Selected docket entries for case 10−3964

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Filed	Document Description	Page	Docket Text
07/19/2011	45 Petition for Rehearing Enbanc	2	Filed Petition for Rehearing and Petition for Rehearing Enbanc by Appellant George H. Ryan, Sr.. [45] [6323682] Paper copies due on 07/22/2011. [10−3964] (RS)

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

RYAN'S PETITION FOR REHEARING WITH SUGGESTION OF REHEARING *EN BANC*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **10-3964**

Short Caption: **George H. Ryan Sr. v. United States of America**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):
George H. Ryan Sr.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Winston & Strawn LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
N/A

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:
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As the panel in this case acknowledged, the jury instructions at Ryan's trial directed the jury to convict him for conduct that *Skilling v. United States*, 130 S. Ct. 2896 (2010), holds is not a crime.[1] The panel nevertheless held that Ryan is not entitled to post-conviction relief because he did not make appropriate objections at trial and on appeal to these instructions. The Government, however, has expressly disavowed reliance on a claim of Ryan's procedural default. A2 at 20-22. *Day v. McDonough*, 547 U.S. 198, 202 (2006), holds it "an abuse of discretion to override a State's deliberate waiver." *See* pp. 10-13 *infra*.

The panel declared that the instructional errors raised only statutory and not constitutional issues and that Ryan may challenge only the sufficiency of the evidence to establish his guilt under *Skilling*. He may not obtain relief because the jury was reasonably likely to have convicted him only of non-criminal conduct or even because it

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[1] Under *Skilling*, "the honest-services form of the mail fraud offense ... covers only bribery and kickback schemes," Slip Op. 2, while "the question under the instructions ... was whether Ryan had received a secret financial benefit," something that is not a crime. Slip Op. 11.

The opinion in *Ryan v. United States*, No. 10-3964, 2011 WL 2624440 (7th Cir. 7/1/2011), is cited as "Slip Op. __." The appendix to Ryan's opening brief is cited as A-__. The appendix to this petition is cited as A2 at __. This appendix includes an unofficial written transcript of the oral argument, the Supplemental Memorandum filed by the Government following oral argument, and Ryan's Supplemental Memorandum. Ryan's opening brief is cited as RBr. __. The government's brief is cited as GBr. __. The trial transcript is cited as Tr. __.

probably did so. Slip Op. 8-10. This position is inconsistent with *Skilling*, which declared that *constitutional* error occurs when a jury is instructed on both a valid and invalid theory of mail fraud. 130 S. Ct. at 2934. It is also inconsistent with this Court's recent decision in *Narvaez v. United States*, 641 F.3d 877 (7th Cir. 2011), which held that even increasing a sentence on the basis of a misconstrued sentencing guideline constitutes a due process violation cognizable in a post-conviction proceeding. It is inconsistent with *United States v. Black*, 625 F.3d 386 (7th Cir. 2010), and *United States v. Segal*, No. 09-3403, 2011 WL 1642831 (7th Cir. 5/3/2011), which recognized the constitutional character of pre-*Skilling* instructional error by applying the harmless error standard applicable to constitutional but not non-constitutional errors on direct review.

The panel opinion is inconsistent with *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995), in which a unanimous Supreme Court declared that the Constitution "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." It is inconsistent with *Whalen v. United States*, 445 U.S. 684, 690 (1980), which noted the "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." It is inconsistent with *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004), which held that narrowing constructions of criminal statutes apply retroactively—*i.e.*, are cognizable in post-conviction proceedings—because they necessarily carry a significant *risk* that a defendant stands convicted of an act that the law does not make criminal.

The panel opinion is inconsistent with *Middleton v. McNeil*, 541 U.S. 433, 437 (2004), in which the Supreme Court said, "In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement," and in which the Court also said that a post-conviction petitioner is entitled to relief whenever there is a "reasonable likelihood" that the jury convicted him of non-criminal conduct. *See also Estelle v. McGuire*, 502 U.S. 62, 72 (1991) ("[W]e inquire whether there is a 'reasonable likelihood that the jury applied the challenged instruction in a way' that violates the Constitution.").

The panel opinion is inconsistent with the first decision it cited in support of its claim that "[j]ury instructions that misstate the elements of an offense are not themselves a ground of collateral relief ...." Slip Op. 8. This decision, *Henderson v. Kibbe*, 431 U.S. 145 (1977), declared that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id*. at 153. *Kibbe* withheld collateral relief only because "the record requires us to conclude that the jury made such a finding." *Id*. at 153; *see* A2 at 45-47.

