the question was, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id*. at 839.

The government observes that no one argued for application of the *Brecht* standard in *Lanier*, and it declares that "*Lanier* is not controlling in this case." GBr. 22-23. Ryan agrees that *Lanier* is not controlling. This Court, however, should adhere to it for three reasons.

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[4] With respect, Ryan notes that another recognized exception to the law of the case doctrine may apply as well. The doctrine is inapplicable when "the prior decision was clearly erroneous and would work manifest injustice." *White*, 371 F.3d at 902.

First, *Brecht*, a five-to-four decision that sparked sharp criticism,[5] does not warrant extension beyond the situation the Court addressed. The Supreme Court itself, far from expanding *Brecht*, significantly narrowed this ruling in *O'Neal v. McAninch*, 513 U.S. 432 (1995).

The government apparently missed part of the *McAninch* modification. It misstates the law when, quoting *Brecht*, it declares "that relief is warranted only upon a finding that trial errors resulted in 'actual prejudice.'" GBr. 23 (quoting *Brecht*, 507 U.S. at 637). In *McAninch*, the Court expressly repudiated this language. 513 U.S. at 438. It found *Brecht*'s requirement of "actual prejudice" baffling, for *Brecht* purported to rely on *Kotteakos v. United States*, 328 U.S. 750 (1946), which itself had "plac[ed] the risk of doubt on the State." *McAninch*, 513 U.S. at 439. *McAninch* concluded that when a federal court is in doubt about the effect of an error on the jury's verdict, it must grant *habeas corpus* relief. *Id.* at 435.

Second, *Brecht* was expressly grounded on federalism concerns inapplicable to Section 2255 proceedings brought by federal prisoners. The government writes, "Although the Court in *Brecht* did indeed mention comity and federalism as important concerns, it also noted that, 'The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system.'" GBr. 22

[5] Justice O'Connor, dissenting in *Brecht*, cautioned against the view that "denying [habeas corpus] relief whenever possible is an unalloyed good." 507 U.S. at 656. *See generally* James S. Liebman and Randy Hertz, Brecht v. Abrahamson*: Harmful Error in Habeas Corpus Law*, 84 J. CRIM. L. & CRIMINOLOGY 1109 (1994).

(quoting *Brecht*, 507 U.S. at 635). The language quoted by the government reveals that the Court's goal was to safeguard *state* interests.

Third, the "harmless beyond a reasonable doubt" standard serves an especially important function for federal prisoners seeking post-conviction relief under Section 2255. Unlike state prisoners seeking *habeas corpus* relief under other federal statutes, federal prisoners have no other means of obtaining this relief.

Ryan alleges that the jury might have convicted him for conduct that is not criminal. Unless this Court can say beyond a reasonable doubt that the jury did convict him of criminal conduct, denying his petition would prolong his imprisonment when he might be innocent. A decent legal system does not imprison people unless their guilt is clear. Departures from this principle not only gravely injure the innocent but also undermine faith in the system itself.

When a state court narrows the scope of a substantive criminal statute, the state bears primary responsibility for providing relief to prisoners who were wrongly convicted under the previously misconstrued statute. Every state, in fact, empowers its courts to provide some form of post-conviction relief. *See* Donald E. Wilkes, Jr., STATE POST-CONVICTION REMEDIES AND RELIEF (1996). *Brecht* stressed that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect." 507 U.S. at 636.

The Supreme Court apparently views federal *habeas corpus* for state prisoners as a backup for state proceedings, providing a corrective when state courts have failed to do the job. For federal prisoners like Ryan, however, Section 2255 proceedings are all there

are—the only proceedings in which courts will determine whether they have been imprisoned for noncriminal conduct. Although the federal courts may allow the states to right their own wrongs and may review their rulings with deference, federal courts bear the exclusive responsibility for correcting federal wrongs.

Federal courts should not countenance the continued punishment of federal prisoners who may be innocent. Unless a court can say beyond a reasonable doubt that the conduct for which these prisoners were convicted was criminal, their imprisonment should end. This Court should distinguish *Brecht* and adhere to *Lanier*.

B. The Jury Might Have Convicted Ryan for Favoring Friends in the Award of Contracts.

Ryan argued that the jury might have convicted him without finding bribery or anything resembling bribery. For instance, a determination that he favored friends in the award of public contracts would have been enough to warrant his conviction.

