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 remand from the Supreme Court of the United States, No. 11-499

CIRCUIT RULE 54 STATEMENT OF PETITIONER-APPELLANT

RE-ARGUMENT REQUESTED

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INTRODUCTION

The Supreme Court has remanded this case for further consideration in light of *Wood v. Milyard*, 132 S. Ct. 1826 (2012). *See Ryan v. United States*, 132 S. Ct. 2099 (2012). *Wood* holds that a federal court "is not at liberty … to bypass, override, or excuse" the government's deliberate waiver of a non-jurisdictional defense. 132 S. Ct. at 1830. It also holds that an appellate court may disregard the government's inadvertent forfeiture of a non-jurisdictional defense only in "extraordinary circumstances." *Id*. at 1833.

This statement pursuant to Circuit Rule 54 contends that, in light of *Wood*, it was improper for this Court to rely on a supposed procedural default by Ryan when the Government not only failed to assert any default but also declared expressly that no default occurred.

In addition, the government waived (1) any objection to considering in this post-conviction proceeding whether the district court received evidence rendered inadmissible by *Skilling v. United States*, 130 S. Ct. 2896 (2010); (2) any objection to considering whether the district court's erroneous receipt of evidence was harmless under the standard of *United States v. Owens*, 424 F.3d 649 (7th Cir. 2005), a standard the government itself proposed; and (3) any objection to considering whether the district court's instructional errors were harmless. Moreover, if this Court were to conclude that the government forfeited rather than waived any of these objections, no extraordinary circumstance would justify disregarding the forfeiture.

The Court should now address the issues briefed by the parties—in particular, whether the jury must have found that Ryan engaged in criminal conduct (accepting

bribes or kickbacks) despite instructions that directed it to convict him of noncriminal conduct (violating any of a number of state laws, misusing a public office for private gain, or failing to disclose a personal or financial conflict of interest).

Because this Court directed the initial argument of this case to issues other than those that now may be decisive, this statement concludes by requesting re-argument.

ARGUMENT

I. *WOOD V. MILYARD* PRECLUDES RELIANCE ON A SUPPOSED PROCEDURAL DEFAULT THAT THE GOVERNMENT ACKNOWLEDGED DID NOT OCCUR.

As this Court and the district court both recognized, the jury instructions in this case directed Ryan's conviction for conduct that *Skilling v. United States*, 130 S. Ct. 2896 (2010), holds is not a crime. Most notably, the instructions declared:

> A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails 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, then that official or employee deprives the public of its right to the official's or employee's honest services if the other elements of the mail fraud offense are met.

A-000420[1]; *see Ryan v. United States*, 645 F.3d 913, 914, 918 (7th Cir. 2011) (noting that "the honest-services form of the mail fraud offense … covers only bribery and kickback schemes" while "the question under the instructions … was whether Ryan had received a secret financial benefit"); A-000012-13, A-000019-20.[2] The principal issue briefed by the

[1] The appendix to Ryan's opening brief is cited as A-. Ryan's opening brief is cited as RBr; the government's brief is cited as GBr; and Ryan's reply brief is cited as ReplyBr.

[2] In the district court's view, the instructions marked three invalid paths to conviction and one valid path. Three of the court's instructions told the jury to convict Ryan of conduct that does

parties was whether the district court's instructional errors were harmless under the standard applicable in post-conviction proceedings brought by federal prisoners.[3]

This Court did not address harmless error and most of the other issues briefed by the parties. Instead, it ruled *sua sponte* that Ryan had failed at trial and on appeal to make appropriate objections to the district court's unlawful instructions. *See Ryan*, 645 F.3d at 915-16 ("[Ryan] never made the argument that prevailed in *Skilling*: that § 1346 is limited to bribery and kickback schemes…. The forfeiture as we see it is that Ryan never made … an argument that § 1346 is best understood to be significantly more limited than *Bloom* held.").

The government, however, had asserted no default. To the contrary, it had acknowledged expressly that Ryan made and preserved appropriate objections to the

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not constitute a federal crime—the conflicts-of-interest instruction quoted in text, the *Bloom* instruction (directing conviction for any misuse of position resulting in private gain to the defendant or anyone else), and the state-law instruction (directing conviction for violating state laws having nothing to do with bribes or kickbacks). A-000012-14, A-000019-21. The district court, however, rejected Ryan's argument that its instructions concerning the improper receipt of financial benefits (the "financial benefits" instructions) encompassed benefits that do not qualify as bribes under federal standards and that they too directed his conviction for noncriminal conduct. A-000015-19. The Supreme Court noted in *Skilling*, "[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 (describing *Yates v. United States*, 354 U.S. 298 (1957)).

