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06/14/2011	38 Response	2	Filed Response by Appellee USA to GOVERNMENT'S SUPPLEMENTAL MEMORANDUM. [38][6315503] [10−3964] (Barsella, Laurie)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

GOVERNMENT'S SUPPLEMENTAL MEMORANDUM

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this supplemental memorandum.

INTRODUCTION

The Court has asked the parties to provide supplemental memoranda addressing the bearing of four Supreme Court decisions on this case: *Bousley v. United States*, 523 U.S. 614 (1998); *United States v. Frady*, 456 U.S. 152 (1982); *Engle v. Isaac*, 456 U.S. 107 (1982); and *Davis v. United States*, 417 U.S. 333 (1974). The government submits the following response.

ARGUMENT

The Four Cases

In *Davis*, the Supreme Court recognized that not every claim of error may be raised on a motion under 28 U.S.C. § 2255. To be cognizable under § 2255, the error must be "a fundamental defect which inherently results in a complete miscarriage of justice. . . ." *Davis*, 417 U.S. at 346 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). The Court held that such an error occurs when a defendant is convicted and punished "for an act that the law does not make criminal." *Davis*, 417 U.S. at 346.

In *Frady*, the defendant raised, for the first time on collateral attack, a claim of instructional error. *Frady*, 456 U.S. at 162. The Court reaffirmed the "well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *Id.* at 166. The Court held that where no contemporaneous objection was made, a defendant on collateral review must show both "(1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *Id*. at 168.

Frady elaborated that merely erroneous jury instructions are not sufficient to show actual prejudice, and that an erroneous instruction must "so infect[] the entire trial that the resulting conviction violates due process." *Id.* at 169 (quoting

Henderson v. Kibbe, 431 U.S. 145, 154 (1977)). Based on a review of the evidence in the record and the jury instructions as a whole, the Court in *Frady* determined that there was "no substantial likelihood that the same jury" would have acquitted "if only the . . . instructions had been better framed," and it denied relief. *Frady*, 456 U.S. at 172.

On the day the Court decided *Frady*, it also decided *Isaac*. In that case, defendants failed to challenge at trial the constitutionality of jury instructions rendered erroneous by a subsequent change in state law. *Isaac*, 456 U.S. at 116-17. The Court noted that defendants' petition presented a "plausible constitutional claim," but because they had forfeited it, they needed to establish "cause and actual prejudice" to obtain federal habeas relief. *Id*. at 122, 125, 129.

Bousley involved a defendant who, like the defendants in *Frady* and *Isaac*, procedurally defaulted his constitutional claim. The Court reiterated that the merits of Bousley's claim could not be heard on collateral review unless he met the cause and actual prejudice test to excuse his default. *Bousley*, 523 U.S. at 622. Alternatively, the Court held Bousley could obtain review if he established factual innocence, that is, that in light of all the evidence, it was more likely than not that no reasonable jury would have convicted him. *Id*. at 623.

Taken together, the four cases described above establish that: (1) a defendant raises a constitutional claim, cognizable under § 2255, when he contends that, because of an intervening change in the law, he was convicted based on conduct that is not criminal; and (2) a defendant who has failed to make such a claim on direct review can obtain relief under § 2255 only if he establishes cause and actual prejudice, or, alternatively, factual innocence.

Ryan's Claim of Constitutional Error

Ryan asserted two claims of constitutional error in his motion under § 2255. First, he argued that the evidence was insufficient to support convictions for mail fraud and RICO conspiracy under the standard announced by the Supreme Court in *Skilling*. R. 1 at 4; R. 7-1 at 15-22; R. 24-1 at 23-35 (citing *Skilling v. United States*, – U.S. –, 130 S.Ct. 2896 (2010)). Second, he claimed that the jury instructions were erroneous under *Skilling*, and that the error was not harmless. R. 1 at 4; R. 7-1 at 22-29; R. 24-1 at 11-20.[1]