Each of the three instructions that the district court held erroneous invited conviction for favoring friends. The *Bloom* instruction declared that a public official committed honest services fraud whenever he "misus[ed] his official position…for private gain for himself or another." A-000421. The state law instruction invited conviction for violating an Illinois statute prohibiting the use of public funds for private purposes. And the conflicts of interest instruction required disclosure of any personal interest likely to affect an official decision. *See* RBr. 24-27.

The government does not deny that each of these instructions invited conviction for favoring friends. It also does not deny that the summary of the indictment the jury

received reinforced these instructions. *See* RBr. 23-24. It contends, however, that the jury could not have accepted the invitation to convict on this basis because (1) "Ryan's friendship with Warner was public information"; (2) "Ryan and Klein had little relationship"; and (3) "the jury never hear[d] anyone argue that it should convict Ryan for concealing friendship." GBr. 49.

The evidence cited by the government in support of its claim that "Ryan's friendship with Warner was public information" showed only that their friendship was longstanding, that they sometimes dined together in public restaurants, that Ryan instructed a Secretary of State employee to return Warner's phone calls, and that Ryan acknowledged his friendship with Warner to the press *after* the press had begun investigating whether Warner profited from Secretary of State leases. GBr. 49 (citing Tr. 2750-52, 8110, 11432-33, 11468). Moreover, even if Warner's friendship with Ryan was public knowledge, Warner's interest in properties leased by the state and his interest in obtaining lobbying fees from the award of public contracts sometimes was not. The government's brief still stresses Ryan's alleged failure to disclose Warner's secret interests. GBr. 6-10, 17-18, 30, 59-60. The jury might have convicted Ryan for awarding government benefits to a close friend without revealing that he was doing so.

Klein's friendship with Ryan was not as longstanding as Warner's. By the time Ryan approved the lease alleged in Count 6, however, Ryan, Klein, and their spouses had vacationed together in Jamaica each of the previous four years. Klein's relationship with Ryan was close enough that, in the eyes of the jury, it could have "ha[d] the natural tendency to influence or [was] capable of influencing" Ryan's approval of the

lease. The jury might have convicted Ryan for failing to disclose his relationship with Klein.

The government's closing argument invited the jury to convict Ryan for favoring Warner and Klein in the award of government benefits. The government declared, for example, "The evidence has established that again and again Ryan steered these contracts and leases to Warner or other friends, like Klein." A-000391. Immediately after reciting the *Bloom* instruction, it told the jury that this instruction prohibited Ryan from "using his official decision-making power to steer benefits…to Larry Warner." A-000418.

Ryan acknowledges that most other references to "steering" added that the beneficiaries had provided "undisclosed benefits" to Ryan. Ryan acknowledges, moreover, that the Court must "'review…the case as it was presented to the jury and not how it might have been presented.'" GBr. 49 (quoting *Messinger v. United States*, 872 F.2d 217, 221 (7th Cir. 1989)).

Viewing the case as it was presented to the jury, however, does not require the Court to assume that the jury could not have convicted on the basis of instructions not stressed by the government. Ryan noted, for example, that the government "never urged conviction on the basis of *any* of the financial benefits instructions." RBr. 30. The government does not respond that it ever did. Nevertheless, Ryan recognizes that the jury might have convicted him for the improper receipt of financial benefits. When three instructions clearly invited the jury to convict for favoritism in the award of government benefits, when the summary of the indictment given to the jury reinforced

these instructions, when the evidence indicated favoritism, and when the government alleged favoritism, the jury might have relied on favoritism as the basis for its conviction.[6]

C. The Jury Might Have Convicted Ryan for Failing to Disclose Legitimate Contributions and Gifts.

Although the government did not often suggest that Ryan should be convicted simply for favoring friends in the award of government benefits, its argument that he should be convicted for failing to disclose the benefits he received from Warner and Klein was the heart of its case. Ryan argued that the conflicts of interest instruction required him to disclose not only bribes but all contributions and gifts that might have influenced him.

