No. 11-499

In the Supreme Court of the United States

GEORGE H. RYAN, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner procedurally defaulted his claim that the district court erroneously instructed the jury on the honest-services theory of mail fraud.

2. Whether the court of appeals lacked authority to disregard the government's concession that petitioner had not procedurally defaulted his instructional claim.

3. Whether any instructional error in petitioner's case was harmless.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 645 F.3d 913. The opinion of the district court (Pet. App. 14a-93a) is reported at 759 F. Supp. 2d 975. The opinion of the court of appeals on direct appeal (Pet. App. 94a-182a) is reported at 498 F.3d 666.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on August 3, 2011 (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on October 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); seven counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346; three counts of making false statements to the Federal Bureau of Investigation (FBI), in violation of 18 U.S.C. 1001(a)(2); one count of obstructing the Internal Revenue Service (IRS), in violation of 26 U.S.C. 7212(a); and four counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). He was sentenced to 78 months of imprisonment, to be followed by one year of supervised release. Pet. App. 15a; 1:02-cr-00506 Docket entry No. 888 (N.D. Ill. Sept. 6, 2006). The court of appeals affirmed. Pet. App. 94a-182a. This Court denied certiorari. 553 U.S. 1064 (2008).

In 2010, this Court held in *Skilling* v. *United States*, 130 S. Ct. 2896, 2929-2931, that the honest-services fraud statute, 18 U.S.C. 1346, criminalizes only schemes involving bribes or kickbacks. After the conclusion of direct review, petitioner filed a motion under 28 U.S.C. 2255 (Supp. III 2009) for collateral relief from his mail-fraud and RICO conspiracy convictions based on *Skilling*. The district court denied the motion. Pet. App. 14a-93a. The court of appeals affirmed. *Id.* at 1a-11a.

1. Petitioner was the Secretary of State (SOS) and, later, the Governor of Illinois. The evidence at trial showed that, throughout his tenure as SOS, petitioner accepted financial benefits from supporters in exchange

for awarding those supporters state contracts and leases worth millions of dollars.

Soon after petitioner was elected SOS, his close friend Lawrence Warner, an insurance adjustor, told Don Udstuen, a lobbyist whom Warner did not know well, that Warner was going to capitalize on his relationship with petitioner by becoming a lobbyist. Warner indicated to Udstuen that petitioner had endorsed an arrangement by which Warner would share lobbying fees with Udstuen, who had been a loyal supporter of petitioner for many years and had also been of great assistance to petitioner's daughter by giving her a job, at petitioner's request, at the Illinois State Medical Society. Warner told Udstuen that Warner would "take care of [petitioner]." 10-3964 Gov't C.A. Br. 4-5 & n.2.

In 1991, petitioner authorized Warner and Udstuen, neither of whom was employed by the State, to conduct a search for a new director of the SOS department that dealt with mainframe computer issues. The two men chose an individual who said that he would support awarding the SOS's mainframe computer contract to IBM, a Warner client. Petitioner hired that candidate. As planned, the SOS awarded the $26 million contract to IBM. Warner funneled one-third of his $1 million lobbying fee to a company designated by Udstuen. 10-3964 Gov't C.A. Br. 8-9.

In 1992, Warner told petitioner that he wanted to lease a building Warner owned to the SOS Police. Warner stated that there was no need for worry that the press might discover Warner's ownership of the building because his interest was "buried in the paperwork." The State overpaid for the lease by $246,583 over a five-year period. 10-3964 Gov't C.A. Br. 6-7.

In 1993, an SOS official eliminated a specification that called for a "metallic security mark" on validation stickers for license plates. That specification was beneficial to a Warner client, ADM, because ADM was the only company that could provide the metallic mark. Warner became upset by the elimination of the specification and told the SOS official that he would "take care of it." A day or two later, petitioner directed the official to quietly retract the elimination of the specification. The official complied with the direction, even though he believed that doing so was against the State's best interests. ADM paid Warner $399,000 in "lobbying fees," notwithstanding that Warner never registered as an ADM lobbyist. Warner paid one-third of that amount to Udstuen, who did nothing to assist ADM. 10-3964 Gov't C.A. Br. 5-6.

In 1994, Warner told petitioner that he was looking for property in Joliet for the SOS to lease. Petitioner directed an SOS official to work with Warner on the lease. Warner subsequently purchased property in Joliet using front men to hide his ownership interest. Petitioner then awarded the lease to Warner. The State overpaid for the lease by $296,485. Petitioner falsely told FBI agents that he and Warner never discussed Warner's interest in the lease and that he was unaware that Warner had profited from the transaction. 10-3964 Gov't C.A. Br. 7-8.