The panel opinion is inconsistent with *Messinger v. United States*, 872 F.2d 217 (7th Cir. 1989), *Lombardo v. United States*, 865 F.2d 155 (7th Cir. 1989), *Moore v. United States*, 865 F.2d 149 (7th Cir. 1989), and *United States v. Folak*, 865 F.2d 110 (7th Cir. 1988)—all of them § 2255 proceedings in which the Court considered whether pre-*McNally* instructional errors were harmless because juries *must* have convicted the

petitioners on the basis of a valid pecuniary fraud theory as well as the intangible rights theory invalidated by *McNally v. United States*, 483 U.S. 350 (1987). [2]

The panel's opinion concerning whether Ryan can satisfy the "cause and prejudice" standard was inconsistent with *Waldemer v. United States*, 106 F.3d 729, 731 (7th Cir. 1996), in which this Court held the Supreme Court's general rule that "futility ... does not amount to cause" is inapplicable in proceedings brought by federal rather

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[2] For the proposition that the question in Ryan's case is not whether erroneous instructions created a reasonable likelihood of conviction for a nonexistent crime but rather "whether, applying current legal standards ..., Ryan is entitled to a judgment of acquittal," the panel relied on this Court's decisions following *Bailey v. United States*, 516 U.S. 137 (1995). *See* Slip Op. at 9-10. *Bailey* held that "use" of a firearm under 18 U.S.C. § 924(c) requires "active employment." *Id*. at 150. Understanding the post-*Bailey* decisions requires considering the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

Under AEDPA, the statute of limitations applicable to a prisoner's initial § 2255 petition differs from the statute applicable to subsequent petitions. For an initial petition like Ryan's, the clock is restarted when a "right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). For successive petitions, the clock restarts only when "a new rule of *constitutional* law [is] made retroactive." 28 U.S.C. § 2255 (h)(2) (emphasis added). The petitioner in the first post-*Bailey* case cited by the panel, *Gray-Bey v. United States*, 209 F.3d 986 (7th Cir. 2000), sought relief in a *second* § 2255 petition. The question was whether *Bailey* created "a new rule of constitutional law."

The Court held that it did not. *Bailey* simply construed a federal statute in a new way. *Id*. at 988-89. The Court nevertheless noted that the petitioner would have been entitled to § 2255 relief if his petition had been timely—that is, if he, like Ryan, had not previously invoked § 2255. It said that "the interaction of *old* constitutional rules [*e.g.*, the rule that the jury must have found every element of the crime beyond a reasonable doubt] with *new* statutory interpretations" may show that the petitioner's imprisonment violates the Constitution. *Id*. at 990. "[T]he kind of claim Gray-Bey presents is one for which § 2255 provides a remedy. Indeed, nine of his co-defendants, who raised *Bailey* contentions in their initial attacks, have had their § 924 convictions vacated." The Court noted that, although Gray-Bey could not obtain relief under § 2255, he might be entitled to the same relief under 28 U.S.C. § 2241. Far from rejecting Ryan's position, *Gray-Bey* supports it. *See also Hohn v. United States*, 524 U.S. 236, 240-41, 250 (1998) (noting the Solicitor General's confession of error because a pre-*Bailey* instructional error was "constitutional in nature"); *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," a pre-*Bailey* instructional error "had consequences of constitutional magnitude … [and] is cognizable on collateral review.").

than state prisoners. It was inconsistent with *Bateman v. United States*, 875 F.2d 1304, 1308 (7th Cir. 1989), which held that a post-conviction petitioner had "cause" for failing to present claims of pre-*McNally* error because *McNally* "represent[ed] the type of startling break with past practices so as to excuse procedural default ...." *See* pp. 13-15 *infra*. In short, the panel opinion was contrary to well-settled law in every respect.

II. FACTUAL BACKGROUND

The panel exhibited as little regard for the facts as it did for the law. It declared:

> The record shows ... that [Ryan] received substantial payments from private parties during his years as Secretary of State and Governor. The failure to report and pay tax on this income underlies the tax convictions. The debate at trial on the racketeering and mail-fraud charges was whether these payments were campaign contributions, plus gifts from friends and well-wishers, or were instead bribes ....