The government responds that there were no legitimate gifts—not Warner's waiver of an insurance adjustment fee after Ryan's apartment flooded on Christmas Day, not the wedding present Warner gave Ryan's daughter by paying for the band at her reception, and not the figurine Ron Swanson gave George and Lura Lynn Ryan on their fortieth wedding anniversary. These things were "undisclosed financial benefits,"

[6] One can imagine the following scene in the jury room: Jurors are vigorously debating whether Ryan should be convicted for improperly receiving financial benefits or for failing to disclose benefits when a previously silent juror speaks up. "Wait," he says. "Don't we agree that Ryan favored Warner and Klein in awarding leases? Didn't Ryan therefore use public funds to confer private benefits on his friends in violation of state law? Didn't he also misuse his official position for his friends' private gain in violation of *Bloom*? And didn't he fail to disclose the conflict of interest that arose from his relationship with the people he was benefitting? Isn't there a clear basis for conviction upon which we can agree without even discussing the financial benefits Ryan received?" The jurors nod in agreement, convict Ryan, and go home.

and the government never "asked the jury to convict Ryan for concealing mere gifts." GBr. 34, 51.

The government's emphasis on nondisclosure would have been unnecessary if it had sought conviction on the basis of the financial benefits instructions, for none of these instructions spoke of nondisclosure. Each of the government's dozens of references to undisclosed financial benefits invoked the conflicts of interest instruction and the portion of the state law instruction that authorized conviction for failing to file accurate annual reports of gifts and other financial interests.

"[T]his is the heart of the matter," the government said. "For the first ten counts of the indictment [the mail fraud and RICO counts], it is the heart of the matter. It's about trust. Mr. Ryan's honest services. That's what it's about." The government then recited the conflicts of interest instruction in full and declared, "So folks, on this honest services, on this scheme, this first element, it can be met with a conflict of interest." A-000417.

The government offered an illustration. Ryan allegedly hid the fact that Klein hosted his Jamaican vacations because Klein owned currency exchanges regulated by Ryan's office; he had concealed "a classic conflict of interest."[7] The government observed:

> That's what this instruction is about, folks. And that is the heart and soul not only of the South Holland [Klein] situation, but each and every Warner situation, because that flow of benefits that I talked to you about, George

[7] The government did not suggest that Ryan had concealed a bribe or an agreement to provide any benefit to Klein.

> Ryan was operating under a conflict of interest every time he dealt with Larry Warner, because the benefits were flowing from Larry Warner. He had a duty to disclose them in many different respects, and he didn't.

A-000417-18.

Ryan declared that "the central element of bribery is a *quid pro quo* exchange," RBr. 15, and that "[t]he existence or non-existence of a *quid pro quo* must be evaluated at the time a public official receives the benefit alleged to be a bribe." RBr. 19. The government endorses these statements: "Outside the context of campaign contributions, the parties agree concerning what counts as bribery." GBr. 26. In its closing argument, however, the government told the jury that it could convict without a *quid pro quo*, and it acknowledged that none had been shown. RBr. 32-33. The government thus conceded the absence of the central element of bribery.

The government declares that when it "told the jury that it did not need to find a *quid pro quo*, it meant (and, in context, the jury understood) that the jury did not have to find an express promise to give a specific benefit for a specific official action." GBr. 39. The government imagines that, despite its statement that no *quid pro quo* was required, the jury would have understood the need to find one. The jury somehow would have known that it was required to find at least an implicit promise to provide at least a benefit to be specified later. The government's argument is imaginative reconstruction.

In fact, the government meant what it said. No government witness testified that Ryan ever took anything to influence his official conduct, but the government told the jury it did not matter. The jury was never asked to determine whether Ryan took a bribe—whether he made a commitment, explicit or implicit, specific or unspecific, to

anyone about anything at the time he received any benefit. It was told to convict either way. No one can know how the jury would have resolved the unasked question, especially in view of the difficulties it had reaching a verdict even under pre-*Skilling* standards. *See* RBr. 8-9.

D. The Government's Claim that Ryan Committed Pecuniary Fraud as Well as Honest Services Fraud Adds Nothing to Its Harmless Error Argument.

Ryan conceded for purposes of argument that concealing a bribe to award a contract or lease would constitute pecuniary fraud. He objected, however, to treating the nondisclosure of legitimate contributions and gifts as the basis for a pecuniary fraud conviction. RBr. 33-38.

The government does not contend that a pecuniary fraud conviction can rest on the nondisclosure of legitimate gifts. It declares instead, "Ryan committed money-property fraud by awarding state money to Warner and Klein while concealing and lying about the bribes Warner and Klein paid Ryan in return." GBr. 55. Noting Ryan's concession, it says, "Ryan is correct that if he is guilty of honest services fraud, the money-property theory does not 'add to his guilt,'…but it does provide another reason to find that any errors in the honest services instructions were harmless." GBr. 55 n.23.

