No. 11 - 499

In the Supreme Court of the United States

GEORGE H. RYAN SR.,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION TO RYAN'S PETITION FOR CERTIORARI

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STATEMENT

THE GOVERNMENT'S STATEMENT OF FACTS RESTS ON THE IMPROPER ASSUMPTION THAT THE JURY MUST HAVE CREDITED ALL OF ITS EVIDENCE.

The government's brief in opposition begins with a statement of facts. Govt.Br. 2-6. The government asserts these facts simply because it presented evidence that would have *permitted* a jury to find them.

When the issue is the sufficiency of the evidence to sustain a jury verdict, a court must view the evidence in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). The issue in this case, however, is the harmlessness of an acknowledged error, see Govt.Br. 13—a direction to the jury to convict Ryan of noncriminal conduct. As the government explains, the question is whether the jury "must have found facts establishing guilt under theories that are unaffected by *Skilling* [v. *United States*, 130 S. Ct. 2896 (2010)]." Govt.Br. 24-25.

In evaluating what the jury "must" have found, a court cannot properly assume that the jury credited the government's evidence. To the contrary, unless the jury must have credited this evidence to reach the verdict it did, a court must assume that the jury resolved disputed factual issues in Ryan's favor. An inquiry into harmless error is "almost the polar opposite of a sufficiency of the evidence review," and any suggestion that evidence should be viewed in the light most favorable to the government would "flatly contradict" the required inquiry. *United States* v. *Cappas*, 29 F.3d 1187, 1194 n.4 (7th Cir. 1994).

Under the trial court's instructions, the jury could have found Ryan guilty if he made decisions beneficial to Lawrence Warner and Harry Klein without disclosing the conflict of interest posed by his relationship with these friends and/or the legitimate gifts they had given him and members of his family. The jury need not have credited *any* of the other evidence the government presented.

The government asserts, for example, that "[t]he State overpaid for [a lease of property in which Warner had an interest] by $246,583 over a five-year period" and that it "overpaid for [another lease] by $296,485." Govt.Br. 3-4. In fact, an expert called by the defense testified that the State paid $7233 less than the market rate for the first lease and $31,723 less than the market rate for the second. Tr. 20025-39, 20073-76. No one can know whether the jury believed that the State paid too much.

Similarly, the government declares, "Warner told Udstuen that Warner would 'take care of [petitioner].'" Govt.Br. 3. The only witness who testified to this alleged statement faced serious criminal charges himself, admitted committing perjury on prior occasions, acknowledged lying to hundreds of people, and recognized that his testimony at trial about Warner's supposed statement differed substantially from his testimony before the grand jury. Ryan argued strenuously that this witness should not be believed, and only the jurors know whether they believed him.

The government's mistaken assumption that the jury must have credited all of its evidence pervades its statement of facts. The Court cannot properly rely on this statement.

ARGUMENT

The Seventh Circuit did not reach an issue that the government now lists as a "question presented" by Ryan's petition—"whether any instructional error in petitioner's case was harmless." Govt.Br. at (I). To avoid deciding this issue, the court of appeals made three rulings that neither party had sought: (1) that Ryan procedurally defaulted his objection to the conflicts-of-interest instruction, (2) that the court could properly disregard the government's express acknowledgment that Ryan did not default his objection, and (3) that directing conviction for noncriminal conduct is not a constitutional error and is not cognizable in § 2255 proceedings.

The government offers no defense of the third of these rulings. Renouncing its position below, however, it defends the other two. All three are untenable. They warrant *per curiam* reversal even if this Court chooses not to address the other issues presented by this case.

I. THE COURT OF APPEALS'S RULING THAT RYAN DEFAULTED HIS OBJECTION TO THE CONFLICTS - OF - INTEREST INSTRUCTION IS INSUPPORTABLE.