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[1] At oral argument, the Court questioned the timeliness of Ryan's § 2255 petition. This Court recently stated that when the Supreme Court decides a question of substantive statutory construction, that decision applies retroactively on collateral review. *Narvaez v. United States*, – F.3d –, 2011 WL 2162901, *2-3 (7th Cir. June 3, 2011); *see also Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (Supreme Court decisions holding that a substantive criminal statute does not reach certain conduct are retroactive on collateral review) (quoting *Bousley*, 523 U.S. at 620-621); *cf. Tyler v. Cain*, 533 U.S. 656, 669 (2001) (O'Connor, J., concurring) (when the Supreme Court announces a new rule holding that a particular species of conduct is beyond the power of the criminal law-making authority to proscribe, it necessarily follows that the Court has made the new rule retroactive to cases on collateral review). *Skilling* decided a question of substantive statutory construction, and Ryan therefore had one year from

Ryan's claims of insufficiency of the evidence and instructional error in light of a subsequent change in statutory construction are similar– both question whether Ryan was convicted of conduct that is not criminal after *Skilling*. *See Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998) (Buggs's claim of erroneous jury instruction "can also be characterized as a challenge to the sufficiency of the evidence"). This Court has stated that conviction for conduct that the law does not make criminal is a denial of due process, and is cognizable on a motion under § 2255. *Buggs*, 153 F.3d at 444; *see United States v. Marcus*, – U.S. –, 130 S.Ct. 2159, 2166 (2010) (if jury erroneously convicted based exclusively on noncriminal conduct, defendant would have a valid due process claim); *see also Davis*, 417 U.S. at 346.

Whether Ryan Procedurally Defaulted His Claim

At trial, Ryan argued that the honest services statute, 18 U.S.C. § 1346, was unconstitutionally vague on its face and as applied. 02 CR 506, R. 168, 176. On direct review, Ryan repeated the argument that the statute was unconstitutionally vague as applied to him, because, he claimed, the state-law instruction and the conflict-of-interest instruction did not comply with this Court's decision in *United States v. Bloom*, 149 F.3d 649, 656 (7th Cir. 1998). *See* USCA No. 06-3517, 06-3528, Appellants' Br. at 60-62.

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the date of *Skilling* to file his § 2255 petition. *See* 28 U.S.C. § 2255(f)(3).

Ryan did not, however, claim that § 1346 was limited to bribes and kickbacks. Thus, as Ryan acknowledged in his § 2255 motion, this particular articulation of *Skilling* error was not presented to the trial court or on direct appeal. R. 1 at 4. Nevertheless, in the government's view, Ryan has not procedurally defaulted his claim that he was convicted for conduct that is not a crime. In *Black v. United States*, – U.S. –, 130 S. Ct. 2963 (2010), the defendant challenged in the district court the constitutionality of § 1346 both on its face and as applied to him, but did not argue that honest services fraud was limited only to bribery and kickbacks. *See* 05 CR 727, R. 261, 473 (N.D. Ill). On direct appeal, Black repeated his broad constitutional challenge, and alternatively asked this Court to narrowly construe § 1346 to exclude his conduct. *See* 07-4080, Appellant's Br. at 53-56 (7th Cir.). In the Supreme Court, Black was given the benefit of *Skilling* without plain error review, establishing that Black had sufficiently preserved the claim for review. *Black*, 130 S. Ct. at 2970. Ryan's challenge to the constitutionality of § 1346 similarly preserved his claim for collateral review.[2]

[2] Although the government does not argue that Ryan defaulted his contention that he was convicted for conduct that is not a crime, the government has argued that Ryan procedurally defaulted challenges to a number of specific jury instructions. *See* Govt. Br. at 41, 43, 55 n.22.

The Standard for Relief Under § 2255

In order to obtain *review* of his claim in a § 2255 proceeding, Ryan does not have to establish "cause" because his claim was not defaulted. Collateral *relief* is, however, limited only to those grievously wronged; "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993) (quoting *Frady*, 456 U.S. at 165 (quoting *United States v. Addonizio*, 442 U.S. 178, 184 (1979)). Thus, the appropriate standard on collateral review in this case is the standard announced in *Brecht*. *See Hedgpeth v. Pulido*, 555 U.S. 57, 129 S. Ct. 530 (2008); *see also United States v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006) (applying *Brecht* to § 2255 motion claiming error based on change in law following *Richardson v. United States*, 526 U.S. 813 (1999)); *accord United States v. Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003); *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000).