But why? If this Court can say beyond a reasonable doubt under the *Lanier* standard (or with assurance under the *Brecht-McAninch* standard) that the jury must have found him guilty of taking bribes, it may properly hold the district court's errors harmless and deny Section 2255 relief. If the Court cannot say with assurance that the jury found Ryan guilty of taking bribes, it cannot hold the errors harmless and must

order a new trial. As the government recognizes, the charges of honest services fraud and pecuniary fraud must stand or fall together.[8] The government's allegations of pecuniary fraud add nothing to its other harmless error arguments.

Ryan read the district court's opinion as endorsing the broader argument that a public official's failure to disclose a material personal friendship or legitimate gift can be the basis of a pecuniary fraud conviction. He responded to this argument in his brief. RBr. 33-38. Fortunately, the government disclaims this misconceived argument.

III. THE DISTRICT COURT'S FINANCIAL BENEFITS INSTRUCTIONS DID NOT REQUIRE THE JURY TO FIND BRIBES OR KICKBACKS.

A. Because *Skilling* was a "Clear Break with the Past," this Court Should Find Cause for Ryan's Failure to Present his Objections to the Financial Benefits Instructions on Direct Appeal.

After arguing that the jury might have (and almost certainly did) convict Ryan without reference to any of the district court's financial benefits instructions, Ryan maintained that these instructions themselves invited conviction without proof that the benefits he received were bribes under federal standards. He acknowledged that one of the financial benefits instructions did correctly set forth the requisites of "stream of benefits" bribery, but three other instructions declared it unlawful to receive benefits that were not bribes.[9] One (the "campaign contributions" instruction) authorized the treatment of campaign contributions as bribes in the absence of an explicit *quid pro quo*.

[8] Stated differently, the Court cannot say that Ryan committed pecuniary fraud by failing to disclose a bribe unless it can say that he took a bribe, and if it can say that he took a bribe, he is guilty of honest services fraud.

[9] Ryan accepts the government's statement that a second unchallenged instruction also "accurately summarized the stream of benefits concept." GBr. 40-41.

A second (the "benefits intended to influence" instruction) directed conviction for accepting any benefit that the recipient realized was given with an intent to influence his official decisions. And a third (the "rewards" instruction) directed conviction for accepting benefits intended to reward past acts. Taken as a whole, the financial benefits instructions were bewildering and failed accurately to convey the elements of bribery.

The government contends that because Ryan failed to challenge any of these instructions on direct appeal, his objections are waived. GBr. 41, 43, 44.[10] As to the "campaign contributions" instruction, however, the government's claim of waiver is itself waived because the government failed to make this claim below. *See* A-000340 (asserting that Ryan waived objections to three financial benefits instructions, including one he does not challenge here, but not asserting that he waived his objection to the "campaign contributions" instruction)[11]; A-00015 n.8 ("The Government has not raised a waiver argument with respect to the campaign contribution instruction."); *Hutchings v. United States*, 618 F.3d 693, 696 (7th Cir. 2010) (holding that the government waived its objection that a Section 2255 petitioner failed to sign a pleading under penalty of

[10] Ryan did object to these instructions at trial, but the objection he offered then was not the one he offers now. Ryan maintained then that the instructions were inconsistent with the personal gain element of pre-*Skilling* honest services law. He now objects that the instructions did not convey the *Skilling* standard. Ryan could not have presented before *Skilling* an objection that *Skilling* created.

[11] Ryan's opening brief erroneously declared that he had objected to the "campaign contributions" instruction at every stage of the proceedings. RBr. 38. Ryan did object to this instruction at trial but did not reiterate his objection on appeal. Ryan's counsel was misled in part by the government's failure to assert waiver below, for the government did assert Ryan's failure to preserve on appeal his objections to the other challenged financial benefit instructions.

perjury by failing to present this objection to the district court). In addition, the government notes that Ryan himself proposed the "rewards" instruction. GBr. 43.

Procedural defaults that preceded Section 2255 proceedings are excused when "the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged…violation.'" *Reed v. Farley*, 512 U.S. 339, 354 (1994) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977).[12] Cause for a default exists when the Supreme Court has issued a decision "'overturn[ing] a longstanding and widespread practice to which [the Supreme 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)). As one district court recently held, "*Skilling* represents just the sort of 'clear break with the past' that the United States Supreme Court contemplated as giving rise to 'cause.'" *Stayton v. United States*, No. 1:09-CV-157-WSD, 2011 WL 691238, at *5, 2011 U.S. Dist. LEXIS 20314, at *15 (M.D. Ala. 2/28/2011) (quoting *Reed v. Ross*, 468 U.S. at 17).