The government acknowledges that Ryan objected to the conflicts-of-interest instruction at every stage of the proceedings but claims that he did not make the proper objection: "[P]etitioner procedurally defaulted his present claim that the instructions failed to limit honest-services fraud to schemes involving bribery or kickbacks." Govt.Br. 13.

As Ryan noted and the government does not deny, no litigant anywhere seems to have argued prior to *Skilling* that honest services fraud was limited to bribery and kickback schemes. The government's standard would make post-conviction relief for pre-*Skilling* errors impossible and nullify this Court's rulings that decisions narrowing the scope of federal criminal statutes apply retroactively. *E.g.*, *Schriro* v. *Summerlin*, 542 U.S. 348, 351-52 (2004).

As the government notes, Ryan grounded his objection to the conflicts-of-interest instruction partly on *United States* v. *Bloom*, 149 F.3d 649 (7th Cir. 1998). *Bloom* defined honest services fraud as misuse of office for private gain, *id.* at 655, and misuse of office meant a breach of fiduciary duty. See, *e.g.*, *United States* v. *Haussman*, 345 F.3d 952, 956 (7th Cir. 2003). Contrary to what the conflicts-of-interest instruction told the jury, App. 218a-219a, a public official has no fiduciary duty to disclose to his public employer all personal and financial interests that might affect his decisions.[1] Ryan therefore maintained that the conflicts-of-interest instruction went well beyond *Bloom*.

Ryan's failure to seek as great a limitation of the honest services statute as *Skilling* approved should work no forfeiture of the objection he made. He argued that the statute does not reach undisclosed conflicts, and *Skilling* held that the statute does not

[1] For an official to list every interest that could divert him from an exclusive focus on the public good would be difficult or impossible. This list would include, but not be limited to, every personal friend and family member who might benefit from his actions and every substantial gift or political contribution received from a person who might benefit from these actions. Moreover, even if the official could compile a list of all of his conflicts, he probably would not know where to post it. How does one disclose a conflict of interest to a disembodied public employer?

reach undisclosed conflicts. 130 S. Ct. at 2932-34. *Skilling* also declared that the statute does not reach other things. The other things, however, were not involved in Ryan's case, and Ryan had no reason to argue about them.

Moreover, Ryan argued at every stage of the proceedings that the honest services statute was unconstitutionally vague. The government maintains that this objection is unavailing because *Skilling* "did not hold that Section 1346 is unconstitutionally vague." Govt.Br. 13-14.

Were this Court to adopt the government's position, Ryan might respond, "Very well, but if I failed to make an appropriate objection to the scope of the honest services statute, please rule on the objection I did make and preserve. I argued that, as applied to me, the unreconstructed statute was unconstitutional." *Skilling* avoided resolution of the question Ryan posed by narrowing the reach of the statute. Rather than resolve the constitutional question in his case, the Court might give him the benefit of its narrowing construction. He is entitled to one thing or the other.

Skilling recognized this entitlement. Noting *only* Skilling's objection that the statute was unconstitutionally vague, 130 S. Ct. at 2925, the Court afforded him the benefit of its narrowing construction.

II. THE COURT OF APPEALS ABUSED ITS DISCRETION BY DISREGARDING THE GOVERNMENT'S EXPRESS WAIVER OF A NONJURISDICTIONAL DEFENSE.

Whatever the merits of the court of appeals's ruling that Ryan defaulted his objection to the conflicts-of-interest instruction, the court had no authority to make it. In response to the Seventh Circuit's request for its position, the government had expressly acknowledged that there was no default. In *Day* v. *McDonough*, 547 U.S. 198, 207-11 (2006), this Court held that, although a federal district court may notice *sua sponte* a nonjuristictional defense, it may not disregard the government's deliberate waiver of such a defense.

This Court will consider the application of *Day* in *Wood* v. *Milyard* (No. 10-9995). The first of two questions posed by the grant of certiorari in this case is whether a court of appeals, like a trial court, may raise *sua sponte* a nonjurisdictional defense. If this Court were to hold that an appellate court may not do so, the action of the court of appeals in this case would be plainly improper.