In 1996, Warner offered to help a company named Viisage obtain an SOS contract for digital driver's licenses in return for five percent of Viisage's revenues from the contract. Thereafter, petitioner directed Warner to cut Ron Swanson, another of petitioner's longtime friends and supporters, in on the deal. Warner

received fees totaling $834,000 for the Viisage contract, $36,000 of which he funneled to Swanson, even though Swanson did no work for Viisage. Neither Warner nor Swanson ever registered as a Viisage lobbyist. 10-3964 Gov't C.A. Br. 9-10.

In return for the State contracts and leases that petitioner steered to Warner and his clients, Warner "took care of" petitioner by providing a stream of benefits to him, his family members, and his associates. These included the more than $400,000 in payments to Udstuen from Warner's fees for the ADM and IBM contracts; a $50,000 loan to a financially distressed company partly owned by petitioner's brother, only $10,500 of which was repaid; another $97,000 loan to petitioner's brother's company; a $6000 payment to a fledgling cigar company partly owned by petitioner's son; a $5000 loan to petitioner's son-in-law, which was never repaid; free insurance adjustment services for petitioner and his son-in-law; the $36,000 payment to Swanson from the Viisage fee; and a payment of over $3000 for a band to perform at petitioner's daughter's wedding. 10-3964 Gov't C.A. Br. 10-12.

Warner was not the only friend of petitioner who provided benefits to him in return for favorable State action. Each year from 1993 to 2001, Harry Klein, an Illinois currency exchange owner, provided petitioner and his chief of staff with free use of his Jamaica villa. Petitioner devised an arrangement whereby, in order to disguise his free use of the villa, he and his chief of staff would each write Klein a $1000 check for the lodgings, and Klein would then return the money to them in cash. On two occasions, Klein also gave petitioner a free week's vacation at his Palm Springs condominium. Peti-

tioner falsely told FBI agents that he paid Klein for use of the Jamaica villa. In support of this falsehood, he produced his negotiated $1000 checks to Klein while concealing the cash-back arrangement. 10-3964 Gov't C.A. Br. 12.

The SOS was responsible for regulating the currency exchange business. In 1995, at Klein's request, petitioner arranged for a currency exchange fee increase, notwithstanding that he routinely rejected requests to raise the exchange fee from others. In 1997, petitioner directed an SOS official to cancel a less expensive lease in order to move an SOS office to a building owned by Klein. The SOS office had not been looking for new rental space, and it did not review other sites. 10-3964 Gov't C.A. Br. 13-14.

2. A grand jury sitting in the Northern District of Illinois returned an indictment charging petitioner with nine counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346; one count of RICO conspiracy with mail-fraud predicates, in violation of 18 U.S.C. 1962(d); three counts of making false statements to the FBI, in violation of 18 U.S.C. 1001(a)(2); one count of obstructing the IRS, in violation of 26 U.S.C. 7212(a); and four counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). 1:02-cr-00506 Docket entry No. 110 (N.D. Ill. Dec. 17, 2003). Section 1341 criminalizes the use of the mail to execute or further "any scheme or artifice to defraud, or for obtaining money through false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

The government proceeded on three overlapping theories of mail fraud: (1) that petitioner deprived the State of his honest services in that he failed to disclose a conflict of interest involving his misuse of public office for private gain; (2) that he committed honest-services fraud in that he accepted financial benefits in return for favorable official action; and (3) that he fraudulently deprived the State of money or property. The district court instructed the jury with respect to each of these theories. See Pet. App. 31a-32a; 41a-42a, 147a (conflict of interest); *id.* at 35a-40a (bribery or kickbacks); *id.* at 53a (money or property). The jury returned a general verdict of guilty on all counts. *Id.* at 15a; 1:02-cr-00506 Docket entry No. 888 (Sept. 6, 2006).[1]

3. The court of appeals affirmed. Pet. App. 94a-182a. On appeal, petitioner argued that the honest services mail-fraud statute is unconstitutionally vague. *Id.* at 95a-96a. The court of appeals rejected this claim, relying on its earlier decision in *United States* v. *Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003), cert. denied, 541 U.S. 1072 (2004), and decisions from other circuits. Pet. App. 144a-148a. The court focused instead on petitioner's subsidiary contention that the district court's jury instructions on honest-services fraud were inconsistent with the court's previous decisions in *Hausmann* and *United States* v. *Bloom*, 149 F.3d 649 (7th Cir. 1998). Pet. App. 146a. In those cases, the court limited honest-services fraud to conduct involving the "misuse of office * * * for private gain." 149 F.3d at 655. The court found that the instructions properly required the

[1] The district court granted petitioner's motion for a judgment of acquittal on two of the nine mail-fraud counts. Pet. App. 15a.

jury to find that petitioner misused his office for private gain in order to convict him of honest-services fraud. Pet. App. 147a-148a. This Court denied certiorari. 553 U.S. 1064 (2008).