Slip Op. 10. In fact, the tax charges focused on Ryan's alleged use of campaign funds for personal expenses (a use that was lawful but that constituted income), his receipt of a consulting fee from the Phil Gramm presidential campaign, and a few other alleged payments. *See* A-000138-46. None of these payments were alleged to be bribes. All of the mail fraud charges of which Ryan remains convicted concern benefits he and others (mostly others) received from Lawrence Warner and Harry Klein. *See* A-000121-28. Only these benefits are now alleged to be bribes, and none played any part in the tax charges. The principal debate at trial was *not* about whether these benefits were legitimate gifts and campaign contributions or instead were bribes. It was about whether Ryan's failure to disclose them (even if they were legitimate contributions and

gifts) constituted a failure to disclose a personal or financial interest likely to have affected his official decisions.

In essence, the jury instructions directed Ryan's conviction if he (a) accepted bribes, (b) failed to disclose any conflict of interest (defined as any personal or financial interest likely to affect an official decision), or (c) violated any of a number of Illinois laws having nothing to do with bribery (for example, a law requiring officials to file accurate annual reports of their financial interests).[3]

The Government's closing argument never urged conviction on the basis of *any* of the bribery instructions. It instead emphasized the conflicts-of-interest instruction. For example, after reciting this instruction in full and calling it the "heart and soul" of the case, the Government declared that Ryan had hidden a "classic conflict of interest" when he vacationed at the Jamaican home of Harry Klein, an owner of currency exchanges regulated by the Secretary of State's office. A-000417-18.

The defining characteristic of bribery is a *quid pro quo*. *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*

[3] The instructions declared that these actions would constitute honest services fraud only if they were intended to produce private gain, but it added repeatedly that this gain could go to someone other than the defendant. A-000421. Thus, if Ryan made official decisions benefitting Warner and Klein while failing to disclose a conflict of interest created by their past gifts or his friendship with them, the instructions mandated his conviction.

The summary of the instructions in text understates the extent of the District Court's errors. As that court acknowledged, a fourth path to conviction for honest services fraud (the "*Bloom* instruction") also directed conviction for noncriminal conduct. Moreover, Ryan has argued that a series of instructions concerning the improper receipt of financial benefits encompassed benefits other than bribes or kickbacks. These instructions also directed conviction for noncriminal conduct. In order to simplify this petition, Ryan does not press these issues but instead assumes that the "financial benefits" instructions encompassed only bribes.

quo—a specific intent to give or receive something of value *in exchange* for an official act."). Several passages in the Government's closing argument acknowledged its failure to prove this element. *See* RBr. 32-33. For example:

> How did George Ryan reciprocate this longtime friendship [with Warner]? Governmental 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's what we have charged .... We have charged an undisclosed flow of benefits, which, under the law, is sufficient ....

A-000416 (emphasis added).[4] The Government repeatedly encouraged the jury to find Ryan guilty for failing to disclose a conflict without deciding whether he took bribes.[5]

III. RYAN MADE AND PRESERVED APPROPRIATE OBJECTIONS TO THE CONFLICT OF INTEREST AND STATE LAW INSTRUCTIONS.

Before trial, the Government asked the court to preclude Ryan from arguing "that 'corrupt dollars' for contracts or other specific quid pro quo evidence is a prerequisite to a finding of guilt ...." A-000157. It contended that "[o]ther circuits ... have upheld public corruption prosecutions rooted in ... the failure of a public official to

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[4] The Government now maintains that when it "told the jury that it did not need to find a *quid pro quo*, it meant ... that the jury did not have to find an express promise to give a specific benefit for a specific official action ...." GBr. 39. This is imaginative reconstruction. In context, the Government plainly told the jury that it need not find a *quid pro quo* of any kind because Ryan's failure to *disclose* benefits was sufficient.

[5] The panel declared that "a properly instructed jury *could* have deemed the payments bribes or kickbacks; the inference that they were verges on the inescapable." Slip Op. 11. The jury, however, had difficulty reaching a verdict even when directed to convict for failing to disclose a conflict of interest. After it had deliberated eight days, the District Court replaced two jurors, one of whom was later revealed to be pro-defense. A-000424-26. The reconstituted jury then deliberated ten days before reaching a verdict. *United States v. Warner*, 498 F.3d 666, 677 (7th Cir. 2007).

disclose a financial interest or relationship affected by his official actions." A-000158. Ryan replied that the other circuits' rulings "do not conform to the controlling Seventh Circuit law ... as articulated in [*United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998)]." A-000173. He contended that "a *quid pro quo* is required where federal charges are predicated on the receipt of a gift." A-000179-82.