The second issue in *Wood* is whether a prosecutor deliberately waived a limitations defense when he said that he would neither challenge nor concede the timeliness of a *habeas corpus* petition. If the Court were to find a deliberate waiver in this agnostic statement, it could not fail to find one in the unambiguous declarations made by the government in this case.

Whatever the ruling in *Wood* may be, the government's waiver in this case is unmistakable. In *Day*, as the government notes, there was no deliberate waiver; the State made an inadvertent computational error in determining whether a statute of limitations applied. The government argues that its own waiver in this case was similarly "mistaken." Govt.Br. 18.

It is difficult, however, to imagine a more knowing and voluntary waiver. From the beginning, the government argued that Ryan defaulted his objections to two "financial benefits" instructions. It did not assert any default with respect to the conflicts-of-interest instruction, however, because it recognized that there had been none.

At the conclusion of oral argument, the court of appeals directed the parties to file supplemental memoranda on the significance of several procedural-default decisions of this 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." See Cert.Pet. 23. This concession was a fully knowing waiver, and disregarding it was flatly inconsistent with *Day*. This Court might reasonably reverse the court of appeals's decision for this abuse of discretion without full briefing and argument.[2]

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[2] The government writes:

> As the court [of appeals] explained, petitioner's trial lasted eight months, and his direct appeal produced more than 100 pages of judicial opinion * * * * In these exceptional circumstances, the Judicial Branch's interest in finality and conservation of resources is particularly weighty.

Govt.Br. 16. The eight-month trial, however, did not happen. Ryan's trial lasted six months. See *United States* v. *Warner*, 498 F.3d 666, 674 (7th Cir. 2007).

Ryan's trial was unconscionably long because most of the evidence the court admitted had nothing to do with bribes or kickbacks. A trial limited to allegations that Warner and Klein bribed Ryan would have ended within weeks. It is unbecoming, if not Kafkaesque, for a court to permit an improper, sprawling trial and then cite its indecent length as an "exceptional circumstance" justifying greater finality than is accorded other trials.

III. THIS COURT SHOULD CLARIFY THE STANDARD FOR AWARDING A NEW TRIAL WHEN INSTRUCTIONS HAVE DIRECTED A § 2255 PETITIONER'S CONVICTION FOR NONCRIMINAL CONDUCT.

The government is bold enough to compare its carefully considered waiver to the State's inadvertent slip-up in *Day*. It is not, however, audacious enough to offer a defense of the Seventh Circuit's ruling that, when jury instructions have directed a § 2255 petitioner's conviction for noncriminal conduct, the petitioner may challenge only the sufficiency of the evidence to support his conviction. Offering no defense of the Seventh Circuit's eccentric reading of *Davis* v. *United States*, 417 U.S. 333 (1974), and *Bousley* v. *United States*, 523 U.S. 614 (1998), the government recognizes that the petitioner is entitled to a new trial unless the instructional error was harmless. If this Court were to reverse *per curiam* the Seventh Circuit's disregard of the government's waiver, it should make clear to that court that it must apply one harmless error standard or another to the constitutional error in this case.

With the Seventh Circuit's "sufficiency of the evidence" standard abandoned, the government argues that the harmless error standard is clear. Citing *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993), it writes, "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." Govt.Br. 20.

Brecht, however, was limited to post-conviction proceedings brought by state prisoners and does not extend to all collateral review. The Court explicitly relied on concerns of "comity and federalism" that do not apply to § 2255 proceedings brought by federal prisoners. 507 U.S. at 635. The "harmless beyond a reasonable doubt" standard that the Seventh Circuit approved in *Lanier* v. *United States*, 220 F.3d 833 (7th Cir. 2000), and that the district court applied in this case offers a better alternative.