4. After the conclusion of direct review, this Court held in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), that the honest-services fraud statute criminalizes only schemes involving bribes or kickbacks. *Id.* at 2929-2931. Petitioner filed a motion under 28 U.S.C. 2255 (Supp. III 2009) to vacate his mail-fraud and RICO conspiracy convictions, arguing that the jury instructions failed to limit the scope of honest-services fraud in accordance with *Skilling*. Pet. App. 2a.

The district court denied petitioner's motion. Pet. App. 14a-93a. The court agreed with petitioner that certain of its jury instructions were defective in light of *Skilling*. *Id.* at 32a, 42a-44a. The court concluded, however, that the flawed instructions amounted to harmless error. *Id.* at 47a-48a. The court applied the harmless error standard that petitioner pressed—that the conviction should be overturned unless it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Id.* at 24a-26a.

The court noted that "[w]hile *Skilling* did not comment directly on [petitioner's] case, it came close." Pet. App. 20a. The Court's opinion in *Skilling* cites *United States* v. *Sorich*, 523 F.3d 702, 707 (7th Cir. 2008), cert. denied, 555 U.S. 1204 (2009), which gives the prosecution of petitioner as an example of an honest-services fraud prosecution, for the proposition that "the honest-services doctrine had its genesis in prosecutions involving bribery allegations." Pet. App. 21a (quoting *Skilling*, 130 S. Ct. at 2931). The district court thus ex-

plained that "[t]he Seventh Circuit and the Supreme Court have * * * acknowledged that this case presents the paradigmatic type of case undisturbed by *Skilling*." *Ibid.*

Conducting a detailed count-by-count analysis, the court explained with respect to each mail-fraud count that a rational jury could not have convicted petitioner of honest-services fraud under a conflict-of-interest theory without also finding that petitioner accepted bribes or kickbacks in return for official action. Pet. App. 57a-71a. The court further concluded, again with respect to each mail-fraud count, that the jury could not rationally have found petitioner guilty of honest-services fraud without finding that he also committed money or property fraud. *Id.* at 71a-84a.

5. The court of appeals affirmed. Pet. App. 1a-11a. At the conclusion of oral argument, the court directed the parties to file supplemental memoranda addressing the bearing on the appeal of *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). 10-3964 Docket entry No. 36 (7th Cir. May 31, 2011). In its supplemental memorandum, the government stated:

> [Petitioner] did not * * * claim that § 1346 was limited to bribes and kickbacks. Thus, as [petitioner] acknowledged in his § 2255 motion, this particular articulation of *Skilling* error was not presented to the trial court or on direct appeal. Nevertheless, in the government's view, [petitioner] has not procedurally defaulted his claim that he was convicted for conduct that is not a crime.

10-3964 Gov't C.A. Supp. Mem. 6 (citation omitted). Notwithstanding the government's submission, the court concluded that petitioner had procedurally defaulted his *Skilling* claim. Pet. App. 3a. The court explained that petitioner "never made the argument that prevailed in *Skilling*: that § 1346 is limited to bribery and kickback schemes." *Ibid.* The court noted that "[petitioner] 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." *Ibid.* (citation omitted). The court concluded that the applicable standard of review for evaluating petitioner's collateral review challenge to the content of his jury instructions is "cause and prejudice." *Id.* at 3a-4a.

The court determined that petitioner had failed to establish cause for his procedural default. Pet. App. 4a-7a. The court rejected petitioner's argument that, in light of pre-*Skilling* Seventh Circuit case law holding that Section 1346 is violated when a public official secretly uses his position for private gain, it would have been "pointless" (*id.* at 5a) for him to ask for an instruction limiting Section 1346 to bribery and kickback schemes. The court explained that, unlike Skilling, who proposed a narrowing construction of Section 1346, petitioner proposed instructions based on *Bloom*, *supra*. The court elaborated:

> [i]t would *not* have been pointless to argue that § 1346 is limited to bribery or kickbacks. Both [petitioner] and Skilling were tried in 2006. Yet while [petitioner's] lawyers proposed instructions based on *Bloom*—which was more favorable to defendants than the law in some other circuits—Skilling's lawyers contended that § 1346 is much narrower if not

> unconstitutionally vague. Skilling asked the Supreme Court to disapprove [*Bloom*]. That Court ruled in his favor. If [petitioner's] lawyers had done what Skilling's lawyers did, the controlling decision today might be *Ryan* rather than *Skilling*.