[3] The parties disagreed about what this standard was. *See* RBr. 13-15 (arguing for the harmless error standard this Court applied to post-conviction proceedings brought by federal prisoners in *Lanier v. United States*, 220 F.3d 833, 838-39 (7th Cir. 2000)); GBr. 20-23 (arguing for the harmless error standard the Supreme Court applied to post-conviction proceedings brought by state prisoners in *Brecht v. Abramson*, 507 U.S. 619, 637 (1993)); ReplyBr. 7-10 (noting the government's failure to acknowledge the Supreme Court's modification of *Brecht* in *O'Neal v. McAninch*, 523 U.S. 432 (1995), and explaining why, although neither *Lanier* nor *Brecht-McAninch* is controlling, the *Lanier* standard is more appropriate).

instructions that the district court held erroneous.[4] At the conclusion of oral argument, the Court directed the parties to file supplemental memoranda on the significance of several Supreme Court decisions neither party had cited. The government's memorandum declared, "[I]n the government's view, Ryan has not procedurally defaulted his claim that he was convicted for conduct that is not a crime." Government's Supplemental Memorandum at 6, Doc. 38, *Ryan v. United States*, 645 F.3d 913 (7th Cir. 2011) (No. 10-3964). It added, "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." *Id*. at 7 (emphasis removed).

In *Wood v. Milyard*, the Supreme Court noted the distinction between waiver and forfeiture. "A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve." 132 S. Ct. at 1832 n.4. The Court declared, "[I]t would be 'an abuse of discretion' . . . for a court 'to override a State's deliberate waiver of a limitations defense.'" *Id*. at 1834 (quoting *Day v. McDonough*, 547 U.S. 198, 202 (2006)). The Court noted that its ruling applied not only to statute of limitations defenses like the one waived in *Wood* but also to other non-jurisdictional defenses. *See id*. at 1833.

In *Wood*, a prosecutor told the district court, "Respondents will not challenge, but are not conceding, the timeliness of Wood's [federal] habeas petition." *Id*. at 1830. The Supreme Court concluded that this statement fit the classic definition of waiver—an

[4] The government did argue that Ryan had defaulted his objections to other instructions. *See* note 5 *infra*.

"intentional relinquishment or abandonment of a known right." *Id*. at 1835. More clearly than the prosecutor's agnostic and confusing statement in *Wood*, the government's unambiguous declarations in this case constituted a waiver of its possible procedural defense.

The government's waiver was fully knowing and voluntary. From the beginning, the government argued that Ryan defaulted his objections to two "financial benefits" instructions.[5] It did not, however, assert any default with respect to the three instructions the district court held erroneous. The government apparently had considered whether Ryan failed to make appropriate objections to these instructions and concluded that he did not. When the oral argument in this Court concluded,

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[5] In this Court, the government maintained that Ryan defaulted his objections to *three* financial benefits instructions. GBr. 41, 43, 44. It noted that Ryan did not object to these instructions on direct appeal and that he proposed some of the language of one of them. In the district court, however, the government claimed only that Ryan defaulted his objections to *two* of these instructions (and to another instruction that he no longer challenges). It did not suggest any default with respect to the "campaign contributions" instruction—an instruction declaring that, in determining whether accepting a campaign contribution constituted honest-services fraud, "the intent of each party can be implied from their words and ongoing conduct." *Contra McCormick v. United States*, 500 U.S. 257, 273 (1991) (holding that campaign contributions may be treated as *bribes* "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act"). *See* A-000340 n.11; A-00015 n.8 ("The Government has not raised a waiver argument with respect to the campaign contribution instruction.").

As to the "campaign contributions" instruction, Ryan argued that the government had "waived waiver" or, more precisely, "forfeited forfeiture." *See* ReplyBr. 18. As to the two other financial benefits instructions, he contended that "cause and prejudice" excused his default. Ryan did not claim that cause existed because it would have been futile to present his objections to the Seventh Circuit; rather, he relied on Supreme Court decisions holding that cause exists when that Court has "overturn[ed] a longstanding and widespread practice to which [it] 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). He asked this Court to adhere to its ruling in *Bateman v. United States*, 875 F.2d 1304, 1307-08 (7th Cir. 1989). ReplyBr. 17-21.

moreover, the Court requested supplemental memoranda on the significance of several procedural-default decisions of the Supreme Court. After studying these decisions and reconsidering the issue, the government declared, "Ryan does not have to establish 'cause' because his claim was not defaulted." Government's Supplemental Memorandum, *supra*, at 7.[6]

Wood precludes reliance on Ryan's supposed procedural default. The Court should now address the issues briefed by the parties.