In the 22 years between the enactment of the honest services statute and *Skilling*, no court endorsed the construction of this statute that the Supreme Court approved, and none of the parties before the Court advocated this construction. *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.").

[12] This section responds to the government's contention that Ryan has not shown cause. The prejudice resulting from the district court's inaccurate financial benefits instructions is evident, for they did not require the jury to find what is now the central element of honest services fraud.

McNally v. United States, 483 U.S. 350 (1987), similarly departed from uniform lower court precedent. Following *McNally*'s invalidation of the intangible rights theory of honest services fraud, courts excused the earlier procedural defaults of Section 2255 petitioners, including their failures to object to improper jury instructions. *See*, *e.g.*, *Bateman v. United States*, 875 F.2d 1304, 1308 (7th Cir. 1989); *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988); *Dalton v. United States*, 862 F.2d 1307, 1310 (8th Cir. 1988). *See also Waldemer v. United States*, 106 F.3d 729, 731 (7th Cir. 1996).

The government notes that Ryan bases many of his objections to the financial benefits instructions on precedents that antedated *Skilling*, including *McCormick v. United States*, 500 U.S. 257 (1991), and *United States v. Sun Diamond Growers*, 526 U.S. 398 (1999). GBr. 41-42 n.15, 43 n.16. It declares, "*Skilling* did nothing to change the meaning of bribes under federal law." GBr. 42 n.15. *Skilling*, however, transformed the meaning of honest services fraud when it held that the standards established by *McCormick* and *Sun Diamond Growers* for bribery prosecutions apply in honest services prosecutions as well. During the instructions conference in this case, the government resisted "instruct[ing] essentially a bribery, a McCormick type bribery instruction onto the federal mail fraud statute." A-000390.

A showing of cause and prejudice should excuse not only a Section 2255 petitioner's failure to object to an instruction requested by the government but also his own request for an instruction unless that request reflected a knowing and voluntary waiver of the objection he presents. *See Lee v. United States*, 113 F.3d 73, 75 (7th Cir. 1997) (affording relief even to a Section 2255 petitioner who pled guilty because "[h]e

could not possibly be viewed as having voluntarily waived what turns out to be a *Bailey* challenge when *Bailey* did not exist at the time he pled guilty").[13] In this case, moreover, Ryan proposed the faulty "rewards" instruction only after the district court denied his request for a correct instruction advising the jury of the need to find a *quid pro quo*. *See* A-000174-82. By seeking the "rewards" instruction, Ryan did not waive or forfeit his objection to the court's refusal to give a better instruction. *See* 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2553 at 63 (3d ed. 2004); *United States v. Salamone*, 800 F.2d 1216, 1223 (3d Cir. 1986). Ryan's objections to the financial benefits instructions reveal the prejudicial consequences of the district court's denial of his request for a *quid pro quo* instruction.

B. The Instructions Erroneously Declared that a Campaign Contribution May Be Treated as a Bribe without an Explicit *Quid Pro Quo*.

McCormick held that campaign contributions may be treated as bribes only when the recipient has made "an explicit promise…to perform or not to perform an official act" in return. 500 U.S. at 273. The district court, however, invited the jury to "imply" that campaign contributions were given in exchange for official acts from the parties' "words and ongoing conduct." A-000421.

The government declares, "While a *quid pro quo* relating to campaign contributions must be explicit, it need not be express." GBr. 45. This statement is gibberish. *See The Random House College Dictionary* 467 (rev. ed. 1975) (offering as the

[13] The government cites *United States v. Yu Tian Li*, 615 F.3d 752, 757 (7th Cir. 2010), for the proposition that an affirmative request for an instruction waives any objection to it, GBr. 43, but the knowing and voluntary character of the waiver in *Yu Tian Li* was not in doubt.

first definition of the adjective *express* "clearly indicated; *explicit*") (emphasis added); *id.* at 466 (defining *explicit* as "leaving nothing merely implied").

The government declares that "[s]ince *McCormick*, courts have made clear that an 'explicit' promise means a 'specific' promise." GBr. 44. It relies on *Evans v. United States*, 504 U.S. 255 (1992), which upheld an instruction that read, "If a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act." *Id.* at 258. *Evans*, however, did not modify *McCormick*. An official who *demands* or *accepts* money in *exchange* for a specific *requested* exercise of his or her official power enters an explicit agreement.