Pet. App. 5a. The court added that many other defendants in the Seventh Circuit had challenged the correctness of the Seventh Circuit's pre-*Skilling* understanding of honest-services fraud. *Ibid.* The court observed that, in any event, futility may not constitute cause for a procedural default as a matter of law. *Id.* at 6a-7a (citing *Bousley*, 523 U.S. at 622-623).

Notwithstanding petitioner's failure to satisfy the cause and prejudice standard, the court of appeals observed that petitioner would be entitled to collateral relief if he could show that, in light of *Skilling*, he was innocent of the mail-fraud charges. Pet. App. 7a-8a. The court stated that inquiry turns "on the content of the trial record, not the content of the jury instructions." *Id.* at 8a.

The court noted that the government had forfeited an argument about petitioner's procedural default by failing to raise it. Pet. App. 8a. But the court elected to disregard the forfeiture based on the Judicial Branch's "independent interest in the finality of judgments." *Ibid.* Given that petitioner's trial had lasted eight months and that his appeal had generated more than 100 pages of opinion, the court stated that "it would be inappropriate to treat this collateral proceeding as a second direct appeal." *Id.* at 8a-9a. The court added: "It is not as if the United States gave the game away; to the contrary, it argued that the errors in the instructions are harmless because the record at trial establishes that

[petitioner] took bribes in exchange for official services. If he did, then *Skilling* permits his conviction for mail fraud." *Id.* at 9a.

Relying on *Davis* and *Bousley*, the court of appeals stated that the "right question * * * is whether, applying current legal standards to the trial record, [petitioner] is entitled to a judgment of acquittal" on the mail-fraud counts. Pet. App. 9a. The court then concluded that petitioner had failed to satisfy that standard: "[T]here is no doubt that a properly instructed jury could have deemed the payments bribes or kickbacks; the inference that they were verges on the inescapable." *Id.* at 10a-11a.

ARGUMENT

Petitioner contends that he did not procedurally default his *Skilling* claim (Pet. 21-23); that the court of appeals lacked authority to disregard the government's concession that petitioner did not procedurally default his *Skilling* claim (Pet. 23-24); and that he is entitled to collateral relief from his mail-fraud and RICO conspiracy convictions because it is not clear beyond a reasonable doubt that a rational jury would have convicted him absent *Skilling* error in the jury instructions (Pet. 24-34). The court of appeals' decision that petitioner procedurally defaulted his *Skilling* claim is correct, and it does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's procedural default claims is therefore unwarranted. Moreover, even if petitioner had not procedurally defaulted his *Skilling* claim, review would not be warranted because any error was harmless.

1. Petitioner contends (Pet. 21-23) that he preserved his *Skilling* claim in the district court and on direct appeal in two separate ways—by arguing that Section 1346 does not reach undisclosed conflicts of interest and by arguing that the statute is unconstitutionally vague.

The district court did not instruct the jury that failure to disclose a conflict of interest, standing alone, constitutes honest-services fraud. Rather, as the court of appeals explained on direct appeal, the instructions required, in accordance with the Seventh Circuit's decision in *United States* v. *Bloom*, 149 F.3d 649, 655 (1998), that the conflict entail the misuse of public office for private gain. Pet. App. 147a. Although this standard covered bribery or kickback schemes, it did not limit honest-services fraud to such schemes, and therefore was erroneous in light of *Skilling*. Petitioner did not take issue at trial or on appeal with the district court's misuse of office/private gain instruction. To the contrary, he himself requested a *Bloom* instruction at trial. See Petitioner's Proposed Jury Instruction No. 45, 1:02-cr-00506 Docket entry No. 661 (N.D. Ill. Feb. 21, 2006). And on direct appeal his sole instructional claim was that certain of the district court's instructions on honest-services fraud were defective because they were *out of keeping with* the *Bloom* standard. See Pet. App. 146a-147a; 06-3528 Pet. C.A. Br. 60-61. In these circumstances, petitioner procedurally defaulted his present claim that the instructions failed to limit honest-services fraud to schemes involving bribery or kickbacks.