II. IN LIGHT OF *WOOD*, THIS COURT CANNOT PROPERLY DISREGARD THE GOVERNMENT'S WAIVER OR FORFEITURE OF ANY OBJECTION TO CONSIDERING IN THIS POST-CONVICTION PROCEEDING THE EVIDENTIARY ISSUES PRESENTED BY THE PARTIES.

The law of federal post-conviction proceedings treats instructional errors and evidentiary errors differently. In the absence of a procedural default, instructions that direct conviction for non-criminal conduct violate the Constitution, and a prisoner who may have been convicted of non-criminal conduct is entitled to post-conviction relief. *See Henderson v. Kibbe*, 431 U.S. 145, 153-24 (1977); *O'Neal v. McAninch*, 513 U.S. 432 (1995); *Middleton v. McNeil*, 541 U.S. 433, 437-38 (2004); *Hedgpeth v. Pulido*, 555 U.S. 57 (2008); *Waddington v. Sarausad*, 555 U.S. 179, 191 (2009). As these decisions recognize, the

[6] The government's concession did not evidence any ignorance. Ryan had objected before trial, at trial, and on appeal that § 1346 did not reach undisclosed conflicts of interest. This Court offered no reason for its apparent conclusion that Ryan was required, not just to object to his conviction for a nonexistent crime, but to anticipate the precise standard the Supreme Court would articulate when it held his conduct noncriminal in a later case. In fact, no litigant anywhere in the United States appears to have argued for *Skilling*'s "bribes and kickbacks" standard prior to *Skilling*. This Court also offered no reason for its apparent conclusion that Ryan should have asked it to overrule its leading decision on honest-services fraud. Ryan had a strong argument that the district court's instructions were incompatible with this decision and no reason to make a more sweeping argument. Even if this Court's view of Ryan's default was correct, the government's position was no slip-up.

due process clause requires proof beyond a reasonable doubt of every element of a crime, and jury instructions directing conviction for non-criminal conduct violate this requirement at the same time they misstate state or federal statutory law. *See also Skilling*, 130 S. Ct. at 2934 ("[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") (describing *Yates v. United States*, 354 U.S. 298 (1957)); *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (declaring that rulings narrowing the scope of federal criminal statutes apply retroactively "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal") (internal quotation marks omitted); *Bousley v. United States*, 523 U.S. 614, 620 (1998) ("[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.") (internal quotation marks omitted).[7]

[7] This Court's decisions over the past 25 years have adhered to the principles recognized in *Kibbe*, *O'Neal*, *Middleton*, *Hedgpeth*, and *Waddington*. In post-conviction proceedings following *McNally v. United States*, 483 U.S. 350 (1987), and other Supreme Court decisions narrowing the scope of federal criminal statutes, the Court has recognized that a petitioner is entitled to a new trial unless it is clear upon an examination of the evidence, arguments, and jury instructions that he was convicted of conduct that remains criminal. *See*, *e.g.*, *Messinger v. United States*, 872 F.2d 217, 221 (7th Cir. 1989); *Lombardo v. United States*, 865 F.2d 155, 158 (7th Cir. 1989); *Moore v. United States*, 865 F.2d 149, 151, 154 (7th Cir. 1989); *United States v. Folak*, 865 F.2d 110, 112-13 (7th Cir. 1988); *Buggs v. United States*, 153 F.3d 439, 444 (7th Cir. 1998) (Because "this court has stated numerous times that a conviction for engaging in conduct that the law does not make criminal is a violation of due process," an instructional error "had consequences of constitutional magnitude … [and] is cognizable on collateral review"); *Gray-Bey v. United States*, 209 F.3d 986, 990 (7th Cir. 2000) ("[T]he kind of claim Gray-Bey presents is one for which § 2255 provides a remedy."); *Narvaez v. United States*, 641 F.3d 877 (7th Cir. 2011) (finding a due process violation cognizable in a § 2255 proceeding because a prisoner had been sentenced under a broader interpretation of a federal sentencing guideline than the Supreme Court later approved).