Ryan objected again to the claim that undisclosed conflicts are sufficient at the conference on jury instructions, Tr. 22063-88, and he reiterated his objection on appeal. Br. of Appellants at 61, *Warner*, 498 F.3d at 666 (Nos. 06-3517, 06-3528) ("Similarly in tension with *Bloom*, the district court instructed that a failure to disclose a 'conflict of interest' ... constitutes a deprivation of honest services ...."). This Court reviewed and upheld the challenged instruction. 498 F.3d at 698-99.

The Government argued in *Skilling* as it had in *Ryan* that failing to disclose a conflict of interest constitutes honest services fraud. The Supreme Court not only rejected this argument but warned Congress that an attempted legislative restoration of this vague standard might be held unconstitutional. *Skilling*, 130 S. Ct. at 2932-33 & n.45.

Ryan thus argued before trial, at trial, and on appeal that the honest services statute, 18 U.S.C. § 1346, does not encompass undisclosed conflicts, and *Skilling* later held that § 1346 does not reach undisclosed conflicts. Like the Government, Ryan is baffled by the panel's suggestion of procedural default.

Similarly, Ryan objected before the trial began and through his appeal that honest services convictions may not be predicated on violations of state law. *See* A-000169; Br. of Appellants at 61, *Warner*, *supra* (arguing that "when Congress has

intended to incorporate state law into federal criminal statutes, it has done so expressly ... and that clear expression is notably absent from the mail fraud statute."). Again, this Court rejected his contention, 498 F.3d at 698, and again, the Supreme Court ruled in *Skilling* that he was correct. It declared, "[O]ur construction of § 1346 'establish(es) a uniform national standard .... '" 130 S. Ct. at 2933 (quoting Br. of Albert W. Alschuler as *Amicus Curiae* in *Weyhrauch* v. *United States*, O. T. 2009, No. 08-1196, at 28-29). Once more, Ryan is baffled by the suggestion of procedural default.

The panel apparently concluded that Ryan did not make the *correct* objection to the conflicts of interest and state law instructions. It said, "[W]hile Ryan's lawyers proposed instructions based on *Bloom* .... Skilling asked the Supreme Court to disapprove *Bloom*." Slip Op. 5. *Bloom*, however, is not mentioned in Jeffrey Skilling's Supreme Court brief, Br. of Petitioner, *Skilling*, *supra* (No. 08-1394), 2009 WL 4818500, and in the Fifth Circuit, Skilling cited *Bloom* only in support of his arguments. Br. of Defendant at 65, *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009) (No. 06-20885), 2007 WL 2804318 at *65.

The panel also declared that Ryan "never made the argument that prevailed in *Skilling*: that § 1346 is limited to bribery and kickback schemes." Slip Op. 3. In fact, no litigant appears to have made this argument until the lawyer who is currently Ryan's principal counsel made it in the *amicus curiae* brief quoted in *Skilling* above. *See Skilling*, 130 S. Ct. at 2940 (Scalia, J., concurring in part) ("Until today, no one has thought ... that the honest-services statute prohibited only bribery and kickbacks.").

The Supreme Court granted certiorari in *Skilling* only after the Government

contended in the argument of two other cases that the defendants had failed to argue below that § 1346 was unconstitutionally vague. During that argument, some Justices expressed interest in the "Alschuler position," and Skilling's brief later advanced a similar position as an alternative to his claim that the statute was unconstitutional. Br. of Petitioner at 48-52, *Skilling*, *supra*, 2009 WL 4818500 at *48-52. Skilling had not argued that § 1346 should be limited to bribes and kickbacks in his certiorari petition or in the courts below.[6]

The Supreme Court did not mention Skilling's belated attempt to argue for limiting § 1346 to bribes and kickbacks. It mentioned only his claim that the statute was unconstitutionally vague. 130 S. Ct. at 2907. The Court apparently considered this constitutional objection sufficient to entitle Skilling to the benefit of its new construction of the statute. *Id*. at 2934-35. Ryan had similarly argued that § 1346 was unconstitutionally vague, and this Court had rejected his argument. Br. of Appellants at 60, *Warner*, *supra*; *Warner*, 498 F.3d at 697-99.[7]