Nor did petitioner preserve his *Skilling* claim by challenging the constitutionality of Section 1346 on vagueness grounds. In *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), the Court did not hold that Section

1346 is unconstitutionally vague; it held that the statute was not vague as properly construed to cover only bribery and kickback schemes. See *id.* at 2933. Far from arguing in the court of appeals that Section 1346 was limited to bribery or kickback schemes, petitioner did not seek a narrowing construction of the statute at all. Rather, he accepted the correctness of the Seventh Circuit's *Bloom* standard. By contrast, in *Black* v. *United States*, 130 S. Ct. 2963 (2010), in which this Court gave the defendant the benefit of the *Skilling* holding on direct review, the defendant had challenged the *Bloom* instruction given in that case both at trial, see *id.* at 2967, 2969 & n.12, and in the court of appeals, see *United States* v. *Black*, 530 F.3d 596, 600 (7th Cir. 2008), vacated, 130 S. Ct. 2963 (2010). Likewise, Skilling himself sought a narrowing construction of Section 1346 in the court of appeals. See *Skilling*, 130 S. Ct. at 2912. One purpose of procedural default doctrine is to lessen the injury to the State that results through reexamination of a conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time. See *McCleskey* v. *Zant*, 499 U.S. 467, 490-491 (1991). The government did not have an opportunity to address on direct appeal a potential narrowing construction of Section 1346, as it did in *Skilling* and *Black*, because petitioner did not raise it.

Petitioner argues (Pet. 21) that he should be excused from failing to challenge the *Bloom* standard on direct appeal because he had a "strong argument" that the district court's honest-services instructions were incompatible with *Bloom*. If petitioner wanted to preserve an objection to the *Bloom* standard, he could, in the alternative, have challenged the standard. It is no argument

that, given *Bloom*, a challenge to the theory of honest-services fraud it upheld would have been futile. This Court has held that, under the cause and prejudice standard, "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Bousley* v. *United States*, 523 U.S. 614, 623 (1998) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 130 n.35 (1982)). If futility cannot constitute valid cause for a default, it cannot logically provide a valid ground for finding no default in the first place.

For the foregoing reasons, the court of appeals correctly held that, on the record in this case, petitioner procedurally defaulted his *Skilling* claim. That case-specific finding does not warrant this Court's review. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). Furthermore, given the limited number of pre-*Skilling* appellate decisions that could be called into question by *Skilling*, the issue of what is required to have preserved a *Skilling* claim for collateral review is of progressively diminishing importance.

2. Nor is there merit to petitioner's claim (Pet. 23-24) that the court of appeals lacked authority to disregard the government's concession that petitioner did not procedurally default his *Skilling* claim.

As this Court has observed, the courts of appeals have unanimously held that, "in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default." *Day* v. *McDonough*, 547 U.S. 198, 206-207 (2006) (collecting cases). This discretion recognizes that courts have "an independent interest in the finality of judgments." Pet. App. 8a; see *Day*, 547 U.S. at 205; *Rosario* v. *United States*, 164 F.3d 729,

732 (2d Cir. 1998), cert. denied, 526 U.S. 1033, and 527 U.S. 1012 (1999).

In related contexts, this Court has held that federal courts have discretion to raise affirmative defenses *sua sponte* on collateral review. See *Granberry* v. *Greer*, 481 U.S. 129 (1987) (federal appellate courts have discretion to consider the issue of exhaustion despite the State's failure to interpose the defense in the district court); see also *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994) ("a federal court may, but need not, decline to apply [the nonretroactivity rule announced in *Teague* v. *Lane*, 489 U.S. 288, 310 (1989) (plurality opinion),] * * * if the State does not argue it"); *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994) (declining to address nonretroactivity defense that State raised only in the Supreme Court merits brief, "[a]lthough we undoubtedly have the discretion to reach" that argument).

In determining whether to enforce a procedural bar *sua sponte*, courts consider such factors as the interest in finality, judicial efficiency, conservation of scarce judicial resources, and the prompt administration of justice. See *United States* v. *Wiseman*, 297 F.3d 975, 979-980 (10th Cir. 2002). In this case, the court of appeals decided to invoke the procedural bar *sua sponte* given the magnitude of the judicial resources already expended in the matter. As the court explained, petitioner's trial lasted eight months, and his direct appeal produced more than 100 pages of judicial opinion. Pet. App. 8a-9a. In these exceptional circumstances, the Judicial Branch's interest in finality and the conservation of resources is particularly weighty. Moreover, there is no indication that petitioner was prejudiced by the de-

layed focus on the procedural default issue,[2] that the government deliberately withheld the defense for some strategic advantage, or that it intentionally relinquished a defense that it believed to be available to it. See *Day*, 547 U.S. at 210-211. In these circumstances, the court below did not abuse its discretion in invoking petitioner's procedural default *sua sponte*. See *Granberry*, 481 U.S. at 134 (when "the State fails, *whether inadvertently or otherwise*, to raise an arguably meritorious non-exhaustion defense [in the district court,] [t]he State's omission * * * makes it appropriate for the court of appeals to take a fresh look at the issue") (emphasis added).