Ordinarily, however, the erroneous admission of evidence entitles a prisoner to post-conviction relief only when "'the error was of such a magnitude as to deny fundamental fairness to the criminal trial….'" *Woods v. Estelle*, 547 F.2d 269, 271 (5th Cir. 1977) (quoting *Hills v. Henderson*, 529 F.2d 397, 400 (5th Cir. 1976)); *see United States* ex rel. *Searcy v. Greer*, 768 F.2d 906 (7th Cir. 1985). Because Ryan considered success under this standard unlikely, he did not initially seek relief on the basis of the district court's erroneous admission of non-bribery evidence. No argument heading of his Memorandum of Law in Support of Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, Doc. 7-1, *United States v. Ryan*, 759 F. Supp. 2d 975 (N.D. Ill. 2010) (No. 10-cv-5512), spoke of the district court's evidentiary errors.

Under two argument headings, however—"The Evidence in this Case was Insufficient to Establish Mail Fraud or Racketeering Under the *Skilling* Standard" and "The Error in Instructing the Jury was not Harmless"—Ryan mentioned that "[o]ver the course of a five-and-one-half month trial, the Government presented evidence of conduct that bore no resemblance to bribes or kickbacks." *Id*. at 28. He noted six sorts of evidence that "would be inadmissible in a post-*Skilling* mail fraud trial and would be highly prejudicial in a trial of legitimate mail fraud charges." *Id*. at 15. The fact that the jury heard months of evidence that had nothing to do with bribes or kickbacks bore on whether it might have convicted Ryan of noncriminal conduct. Ryan did not maintain, however, that the erroneous admission of evidence itself warranted a new trial.

The government then devoted a full section of its response to answering the argument Ryan had not made. It maintained that all of the evidence presented at Ryan's

trial would have been admissible after *Skilling* and, in the alternative, that "a reasonable juror's view of the case would not have changed had this evidence been excluded." A-000363-64. The government thus invoked the standard of harmless error this Court applies on direct review to the improper admission of evidence. As authority for this standard, it cited two cases on direct appeal, *United States v. Owens*, 424 F.3d 649 (7th Cir. 2005), and *United States v. Jones*, 389 F.3d 753 (7th Cir. 2004). In one of these cases, *Owens*, this Court reversed a conviction because the district court improperly admitted propensity evidence.[8]

Recognizing that the government had waived or forfeited any objection to affording post-conviction relief on the basis of improperly received evidence and also that it had waived or forfeited any objection to applying the *Owens* standard of harmless error, Ryan engaged the issue on the government's terms. His reply in the district court contended that the admission of non-bribery evidence warranted a new trial. *See* Movant's Reply in Support of His Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 at 36-37, Doc. 24-1, *United States v. Ryan*, 759 F. Supp. 2d 975 (N.D. Ill. 2010) (No. 10-cv-5512).

The district court resolved the evidentiary issues as they had been framed by the government and endorsed by Ryan. *See* A-000053-57. It held that some non-bribery evidence would have been admissible even after *Skilling* by virtue of the "intent"

[8] The government, however, misstated the *Owens* standard. *See* 424 F.3d at 656 ("The test for harmless error is whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded.") (internal quotation marks omitted).

exception to Fed. R. Evid. 404(b). *See* A-00054-56.[9] It held that other non-bribery evidence, although inadmissible on the mail fraud charges, was admissible on the tax charges. *See* A-000054-55.[10] It held that still other evidence should not have been received at all but that the error was harmless under the *Owens* standard. *See* A-000056-57.[11]

In this Court, Ryan challenged the district court's rulings, relying once again on the *Owens* standard the government had proposed. RBr.53-57. The government reiterated that *Owens* was the appropriate standard in its response. GBr.62-68 (citing *Owens* at page 62). Ryan replied, and the last line of his brief (other than its conclusion) was a citation to *Owens*. ReplyBr.30.

By proposing the *Owens* standard, the government waived any claim that erroneous evidentiary rulings "are not themselves a ground of collateral relief," *see Ryan*, 645 F.3d at 917, or that a standard more demanding than *Owens* determines when relief is warranted. *See Ryan*, 645 F.3d at 915 ("Ryan himself proposed some of the instructions that the judge gave, … and with respect to them he has waived and not just forfeited the line of argument he makes now.").