A third standard remains in contention too—the "reasonable likelihood" standard of *Boyde* v. *California*, 494 U.S. 370 (1990). The government notes this Court's statement in *Calderon* v. *Coleman*, 525 U.S. 141, 146 (1998), that *Boyde* supplies, not a harmless error standard, but a test for determining whether constitutional error occurred. Govt.Br. 20 n.4. Both *Boyde* and *Brecht*, however, require a review of the entire record to determine the effect of an improper jury instruction. It would be bizarre to review the record twice—asking first whether there was a reasonable likelihood that an instruction influenced the verdict and then, if the answer was yes, whether the instruction also had a substantial and injurious effect or influence in determining the verdict. Functionally, the two standards do the same job but do it differently.

The law of harmless error remains tangled, as this Court recognized when it granted certiorari in *Vasquez* v. *United States* (No. 11-199). This Court should specify what standard determines whether a petitioner like Ryan is entitled to a new trial.

IV. THE CONSTITUTIONAL ERROR IN THIS CASE WAS NOT HARMLESS.

The government declares that Ryan is "not entitled to relief under any harmlessness standard." Govt.Br. 19. Ryan, however, presented a simple and straightforward case for postconviction relief. He is entitled to a new trial under any standard.

The government's closing argument emphasized the improper conflicts-of-interest instruction and failed even to mention the instructions that authorized Ryan's conviction for taking bribes. Indeed, the argument expressly acknowledged the absence of the defining element of bribery, a *quid pro quo*.[3]

To support its claim that the jury could not have found an undisclosed conflict without also finding bribery, the government quotes a lengthy passage of the district court's opinion. Govt.Br. 21-23. This tortuous passage erred at every turn.

- Noting that an element of honest services fraud was "private gain," the court contended that the only "private gain" the jury could have found was the "stream of benefits" Ryan received from Warner. The instructions, however, told the jury repeatedly that the required gain could consist of gain to Ryan "or another"—for example, Warner. See, *e.g.*, App. 224a. Favoring Warner in the award of contracts would have satisfied the "private gain" requirement even if Ryan had received nothing from him at all.

- The court declared that the jurors "were specifically instructed that if the benefits

[3] The government now says that it acknowledged only that "it had not shown a *quid pro quo* exchange of money for specific favors." Govt.Br. 23 n.6. That, however, is not what the government said and not what it meant. The government acknowledged 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.

[petitioner] received from Warner were merely the proceeds of friendship, they could not be the basis for conviction." The only instruction that mentioned friendship, however, was one describing an Illinois statute outlawing gifts from lobbyists. This statute excluded "anything provided on the basis of friendship." App. 222a-223a. No instruction indicated that gifts provided on the basis of friendship could not create conflicts of interest that Ryan would be obliged to disclose.

- The court said that any conflict of interest the jury found must have been "related to" benefits that Warner provided to Ryan. It then leapt to the conclusion that "the jury must have found [petitioner] accepted gifts from Warner with the intent to influence his actions." The jury, however, need not have found that Ryan's acceptance of gifts from Warner was in any way improper. It might have found only that Ryan had a duty to disclose these gifts when he later made decisions benefitting their donor.

The passage quoted by the government illustrates the intellectual gymnastics in which both the district court and the court of appeals engaged. Ryan asks this Court to apply the rule of law.

CONCLUSION

This Court might reasonably reverse the Seventh Circuit's disregard of the government's express waiver of a nonjurisidictional defense without full briefing and argument, and it might remand this case with directions to determine whether the instructional error in this case was harmless.

A better course, however, would be to direct the parties to brief three questions: whether the court of appeals improperly disregarded the government's waiver of a nonjurisdicitional defense, what standard determines a § 2255 petitioner's entitlement to a new trial when jury instructions have directed his conviction for noncriminal conduct, and whether the instructional error in this case was harmless.

This Court should grant Ryan's petition.

Respectfully submitted,

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