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[6] Similarly, the defendant in *Black v. United States*, 130 S. Ct. 2963 (2010), cited *Bloom* only to support his arguments and never suggested that § 1346 should be limited to bribes and kickbacks. *See* Br. of Appellants at 47, 51-52, 55, 86, *United States v. Black*, 530 F.3d 596 (7th Cir. 2008) (Nos. 07-4080, 08-1030, 08-1072, 08-1106), 2008 WL 5786710; Br. for Petitioners, *Black v. United States*, 130 S. Ct. at 2963 (No. 08-876), 2009 WL 2372920. *But see* Slip Op. 5 ("Many other defendants in this circuit contended that *Bloom* was wrongly decided. Conrad Black was among them. ... Black's arguments were not identical to Skilling's, but they came closer than Ryan's.").

[7] When a statute would be unconstitutional without a narrowing construction, it makes sense to give the benefit of this new construction to defendants who have not argued for it but have contended that the statute is unconstitutionally vague. Without the benefit of this new construction, applying the statute to them would be unconstitutional just as they always claimed. They would have made the correct objection.

IV. THE PANEL IMPROPERLY REJECTED THE GOVERNMENT'S EXPRESS WAIVER OF A CLAIM OF PROCEDURAL DEFAULT.

At the conclusion of the argument in this case, the panel directed the parties to file supplemental memoranda concerning procedural-default cases that neither had cited. A2 at 15. The Government 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." *Id*. at 21. Its memorandum reviewed the objections to pre-*Skilling* instructions raised by the defendant in *Black* and said that Ryan had "similarly preserved his claim for collateral review." *Id*.[8] It concluded, "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 22.

The panel rejected the Government's position, Slip Op. 9, citing only *Day v. McDonough*, 547 U.S. 198 (2006), for the proposition that it had authority to do so. Although *Day* held that a federal court may dismiss a post-conviction petition as untimely when the prosecution has forfeited rather than waived its objection, it added, "[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense." 547 U.S. at 202. The Court declared, "[S]hould a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice." *Id*. at 211 n.11. Because the Government has knowingly and affirmatively disclaimed reliance on a claim of procedural default, the panel opinion is

[8] *Black* was a case on appeal rather than collateral review, but that circumstance is immaterial in deciding *whether* a procedural default has occurred. The crucial difference between the two sorts of proceedings arises *after* a procedural default has been found. The standard for relief from a procedural default on direct review (plain error) differs from the standard for relief in a § 2255 proceeding (cause and prejudice). *See United States v. Frady*, 456 U.S. 152, 162-68 (1982).

inconsistent with the very authority upon which it relied.

Although a court may in appropriate circumstances disregard the Government's forfeiture (or nonassertion) of a procedural default, the Seventh Circuit seems *never* to have done so before this case. As far as counsel's research reveals, the Court has always accepted the Government's forfeiture. *See*, *e.g.*, *Kerr v. Thurmer*, 639 F.3d 315, 325 (7th Cir. 2011) (noting that a state's forfeiture should be overlooked only in "unusual cases"); *Hutchings v. United States*, 618 F.3d 693, 698 (7th Cir. 2010); *Mercado v. Dart*, 604 F.3d 360, 364 (7th Cir. 2010); *Simms v. Acevedo*, 595 F.3d 774, 778-79 (7th Cir. 2010); *Huusko v. Jenkins*, 556 F.3d 633, 635 (7th Cir. 2009).

In view of the Government's affirmative waiver, this seems an odd case in which to depart from the pattern. The panel indicated only one reason for doing so: "Ryan's trial lasted eight months,[9] and his appeal led to more than 100 pages of opinions by four judges of this court." Slip Op. 9.

One of these judges noted the unfairness of denying relief to a defendant whose trial was long when a defendant whose trial was shorter would have been granted relief. *See Warner*, 498 F.3d at 715 (Kanne, J., dissenting) ("In the final analysis, this case was inexorably driven to a defective conclusion by the natural human desire to bring an end to the massive expenditure of time and resources occasioned by this trial—to the detriment of the defendants.... I have no doubt that if this case had been a six-day trial, rather than a six-month trial, a mistrial would have been swiftly declared.").

[9] In fact, the trial lasted six months. *See Warner*, 498 F.3d at 674.