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[9] The court, however, made no effort to apply the "four-factor test for introducing evidence of prior acts" articulated in *United States v. Ciesiolka*, 614 F.3d 347, 350 (7th Cir. 2010).

[10] This ruling did not respond to Ryan's argument that the evidence was inadmissible on the mail fraud charges.

[11] The court adverted obliquely to the fact that Ryan had come to the issue only belatedly: "Ryan does not suggest a standard that should govern the court's review on this issue, although he appears to agree [presumably with the government] that *United States v. Owens* … applies." A-000053.

Wood v. Milyard spoke not only to when federal courts may disregard waivers by the government but also to when federal appellate courts may disregard the government's forfeitures. Even if this Court were to conclude that the government forfeited rather than waived any objection to considering the district court's evidentiary errors, it could not appropriately disregard the forfeiture.

Wood reiterated the Supreme Court's "'reluctance to adopt rules that allow a party to withhold raising a defense until after the "main event" … is over,'" but it concluded that "the bar to court of appeals' consideration of a forfeited habeas defense is not absolute." 132 S. Ct. at 1833 (quoting *Granberry v. Greer*, 481 U.S. 129, 132-33 (1987)).[12] The Court cautioned that "a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Id*. It declared that appellate courts may notice forfeited defenses only in "exceptional cases" and "extraordinary circumstances." *Id*.

The Court explained:

> For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance…. That restraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal…. When a court of appeals raises a procedural impediment to disposition on the merits, and disposes of the case on that ground, the district court's labor is discounted and the appellate court acts not as a court of review but as one of first view.

[12] Justices Thomas and Scalia, concurring, would have held that the bar to consideration of a forfeited statute of limitations defense is absolute. They added that "[a]ppellate courts … are particularly ill suited to consider issues forfeited below." 132 S. Ct. at 1836 (Thomas, J., concurring).

Id. at 1834.

At this late stage of the proceedings, after Ryan, the district court, and the government have addressed repeatedly the evidentiary issues on the terms the government proposed, no extraordinary circumstance justifies disregarding the government's forfeiture (if indeed the government did not waive any objection to applying the *Owens* standard of harmless error).

III. THIS COURT CANNOT PROPERLY DISREGARD THE GOVERNMENT'S WAIVER OR FORFEITURE OF ANY OBJECTION TO CONSIDERING IN THIS POST-CONVICTION PROCEEDING WHETHER THE DISTRICT COURT'S INSTRUCTIONAL ERRORS WERE HARMLESS.

This Court declared, "Jury instructions that misstate the elements of an offense are not themselves a ground of collateral relief." It added in parentheses, "Unconstitutional jury instructions are a different matter…. But *Skilling* is about statutory interpretation." *Ryan*, 645 F.3d at 917.

One possible reading of this language is that misstatements of statutory law in jury instructions are not cognizable in post-conviction proceedings even when they might have led the jury to convict a defendant of non-criminal conduct. Another reading, however, views this passage in the context of this Court's discussion of procedural default. It says that directions to convict of non-criminal conduct provide no basis for relief when a petitioner has failed to make and preserve appropriate objections to the instructions at trial and on appeal.[13] The former interpretation attributes to this

[13] This Court would have had no reason to discuss Ryan's supposed default if it meant to hold that his arguments provided no basis for relief in any event.

Court a proposition of law that Ryan has argued is incorrect, *see* pp. 6-7 & note 7 *supra*, and the government's response to Ryan's petition for certiorari offered no defense of this proposition. Instead it endorsed the alternative reading of the quoted passage, limiting its application to cases of procedural default. Brief for the United States in Opposition at 21 n.5, *Ryan v. United States*, 132 S. Ct. 2099 (2012) (No. 11-499).

Although the import of the quoted passage may be uncertain, the government's position has been clear and consistent. From the outset, the parties have agreed that Ryan is entitled to a new trial if the errors in the district court's instructions were not harmless. By proposing that the Court apply the *Brecht-McAninch* standard of harmless error, *see* note 3 *supra*, the government has waived any objection to affording relief on the basis of instructional errors.

Even if this Court were to conclude that the government merely forfeited any objection to considering these errors, the Court could not appropriately disregard the forfeiture. No extraordinary circumstance would justify setting aside the government's default at this late stage of the proceedings.[14]

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[14] To be sure, "the Judicial Branch has an independent interest in the finality of judgments." *Ryan*, 645 F.3d at 918. On the other side of the scale, however, Ryan does not simply assert procedural errors in his trial or a technical bar to his punishment; he maintains that he was never convicted of a crime.