Relying on *Day*, petitioner argues that the court lacked discretion to apply the cause and prejudice standard because, instead of merely forfeiting the issue, the government expressly conceded in its supplemental memorandum that petitioner did not procedurally default his *Skilling* claim. In *Day*, the State conceded in its answer to a habeas petition that the petition was timely under 28 U.S.C. 2244(d)(1)(A). After determining that the State had miscalculated the tolling time and that the petition was in fact untimely, the district court dismissed the petition on its own initiative. 547 U.S. at 203-204. The issue before this Court was whether a district court may dismiss a federal habeas petition as untimely despite the State's erroneous concession of the timeliness issue. *Id.* at 205. The Court held that "dis-

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[2] The court of appeals gave petitioner the opportunity to show, through supplemental briefing, that he had not procedurally defaulted his claim of *Skilling* error and that any procedural default should not bar consideration of the claim. See *Day*, 547 U.S. at 210. Petitioner took full advantage of that opportunity.

trict courts are permitted, but not obliged, to consider *sua sponte*, the timeliness of a state prisoner's habeas petition." *Id.* at 209. And the Court determined that, on the record before it, the district court did not abuse its discretion in disregarding the State's concession. *Id.* at 210-211.

Petitioner focuses, however, on the Court's statement in *Day* that "we would count it an abuse of discretion to override a State's *deliberate waiver* of a limitations defense." 547 U.S. at 202 (emphasis added). Petitioner misapprehends the import of that statement. In *Day*, the Court explained that, in the case before it, the State's express concession that the habeas petition was timely did not constitute a "deliberate waiver" of the limitations defense because, given its miscalculation of the tolling time, the State did not understand that the defense was available to it. See *ibid.* ("no *intelligent* waiver on the State's part") (emphasis added). The State's concession of the limitations issue in *Day* is functionally the same as the government's concession of the procedural default issue here. Just as the State erroneously believed in *Day* that it had no legitimate limitations defense, the government erroneously believed here that it had no legitimate defense of procedural default. The government mistakenly viewed petitioner's vagueness challenge as the equivalent of Black's and Skilling's narrow construction arguments, and thus as not defaulted. Upon further review, however, the court of appeals was correct because in this case, the government was not given the opportunity on direct appeal to address a new, narrow construction of the statute, while it was given that opportunity in *Black* and *Skilling*. As in

Day, the government made no deliberate "cho[ice] to relinquish" a valid defense. *Id.* at 211.

The legal principles governing a court of appeals's exercise of discretion to find a procedural default *sua sponte* are well settled. The issue of whether the court below abused that discretion in the exceptional circumstances of this case does not warrant the Court's review.[3]

3. Petitioner further contends (Pet. 24-34) that certiorari is warranted to address which standard applies, in the absence of procedural default, to determine whether a Section 2255 petitioner is entitled to a new trial. This case would be a poor vehicle in which to address that issue because, even if petitioner had not procedurally defaulted his claim of *Skilling* error, he would not be entitled to relief under any harmlessness standard. Further review of this claim is unwarranted.

a. Petitioner argues (Pet. 24-34) that the harmless error standard applicable on collateral review is harmlessness beyond a reasonable doubt. Petitioner is mis-

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[3] In *Wood* v. *Milyard*, cert. granted, No. 10-9995 (oral argument scheduled for Feb. 27, 2012), this Court granted review limited to the following questions: (1) Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. 2244(d) statute of limitations defense? (2) Does the State's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had? In this case, *Day* recognized unanimous court of appeals precedent holding that a court of appeals has authority to raise a petitioner's procedural default *sua sponte*. 547 U.S. at 206. Moreover, the government's legal position on the procedural default issue before the court of appeals in this case differs materially from the State's response to the limitations issue in *Wood*. Accordingly, the petition here need not be held for the petition in *Wood*.