The Eleventh Circuit has read *Evans* as modifying *McCormick*. *See United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009), *reversed and remanded under the name Scrushy v. United States for reconsideration in light of Skilling*, 130 S. Ct. 3541 (2010). The court offered the startling observation that "an explicit agreement may be 'implied.'" *Id.* at 1227. The Second, Fifth, Sixth, and Ninth Circuits, however, continue to distinguish campaign contributions from other benefits and to declare that a jury may not treat a campaign contribution as a bribe without finding an explicit *quid pro quo*. *See* authorities cited in RBr. 41. So does this Court. The district court's "campaign contributions" instruction flatly contradicted *United States v. Giles*, 246 F.3d 966, 971-72 (7th Cir. 2001).

C. The Instructions Erroneously Invited Conviction for Accepting a Benefit with Knowledge of the Benefactor's Intent to Influence the Recipient and also Erroneously Treated Gratuities as Well as Bribes as Honest Services Fraud.

Ryan maintained that the "benefits intended to influence" instruction improperly required the jury to convict whenever a public official had accepted a benefit (lunch, for example) with knowledge that his benefactor sought to influence him. RBr. 44-45. The government offers no argument that this instruction was correct. It does say that the instructions "taken as whole" did not mislead the jury. GBr. 41-43. The jurors, however, probably would have thought it their duty to convict whenever any instruction directed conviction, and their understanding would have been correct.

Ryan also argued that the instructions required conviction for benefits intended to reward past acts—gratuities rather than bribes. RBr. 45-48. The government does not suggest that *Skilling* allows the punishment of gratuities. It notes, however, that the word "reward" appeared in an instruction describing the improper provision of financial benefits rather than their improper receipt. GBr. 43-44.

The jury would not have understood that it was lawful for Ryan to receive what it was unlawful for Warner to give, especially when it examined the indictment summary it was given: "It was a further part of the scheme that defendant Ryan…received personal and financial benefits from defendant Warner…while defendant Ryan knew that such benefits were provided with intent to influence and reward Ryan in the performance of official acts." A-000027.

The government maintains that when the instructions are "taken as a whole," "the use of a single word 'reward' in a single instruction" was not prejudicial. GBr. 44. The government, however, specifically urged Ryan's conviction for accepting a benefit allegedly intended to reward a past act, *see* A-000411; RBr. 48 n.14, and the jury might have been listening.

IV. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH MAIL FRAUD UNDER *SKILLING*.

A. The Government Failed to Show that the Benefits Provided by Warner Were Bribes.

As Ryan argued, RBr. 19, and the government agreed, GBr. 26, the existence or non-existence of a *quid pro quo* must be evaluated as of the time a public official received the benefits alleged to be bribes.

Ryan's opening brief therefore offered a challenge:

- Neither the government nor the district court…has ever indicated what commitment or promise—explicit or implicit—Ryan made to any benefactor at the time any benefit was received. RBr. 49.
- The jury must have believed that some incident had a corrupt purpose,…and neither the government nor the district court has pointed to any that did. *Id*.
- The government has never answered the question that the law makes critical: What commitment or promise did Ryan make to Warner at the time Warner waived an insurance fee for a Ryan son-in-law, shared lobbying fees with Udstuen and Swanson, invested in Ryan's son's cigar business, or paid for the band at Ryan's daughter's wedding? RBr. 52.

This challenge remains unanswered. With respect to Warner, the only answer the government has ever given to "the question the law makes critical" was its

concession during closing argument, "Have we proved a quid pro quo? No, [we] haven't." A-000416.

B. The Government Failed to Show that the Benefits Provided by Klein Were Bribes.

The government presented no evidence that Ryan made any commitment, explicit or implicit, to Klein at the time of his first trip to Jamaica and no evidence that Ryan and Klein's understanding changed in later years.[14] Klein emphatically denied that he hosted Ryan's vacations because he wanted to influence Ryan's official decisions. RBr. 51-52.