Although, contrary to this Court's suggestion, Ryan's trial did not last eight months, *see id*, it did last six. The trial was unconscionably long because most of the evidence the district court admitted had nothing to do with bribes and kickbacks. A trial limited to allegations that Warner and Klein bribed Ryan would have ended within weeks. It would be unbecoming for a court to permit an improper, sprawling trial and then cite the trial's indecent length as an extraordinary circumstance justifying disregard of the government's forfeitures.

Ryan's case for post-conviction relief is simple, straightforward, and sufficiently compelling that the standard of harmless error hardly matters. The jury in his case did not find that he took bribes. The instructions and arguments marked a far easier path to conviction, and there is no reason to doubt that the jury took it. What answer it would have given to the question that *Skilling* makes critical remains unknown.[15]

The most damaging evidence presented during Ryan's trial was probably the testimony of his former chief of staff, Scott Fawell. Fawell testified that Ryan purported to pay for his annual vacations at the vacation home of Harry Klein by writing checks to Klein and taking cash back. Fawell explained that, because Klein's currency exchanges

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In summary, holding that the district court's instructional errors are not cognizable in these proceedings would (1) go beyond this Court's earlier opinion, (2) depart from clearly established law, and (3) disregard without justification the government's waiver or repeated forfeitures.

[15] The issue before the Court is not whether a reasonable jury *would have* convicted Ryan of taking bribes. It is whether the jury in his case *did* convict him of this conduct. Just as a trial court may not direct a verdict of conviction even when it considers the evidence of guilt overwhelming, a reviewing court may not enter the jury box and itself convict a defendant of misconduct not found by a jury. As the Supreme Court observed in *Sullivan v. Louisiana*, 508 U.S. 275 (1993),

> Harmless-error review looks … to the basis on which the jury *actually rested* its verdict…. The inquiry … is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict rendered in *this* trial was surely unattributable to the error…. [T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279 (emphasis in the original) (internal quotation marks omitted); *see Smiley v. Thurmer*, 542 F.3d 574, 584 (7th Cir. 2008); *United States v. Miller*, 673 F.3d 688, 701 (7th Cir. 2012) ("Our role in deciding whether an error was harmless is not to 'become in effect a second jury to determine whether the defendant is guilty.'")(quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)). In the context of this case, competing harmless error standards differ only in the degree of confidence they require for concluding that the jury did find the defendant guilty of conduct that remains criminal.

were regulated by Ryan's office, Ryan did not want Klein's hospitality known. A-000367.

Fawell's testimony gave the government a strong case that Ryan had concealed a conflict of interest, and the government pressed this case. "[T]his is the heart of the matter," its closing argument declared. "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." The government then recited the conflicts-of-interest instruction in full and told the jury, "So folks, on this honest services, on this scheme … it can be met with a conflict of interest." A-000417. The government's closing argument never described or recited *any* of the instructions authorizing Ryan's conviction for taking bribes and never suggested that any of these instructions provided a basis for conviction.[16]

The government told the jury that the cash-back arrangement with Klein concealed "a classic conflict of interest." It did not suggest that Ryan had concealed a bribe:

> 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 [of] that flow of benefits I talked to you about, George Ryan was operating under a conflict of interest every time he dealt with Larry Warner, because benefits were flowing from Larry Warner. He had a duty to disclose them … and he didn't.

A-000417-18.

[16] Although the government did not mention the bribery instructions, it sometimes intimated that Ryan's favoritism for friends who had done favors for him and his family was akin to bribery. At one point, while describing the "various undisclosed financial benefits" Ryan and his family received, it declared that he "sold his office." A-000392. At another, it said that the "type of corruption here" was like a meal plan or open bar. A-000396.

The government's emphasis on the conflicts-of-interest instruction and its failure to mention the bribery instructions reflected both the strength of its conflicts-of-interest case and the weakness of its bribery case. Throughout the trial, Ryan's counsel cross-examined prosecution witnesses by asking such questions as, "[W]ere you ever aware of anybody ever giving any money to George Ryan to affect his decisions as secretary of state?" and "[D]id you ever observe or see George Ryan do anything that indicated to you that he had received any money or benefit from anyone to influence or affect his judgments as secretary of state?" Every witness answered no. *E.g.*, A-000369-70; A-000371; A-000375; A-000379; A-000380-81. Of the 83 witnesses the government called, none "testified that George Ryan accepted anything from anybody to perform his official acts." A-000413.[17]