taken. This Court has held that, for purposes of collateral review, an error requires reversal if it had a "substantial and injurious effect or influence in determining the verdict." *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). Noting that *Brecht* involved a post-conviction challenge to a *state* conviction under 28 U.S.C. 2254 (1988), petitioner takes the view that the decision should be limited to that context. But the finality concerns that in part led the Court to adopt the *Brecht* standard, see 507 U.S. at 635, are equally applicable in the context of habeas review under Section 2255, see *United States* v. *Frady*, 456 U.S. 152, 166 (1982). Every circuit that has considered the issue has held that the standard set forth in *Brecht* applies to Section 2255 harmless error review. See, *e.g.*, *United States* v. *Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006); *United States* v. *Montalvo*, 331 F.3d 1052, 1057-1058 (9th Cir. 2003), cert. denied, 541 U.S. 1011 (2004); *Ross* v. *United States*, 289 F.3d 677, 682 (11th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1113 (2003); *Murr* v. *United States*, 200 F.3d 895, 906 (6th Cir. 2000).[4]

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[4] As petitioner observes (Pet. 31-32), the Seventh Circuit applied the harmlessness beyond a reasonable doubt standard in *Lanier* v. *United States*, 220 F.3d 833, 839, cert. denied, 531 U.S. 930 (2000). But the court in *Lanier* did not consider whether the *Brecht* standard applied. Petitioner also invokes (Pet. 32-34) the test for instructional error on collateral review set forth in *Boyde* v. *California*, 494 U.S. 370, 380 (1990)—whether there was a reasonable likelihood that the jury applied the instruction in a way that prevented it from considering constitutionally relevant evidence. But the *Boyde* test "is not a harmless-error test at all"; it is instead "the test for determining, in the first instance, whether constitutional error occurred." *Calderon* v. *Coleman*, 525 U.S. 141, 146 (1998) (per curiam).

b. Furthermore, petitioner would not be entitled to relief even under the harmless error standard that he has proposed. After a careful count-by-count analysis of the evidence, Pet. App. 57a-84a, the district court specifically found the *Skilling* error in petitioner's case to be harmless beyond a reasonable doubt—the standard petitioner has proposed, see *id.* at 25a-26a. The court of appeals in effect did so too, concluding that the inference that petitioner engaged in a bribery or kickback scheme "verge[d] on the inescapable," and incorporating by reference the district court's harmless error discussion. *Id.* at 11a.[5]

As the district court explained, the jury could not rationally have convicted petitioner under the invalid conflict-of-interest theory of honest-services fraud without also finding that he engaged in honest-services fraud under the valid bribery or kickback theory. The court's analysis turned on its instruction to the jury that, in order to convict petitioner of honest-services fraud on the conflict-of-interest theory, it had to find that the conflict entailed misuse of public office for private gain. See Pet. App. 31a, 147a. The court's reasoning with respect to the ADM count (Count Two) applies to the other mail-fraud counts as well:

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[5] Petitioner contends (Pet. 30) that the court of appeals "would have applied" an incorrect standard of review "in the absence of [his] alleged default." The court of appeals did not state what standard of review it would have applied in the absence of procedural default. The court found that petitioner had procedurally defaulted his *Skilling* claim, applied the cause and prejudice standard, and concluded that petitioner had neither established valid cause for his default, Pet. App. 5a-7a, nor that he was actually innocent on the mail-fraud counts, *id.* at 7a-11a.

The [conflict-of-interest] theory does not stand on its own. The only conflict of interest presented to the jury relating to ADM was [petitioner's] relationship with Warner and Warner's involvement in this contract. Therefore, if the jury found that [petitioner] concealed a conflict of interest * * *, it necessarily had to find that he misused his office for private gain * * *, or that he had accepted benefits from Warner in exchange for favors relating to ADM * * *. The misuse of office theory * * * might stand alone if the jury believed that [petitioner] decided for some illegitimate reason—unrelated to the benefits Warner provided to [petitioner]—to coerce [the SOS official] into withdrawing the specifications. But the only motivations [petitioner] had to interfere with this contract were for legitimate law-enforcement reasons, as the defense suggested, or to compensate Warner for the stream of benefits he provided, as the government urged. The jury rejected the good faith motive. Accordingly, the jury could only have convicted him on this count if it believed that his conduct was a response to the stream of benefits. [Petitioner] suggests that the only "private gain" he received for his intervention in this transaction was the approval of his friend. As explained earlier, however, the jurors must have rejected this argument; they were specifically instructed that if the benefits [petitioner] received from Warner were merely the proceeds of friendship, they could not be the basis for conviction. * * * The court concludes that the jury must have found [petitioner] accepted gifts from Warner with the intent to influence his actions.