The government responds, "Klein's claim is refuted by his own admission that the SOS Office offered him the lease because of his relationship with Ryan." GBr. 32. Klein's testimony, which was merely that his relationship with Ryan had "something to do" with the decision of the Secretary of State's office to lease his property, Tr. 9699, was entirely consistent with his denial that he hosted Ryan's vacations in an effort to influence him. *See* RBr. 20-21 (posing a hypothetical case in which a benefactor has hosted a governor at his ranch and given him other benefits with no hope of reward and later has recommended a close relative for a government job: "the contributions and gifts would not retroactively become bribes even if they influenced the governor."). The ease with which the government slips from plausible allegations of reciprocity to unsupported allegations of bribery is breathtaking. *See*, *e.g.*, GBr. 36-37 ("[T]he

[14] The government finds the requisite commitment simply in the fact that Ryan decided at some point to provide an official benefit to Klein. GBr. 32. The commitment, however, must be an agreement to give something in exchange for a benefit, not to give it independently of the benefit or even in gratitude for the benefit.

government argued that when Ryan gave Klein the South Holland lease, Ryan was 'reciprocating for [Klein's] generosity…from…Jamaica.' Thus, the government clearly argued that Ryan took Klein's benefits intending to be influenced in his official decision-making.") This non sequitur pervades the government's argument.

Twice during the years Ryan vacationed in Jamaica, he and Klein discussed government business affecting Klein. Ryan noted that if he was guilty of bribery, so was Klein, and he asked, "Could a businessman be convicted of bribery or honest services fraud simply because a public official who had been his house guest later made an official decision benefitting him?" RBr. 52.

The government's answer to this question is yes. It reports that it failed to charge Klein with honest services fraud only because it could not have obtained his testimony without a grant of immunity. GBr. 32 n.11. The government's zeal is alarming, and this Court should mark some limits.

V. THE JURY HEARD PREJUDICIAL EVIDENCE RENDERED INADMISSIBLE BY *SKILLING*.

The government charged Ryan with a scheme to defraud the public of the intangible right to his honest services. The scheme allegedly began when he was elected Secretary of State and ended when he left the Governor's office twelve years later. At the time, honest services fraud consisted of a breach of fiduciary duty for private gain, and every duty of a public official was fiduciary. For six months, the government presented allegations of criminal and non-criminal misconduct. All of this misconduct was alleged to be part of a single fraudulent scheme, and much of it bore no

resemblance to bribery. The government now contends that "no evidence admitted at trial was rendered inadmissible by *Skilling*." GBr. 62 n.26.

The government introduced evidence that Ryan violated both a regulation and a personal policy forbidding acceptance of gifts worth more than $50. GBr. 63. The district court held this evidence admissible by virtue of the "intent" exception to Federal Rule of Evidence 404(b) without applying the "four-factor test for introducing evidence of prior acts" mandated by *United States v. Ciesiolka*, 614 F.3d 347, 350 (7th Cir. 2010). *See* RBr. 54-55. The government now contends that, although the evidence was indeed admissible to show "Ryan's intent to defraud," it "was not 'other acts' evidence falling under Rule 404(b)." GBr. 63.

Accepting a $51 gift is not bribery, does not deprive anyone of property, and has nothing to do with kickbacks. The evidence that Ryan accepted gifts worth more than $50 was plainly "other acts" evidence. If this evidence had any tendency to show bribery, it was only because Ryan's willingness to break one rule ("never take anything worth more than $50") suggested his willingness to break another ("never take bribes"). This is precisely the sort of evidence Rule 404(b) makes inadmissible.

The district court acknowledged that it improperly received evidence of Ryan's use of state employees and state resources in political campaigns, A-000056-57, but the government maintains that this evidence was appropriately admitted to show that Ryan committed pecuniary fraud. GBr. 63-64. Before *Skilling*, courts treated a public official's misuse of public property for private gain as honest services fraud, and the parties had

no occasion to consider whether this misuse also constituted pecuniary fraud. As a matter of law, it does not.

As Ryan noted in another context, RBr. 33-34 n.10, *Neder v. United States*, 527 U.S. 1 (1999), transformed the law of pecuniary fraud. *Neder* applied to the word "defraud" the "well-established rule of construction that 'where Congress uses terms that accumulated settled meaning under…the common law, a court must infer…that Congress means to incorporate the established meaning of these terms.'" *Id*. at 21-22 (quoting authorities) (internal quotation marks omitted). To establish pecuniary fraud after *Neder*, the government must establish all the elements of a scheme to commit common law fraud; it is no longer sufficient simply to show that a breach of fiduciary duty resulted in a loss of property. Converting government property to one's own use is not fraud, *see* Wayne R. LaFave, *Criminal Law* §§ 19.6(d), 19.7 (4th ed. 2003), and a conversion of property does not become fraud simply because the person who has converted the property fails to disclose it.