The government in fact acknowledged that it had failed to establish the central element of bribery, a *quid pro quo*[18]:

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[17] Because every bribe creates a conflict of interest but not every conflict of interest is a bribe, it is *always* easier to find a conflict of interest than to find a bribe. Under the district court's instructions, finding a conflict of interest made it unnecessary to consider whether the government had established the elements of bribery, and there is no reason to believe the jury reached this question. Perhaps, for example, the jury could have "inferred" that the check Warner wrote to pay for the band at Ryan's daughter's wedding was a disguised bribe and that Ryan "implicitly" agreed to do something in exchange for this gift, but the instructions gave the jury no reason even to address the issue. It would have been far easier to conclude that Ryan failed to reveal a conflict of interest when he awarded a government lease to a close family friend who, among other things, had paid for the band at his daughter's wedding.

[18] *See, e.g.*, *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999) ("[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.") (emphasis in the original). Like every other definition of bribery, this standard looks to the moment when a benefit is received. As Justice Stevens explained, "When petitioner

> How did George Ryan reciprocate this longtime friendship [with Warner]? Government business is how he did it. $3 million worth of government business. 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… We have charged an undisclosed flow of benefits, which, under the law, is sufficient….

A-000416.[19]

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took the money, he was either guilty or not guilty." *McCormick v. United States*, 500 U.S. 257, 283 (1991) (Stevens, J., dissenting). The Supreme Court declared in *Evans v. United States*, 504 U.S. 255, 268 (1992), "[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts…."

The bribery statutes from which the *Skilling* standard "draws content," *see* 130 S. Ct. at 2933, prohibit demanding, seeking, agreeing to accept, or accepting benefits in return for being influenced. *See* 18 U.S.C. § 201; 18 U.S.C. § 666. They thus describe conduct that can precede but cannot follow the acceptance of benefits. Under these statutes as under the Supreme Court's *quid pro quo* standard, an agreement must be in place when the benefits are received.

Under these definitions, it is not bribery for an official to do a favor for someone who has done a favor for him—not even when the official is prompted by gratitude to his benefactor and not even when he hopes to curry further favor. "One hand washes the other" is not bribery. Cronyism is not bribery. Streams of benefits flowing in both directions may not be bribery. The circumstances must warrant an inference that, at the moment an official accepted one or more of the benefits in the stream, he agreed at least implicitly to provide something in return.

The standards established by these definitions may not reach every "functional equivalent" of bribery, but collapsing the distinction between *quid pro quo* exchanges and "one hand washes the other" would allow prosecutors to convict almost every office holder and make public service intolerable. Every elected official exhibits a pattern of favoritism for supporters.

[19] The government also said:

> [I]t's important to remember that it is not necessary for us to prove a quid pro quo. I used that term before, I think. In other words that was I give you this, you give me that; it doesn't have to be that sort of relationship.
>
> The defense … has repeatedly attempted to focus you on corrupt payments of money or cash bribes, but that's not the case that we have charged here. What the government's case is about is that George Ryan received these financial benefits for himself and steered other benefits to third parties, benefits that were not disclosed to the public ….

A-000407.

The government now says that it acknowledged only that it had failed to prove "an express promise to give a specific benefit for a specific official action." GBr.39. That, however, is not what the government said and not what it meant. The government recognized that it had not shown a *quid pro quo* of any kind; it told the jury repeatedly that it need not prove a *quid pro quo* because it had shown an undisclosed conflict of interest.

The district court's analysis of harmless error rested on a non sequitur. After declaring that any conflict of interest the jury found must have been "related to" the benefits that Warner and Klein provided,[20] it leapt to the conclusion that "the jury must have found Ryan accepted gifts … with the intent to influence his actions." A-000033; *see* A-000022-23; A-000035; A-000040-41. The jury, however, need not have found that Ryan's receipt of gifts was in any way improper. Under the instructions, what was important about these gifts was not that Ryan accepted them with an improper intent but that they later created a conflict of interest he did not disclose. Whether these benefits were bribes or legitimate gifts, the instructions told the jury that Ryan had a duty to disclose them when he made decisions benefitting their donors.[21]

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[20] Even this premise of the court's harmless error analysis was unwarranted. If Ryan awarded government contracts to friends without revealing the conflict of interest created by his friendship, the instructions directed his conviction of honest services fraud without proof that he received any benefits at all. *See* RBr.23-28.