Id. at 59a-60a. As to each mail-fraud count, the jury could not have found a misuse of public office for private gain without finding that petitioner accepted bribes or kickbacks. See *id.* at 62a-71a.[6]

Furthermore, the district court also held with respect to each mail-fraud count that the jury could not rationally have found petitioner guilty of honest-services fraud without finding that he also committed money or property fraud. Pet. App. 71a-84a. Petitioner committed pecuniary fraud by awarding state money to Warner and Klein while concealing and lying about the bribes Warner and Klein paid to petitioner in return. This provides yet another reason to conclude that any error in the honest-services instructions was harmless.

Under *Neder* v. *United States*, 527 U.S. 1 (1999), alternative-theory error, such as the *Skilling* error here, is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty

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[6] Petitioner intimates (Pet. 14 & n.9) that the government disavowed a bribery theory in its closing argument. That is incorrect. The government acknowledged in closing argument that it had not shown a *quid pro quo* exchange of money for specific favors, but that is not required to prove bribery. See Pet. App. 26a-29a. A public official is guilty of bribery when there is "a course of conduct of favors and gifts flowing to [him] in exchange for a pattern of official actions favorable to the donor." *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998); accord *United States* v. *Whitfield*, 590 F.3d 325, 352-353 (5th Cir. 2009), cert. denied, 131 S. Ct. 124, 131 S. Ct. 134, and 131 S. Ct. 136 (2010); *United States* v. *Kemp*, 500 F.3d 257, 282 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008). The parties to the bribe need not specify the official actions at the time of the acceptance of the favors. See *Whitfield*, 590 F.3d at 349-350; *United States* v. *Ganim*, 510 F.3d 134, 147 (2d Cir. 2007), cert. denied, 552 U.S. 1313 (2008). The government relied on this "stream of benefits" approach in the instant case.

absent the error." *Id.* at 18. That standard is necessarily satisfied when the jury must have found facts establishing guilt under the valid theory. See *Skilling*, 130 S. Ct. at 2834 (remanding for harmless-error analysis and noting the government's theory that "[a]ny juror who voted for conviction based on [the honest-services theory] also would have found [Skilling] guilty of conspiring to commit securities fraud") (second and third sets of brackets in original; citation omitted). *Neder* referred to that analysis as the "functional equivalence" test—a test that finds harmlessness when the facts necessarily found by the jury are the "functional equivalent" of a finding of guilt on the valid theory. 527 U.S. at 13-14; see also *Carella* v. *California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in the judgment). The courts of appeals have routinely applied functional equivalence analysis to find errors harmless, including alternative-theory errors. See, *e.g.*, *United States* v. *Segal*, 644 F.3d 364, 366 (7th Cir.), petition for cert. pending, No. 11-343 (filed Sept. 16, 2011); *United States* v. *Brown*, 161 F.3d 256, 259 (5th Cir. 1998); *United States* v. *Hastings*, 134 F.3d 235, 241-242 (4th Cir.), cert. denied, 523 U.S. 1143 (1998); *United States* v. *Washington*, 106 F.3d 983, 1013 (D.C. Cir.) (per curiam), cert. denied, 522 U.S. 984 (1997); *United States* v. *Doherty*, 867 F.2d 47, 57-58 (1st Cir.), cert, denied, 492 U.S. 918 (1989); see also *United States* v. *Skilling*, 638 F.3d 480, 482 (5th Cir.) ("[A]n alternative-theory error is harmless if the jury, in convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory."), petition for cert. pending, No. 11-674 (filed Nov. 28, 2011). Because the jury must have found facts establishing guilt under theories that are unaffected by *Skil-*

ling, any instructional error in petitioner's case is harmless.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] In *Vasquez* v. *United States*, cert. granted, No. 11-199 (oral argument scheduled for Mar. 21, 2012), this Court granted review on the questions whether the Seventh Circuit in that case erroneously focused its harmless-error analysis solely on the weight of the untainted evidence without considering the potential effect of the erroneously admitted evidence; and whether the harmless-error analysis in that case violated the Sixth Amendment right to a jury trial by upholding the conviction without considering the effects of the district court's error on the jury that heard the case. In this case, the error pertained to the jury instructions, not the admission of evidence, and the courts of appeals agree that functional-equivalent analysis is a valid means of finding an instructional error to be harmless. Accordingly, the petition here need not be held for *Vasquez*.