Ryan allegedly accepted consulting fees from the Phil Gramm presidential campaign and concealed them. This asserted misconduct was not bribery, did not deprive anyone of property, and had nothing to do with kickbacks. The alleged misconduct was a tax offense, and the district court treated it as part of the scheme to deprive the public of Ryan's honest services as well. Even if the use of state resources in political campaigns constituted pecuniary fraud, Ryan's non-disclosure of the consulting fees had no tendency to establish his use of state employees in the Gramm campaign or any other campaign. *Contra* GBr. 63-64.

Ryan allegedly reassigned employees of the Secretary of State's Inspector General's Office to limit their investigation of both bribe-taking by Secretary of State employees and political fundraising by these employees. No evidence indicated that the reassignment was motivated by a desire to restrict an investigation of the use of employees in political campaigns or anything else that might have constituted a scheme to deprive the state of property.[15] Reassigning Inspector General employees was not bribery, did not deprive anyone of property, and had nothing to do with kickbacks.

Although the government argues to the contrary, GBr. 66-67, evidence that Ryan assigned low-digit license plates to campaign contributors was inadmissible to show bribery. The Supreme Court has held that campaign contributions may not be treated as bribes in the absence of an explicit *quid pro quo*, *McCormick*, 500 U.S. at 273-74, and the government offered no proof of an explicit promise to provide low-digit license plates to contributors.[16]

Evidence that Ryan revealed to Swanson where a new prison would be built might have been admissible if the government had connected this evidence to any evidence indicating that Ryan intended or foresaw that Swanson would use the

[15] The government claims that state employees raised campaign funds, which Ryan allegedly used for personal purposes. GBr. 65. Ryan, however, was not charged with and could not have been charged with defrauding his own campaign of property.

[16] The government says, "Evidence of Ryan himself assigning low-digit plates was confined to one witness, Tony DeSantis [who testified only about his own contributions and the low-digit plates he received]." GBr. 66-67. At trial, however, the government declared, "George Ryan is personally involved in the issuance of low-digit plates…. George Ryan…had to approve every low-digit plate that was granted during his term as secretary of state. That's what Scott Fawell testified. That was how interested George Ryan was in the low-digit plates." Tr. 22849.

information to profit as a lobbyist. The government, however, presented no such evidence. The district court therefore set aside a jury verdict convicting Ryan on Count 10, which was based on the information he gave Swanson. A-000461-63. Absent evidence that Ryan meant to benefit Swanson, the evidence of Ryan's disclosure had no tendency to show bribery. Both the government and the district court declare that, even if this evidence should not have been admitted, it "was not unfairly prejudicial." GBr. 67; A-000056. The influence of this evidence is shown, however, by the jury's improper conviction on Count 10.

For months, the jury heard evidence it would not have heard in a post-*Skilling* trial, and all of this evidence was designed to portray Ryan in the worst possible light. "[I]n the mind of the average juror, the prosecution's case would have been 'significantly less persuasive'" had this evidence been excluded. *See United States v. Owens*, 424 F.3d 649, 656 (7th Cir. 2005).

CONCLUSION

This Court should hold the evidence insufficient to support Ryan's mail fraud and RICO convictions and should set these convictions aside. In the alternative, it should recognize that the district court's instructional errors were not harmless and should order a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

I, Matthew R. Carter, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as well as this Court's 3/21/2011 Order allowing an oversize reply, as it contains 8,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as qualified by Circuit Rule 32(b), as it has been prepared by using Microsoft Word in a proportionally spaced typeface, Book Antiqua, with a 12-point font in the text and an 11-point font in the footnotes.

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CERTIFICATE OF COMPLIANCE WITH CIR. R. 31

Pursuant to Circuit Rule 31(e), Matthew R. Carter, attorney for Petitioner-Appellant, hereby certifies on March 28, 2011, that, along with the paper copy of this Brief, a digital searchable version of the Brief was provided to the Clerk and opposing counsel.

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CERTIFICATE OF SERVICE

I, Matthew R. Carter, an attorney, hereby certify that I have this day caused an original and fifteen copies (and a digital version) of the Brief to be served on the Clerk. I further certify that I have caused two copies (and a digital version) to be delivered to the counsel listed below.

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