Under *Brecht*, it is not enough to find merely a "reasonable possibility" that trial error contributed to the verdict; Ryan is entitled to relief only if the Court concludes that, or has grave doubt about whether, Ryan suffered "actual prejudice." *See Brecht*, 507 U.S. at 637-38. This is the same standard the Supreme Court discussed in *Frady*. *See Frady*, 456 U.S. at 169; *see also O'Neal*

v. McAnich, 513 U.S. 432, 435 (1995).[3] The question is whether there is a *substantial* likelihood that a properly instructed jury would have acquitted Ryan, *see Frady*, 456 U.S. at 172; *Ross*, 289 F.3d at 683, or in other words, whether the presence of a pre-*Skilling* interpretation of § 1346, had "a *substantial* and injurious effect or influence" on the verdict. *Brecht*, 507 U.S. at 638 (emphasis added).[4]

In deciding this question, although the Court does not review the jury instructions, and their impact on the verdict, as if on direct appeal, the Court can look at the instructions "in relation to all else that happened." *Kotteakos v.*

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[3] Brecht's "actual prejudice" standard is more deferential to the judgment of conviction than the "harmless beyond a reasonable doubt" standard applicable on direct review. *See Chapman v. California*, 386 U.S. 18 (1967). This Court should reject Ryan's contention that the same standard of review that applies on direct review should apply to a § 2255 motion, Br. at 13-15, for the same reason that the Supreme Court in *Frady* rejected the defendant's argument that the plain error standard applies to § 2255 motions. Applying the same standard on direct and collateral review would accord "no significance whatever to the existence of a final judgment perfected by appeal," and would ignore "that a collateral challenge may not do service for an appeal." *Frady*, 456 U.S. at 164-65.

[4] Before *Brecht*, this Court employed different techniques in reviewing assertions of *McNally* error on direct and collateral review. *See Toulabi v. United States*, 875 F.2d 122, 124 (7th Cir. 1989) (discussing difference between direct and collateral review in post-*McNally* decisions and noting that some cases conduct only a narrow review of the indictment, evidence, and instructions, while others conduct a fuller review of evidence and instructions); *see also Toulabi*, 875 F.2d at 126-128 (Ripple, J., concurring) (indictment, evidence and instructions should be reviewed for miscarriage of justice on post-*McNally* collateral review). In this case, the government's position is that a non-defaulted claim of *Skilling* error should be reviewed for actual prejudice, thereby maintaining the distinction between direct and collateral review.

United States, 328 U.S. 750, 767 (1946). In this context, the Court should not judge a single jury instruction "in artificial isolation," but should view it "in the context of the overall charge," and should view the jury instructions as a whole in the context of the entire record, including the evidence and arguments. *Frady*, 456 U.S. at 169 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)).

For the reasons explained in the government's brief, there is no substantial likelihood that a properly instructed jury would have acquitted Ryan. First, there was no *Skilling* error at all because, viewing the instructions as whole, the jury was properly instructed about the requirements of bribery. Govt. Br. at 40-41. Moreover, the evidence and the arguments made clear to the jury that Ryan engaged in a bribery-kickback scheme, that is, that he took benefits with the understanding that he would perform official actions in return. The jury was presented with two clear alternatives: either Ryan merely exchanged innocent gifts and did favors for friends, or Ryan accepted personal benefits and, in return, awarded state contracts and leases, in other words, Ryan took bribes. Govt. Br. at 49-52. The evidence at trial showed, and the government argued, that the only interest Ryan had in the state contracts and leases he awarded were the bribes he accepted to award them to his benefactors, and Ryan's only misuse of office for private gain was awarding the contracts and leases in return for the benefits. Govt. Br. at 49-52, 54-55.

Ryan's arguments to the contrary, Br. 20-22, 24-29; Reply Br.10-16, amount to a claim that there is a possibility the jury reached a different conclusion. A mere possibility, however, is not sufficient to warrant collateral relief. In any event, there is no support in the evidence for Ryan's claim. Indeed, the district court found no relief warranted even under the *Chapman* standard applicable on direct review. A-000008-9.

Finally, the evidence established that Ryan's bribery scheme necessarily involved pecuniary fraud, the government argued that Ryan committed pecuniary fraud, and the jury was properly instructed on pecuniary fraud. Govt. Br. at 57-62.

In sum, the district court correctly concluded that Ryan did not suffer from "a fundamental defect which inherently results in a complete miscarriage of justice," *Davis*, 417 U.S. at 346, and thus he was not entitled to relief under § 2255.

Respectfully Submitted,

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Date: June 14, 2011

Certificate of Service

I hereby certify that on Tuesday, June 14, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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