The unfairness is multiplied when the defendant's long trial should never have happened. For six months in this case, the Government portrayed as one scheme 22 allegations of criminal and non-criminal misconduct, most of which bore no resemblance to bribery. A post-*Skilling* trial limited to the charge that Ryan accepted bribes from Warner and Klein surely could be concluded within weeks. It seems almost Kafkaesque for a Court to allow an improper, sprawling trial and then cite that trial as a reason for denying relief.

Day noted that a court's discretion to reject even an inadvertent governmental forfeiture is limited: "[B]efore acting on its own initiative, a court must ... 'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." 547 U.S. at 210. The panel opinion noted the judiciary's "independent interest in the finality of judgments," Slip Op. 9, but it did not indicate that it had considered the "interests of justice" on the other side. Unlike *Day*, which concerned the application of a statute of limitations, Ryan's case presents a claim that he is imprisoned for noncriminal conduct. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998), described the "interests of justice" this sort of case presents:

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

V. RYAN HAD "CAUSE" FOR NOT PRESENTING HIS OBJECTIONS TO THE INSTRUCTIONS IN THE EXACT LANGUAGE THAT *SKILLING* LATER ARTICULATED.

As noted above, no court had held at the time of Ryan's trial and appeal that honest services fraud should be limited to bribes and kickbacks, and as far as counsel can determine, no litigant had argued for this standard. The panel attributed to Ryan a claim he had not made—that he had "cause" for failing to urge this standard simply because it would have been "pointless" to do so in the Seventh Circuit and pointless as well to seek an overruling of *Bloom*. Slip Op. 4-5.

The panel then noted the Supreme Court's statement that "'futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time.'" Slip Op. 7 (quoting *Bousley*, 523 U.S. at 623, and *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982)). It ignored *Waldemer*, 106 F.3d at 731, which held this standard inapplicable to post-conviction proceedings brought by federal prisoners. A court rather than a jury had found Waldemer's false statement to a grand jury material. When the Supreme Court later ruled that defendants had a right to a jury determination of materiality, Waldemer sought § 2255 relief. This Court held that he had "cause" for not raising the issue earlier:

> The government offers *Engle v. Isaac* ... for the proposition that the futility of asserting a federal constitutional claim does not amount to cause for failing to raise an objection at trial. *Engle*, however, concerned a defendant's failure to raise a federal constitutional objection in *state* court .... The Court explained: ... "[A] defendant ... may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." This principle—which preserves a state court's right to rethink a decision that may conflict with federal constitutional law—is inapposite in cases, like this one,

> where the federal defendant faces seemingly intractable *federal* precedent that his constitutional objection would be futile. To hold otherwise would invite countless frivolous objections at federal trials by defendants fearful of being denied the opportunity for future collateral attack ....

Even in proceedings brought by state prisoners, the Supreme Court has recognized that cause for a default exists when one of its decisions overturns "'a longstanding and widespread practice ... which a near-unanimous body of lower court authority has expressly approved.'" *Reed v. Ross*, 468 U.S. 1, 17 (1984). Following *McNally*, this Court and others excused procedural defaults, including failures to object to instructions, because *McNally* marked a "clear break with the past." *E.g.*, *Bateman v. United States*, 875 F.2d 1304, 1307-08 (7th Cir. 1989); *United States v. Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988); *Dalton v. United States*, 862 F.2d 1307, 1310 (8th Cir. 1988). *Skilling* was no less a "clear break" than *McNally*. *See Stayton v. United States*, 766 F. Supp. 2d 1260, 1266 (M.D. Ala. 2011).

CONCLUSION

Ryan made and preserved appropriate objections to instructions that directed the jury to convict him of nonexistent crimes. Even if he had not, the panel had no authority to override the Government's express waiver of his supposed procedural default. And even if Ryan had failed to make appropriate objections and there had been no governmental waiver, this Court's decisions would have established "cause" for his default. The panel repeatedly misstated both the law and the facts. The Court should order a rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Matthew R. Carter, certify that this petition complies with the page limit of Fed. R. App. P. 40(b), excluding the parts of the petition exempted by Fed. R. App. P. 35(b)(2) and Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this petition 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 the body of the petition has been prepared in a 12-point, proportionally spaced typeface, Book Antiqua, and the footnotes have been prepared in an 11-point, proportionally spaced typeface, Book Antiqua.

Dated: July 19, 2011

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CERTIFICATE OF SERVICE

I, Matthew R. Carter, an attorney, hereby certify that I have this day filed the foregoing via CM/ECF with the Clerk of the Court, thereby electronically serving it on the following:

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