[21] The district court's harmless error analysis invoked three other instructions that it said precluded Ryan's conviction for anything other than bribe taking, but its arguments concerning these instructions were red herrings.

Before trial, the government asked the district court to preclude the defense from "argu[ing] or sugges[ing] to the jury that … specific quid pro quo evidence is a prerequisite to a finding of guilt on the particular mail fraud charges here." A-000157 (emphasis removed). It explained, "Other circuits … have upheld public corruption prosecutions rooted in … the failure of a public official to disclose a financial interest or relationship affected by his official actions." A-000158. The government's motion drew a battle line on which the parties fought before trial, during trial, and on appeal. The

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The court wrote, "[T]he jurors … were specifically instructed that if the benefits Ryan received from Warner were merely the proceeds of a friendship, they could not be the basis of a conviction." A-000033; *see* A-000035. There was, however, no such instruction. The only instruction that mentioned friendship was one describing an Illinois statute that outlawed gifts from lobbyists. This statute excluded "anything provided on the basis of personal friendship, unless the officer had reason to believe that the gift was provided because of the official position of the officer and not because of friendship." A-000421. If Ryan and his family accepted gifts that Warner and Klein provided on the basis of friendship, the jury could not have grounded its conviction on Ryan's violation of *this statute*. It could, however, have grounded its conviction on Ryan's violation of another statute—one requiring officials to file annual reports of their economic interests, including gifts provided on the basis of friendship. *See id*. Moreover, no instruction indicated that gifts provided on the basis of friendship could not create conflicts of interest that Ryan would be obliged to disclose.

Another instruction declared, "Good faith on the part of the defendant is inconsistent with the intent to defraud…." A-000420. The district court concluded that, by rejecting Ryan's claim of good faith, the jury must have found that he did not act for legitimate reasons but instead "steered … leases to Warner in exchange for Warner's provision of benefits to Ryan." A-00035. Under the instructions, however, the jury might have found that Ryan did not act in good faith simply because he failed to disclose a conflict of interest.

The district court noted that an element of honest services fraud was "private gain," and it suggested that the only "private gain" the jury could have found was the "stream of benefits" Ryan received from Warner. A-000033. The instructions, however, declared, "A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrue to others…." A-000421. They added, "The phrase 'intent to defraud' means that the acts were done knowingly … in order to cause a gain of money or property to the defendant *or others*…." A-000420 (emphasis added). They said again, "Where a public official or employee misuses his official position or material nonpublic information he obtained in it for private gain for himself *or another*, then that official or employee has defrauded the public of his honest services…." A-0000421 (emphasis added). Favoring Warner and Klein in the award of contracts would have satisfied the "private gain" requirement even if Ryan had received nothing from them at all.

government contended successfully for a conflicts-of-interest instruction that it acknowledged went beyond existing Seventh Circuit law, believing that this innovative instruction would help bring down its target.

The government now maintains that the conflicts-of-interest instruction could not have helped bring down its target. It says that this instruction made no difference at all. Despite this improper instruction, everyone understood that the case was about what the government had said repeatedly it was not about —*quid pro quo* bribery. The district court gave its approval as the government marched in and as it pivoted and marched out. The government, however, was correct the first time. It based its case primarily on the conflicts-of-interest instruction, and this instruction made a difference.

IV. THE COURT SHOULD ORDER RE-ARGUMENT.

Before Ryan's counsel reached the second sentence of his oral argument, the presiding judge inquired about an issue not briefed by the parties. Another judge soon indicated that the only issue open to counsel was the sufficiency of the evidence and suggested that he turn to that issue, which he did.[22] Counsel had no opportunity to address the principal issue briefed by the parties—the effect of district court's instructional errors. If, in light of *Wood v. Milyard*, the Court now is likely to consider that issue and if argument on the issue might be helpful, counsel would welcome an opportunity to discuss it.

[22] The Court did not seem receptive to counsel's argument on this point and later held the evidence sufficient. *See Ryan*, 645 F.3d at 918-19.

CONCLUSION

Ryan is confined in a federal penitentiary for a crime that prosecutors and judges made up—failing to disclose a personal or financial conflict of interest. He is entitled to a new trial at which an appropriately instructed jury will determine whether he engaged in the conduct that 18 U.S.C. § 1346 proscribes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Friday, June 22, 2012, I electronically filed the foregoing Circuit Rule 54 Statement 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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