No. __ - ____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To have preserved a claim that jury instructions directed and produced a conviction for noncriminal conduct, must a § 2255 petitioner have argued for the precise standard this Court articulated when it held this conduct noncriminal in a later case?

2. May a federal court disregard the government's express acknowledgment that a petitioner preserved a claim that instructions directed and produced his conviction for noncriminal conduct?

3. When a jury was directed to convict a § 2255 petitioner of noncriminal conduct, which of several standards determines whether he is entitled to relief? Must he show (a) that the evidence would have been insufficient to support his conviction under the appropriate standard, (b) that there is grave doubt whether the erroneous instructions had a substantial and injurious effect on the verdict, (c) that there is a reasonable likelihood that he was not convicted of a crime, or (d) that it is not clear beyond a reasonable doubt that he was convicted of a crime?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are those named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

George Ryan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) appears at 645 F.3d 913. The order denying petitioner's petition for rehearing (App. 12a) is unpublished. The opinion of the district court (App. 14a) appears at 759 F. Supp. 2d 975. An earlier decision of the court of appeals affirming the petitioner's conviction (App. 94a) appears at 498 F.3d 666.

JURISDICTION

The Court of Appeals filed its opinion on July 6, 2011. It denied petitioner's timely petition for rehearing on August 3, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part, "[N]or shall any person * * * be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 1341 (defining mail fraud), 18 U.S.C. § 1346 (declaring that a scheme to defraud includes a scheme to deprive another of the intangible right of

honest services), and 28 U.S.C. § 2255(a) (providing a post-conviction remedy for federal prisoners) are reproduced in the appendix. App. 183a-185a.

STATEMENT OF THE CASE

A. Preliminary Statement

After this Court's decision in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), George Ryan, a former Illinois Secretary of State and Governor serving a sentence for mail fraud, petitioned for post-conviction relief under 28 U.S.C. § 2255. *Skilling* narrowed the scope of 18 U.S.C. § 1346, the "honest services" statute, by holding that it "covers only bribery and kickback schemes." 130 S. Ct. at 2907.

Ryan maintained that jury instructions had directed his conviction for conduct that *Skilling* held was not a crime—in particular, failing to disclose a personal or financial conflict of interest. Moreover, the trial record revealed that the jury had almost certainly convicted him of this nonexistent crime rather than of scheming to obtain bribes or kickbacks.

Rather than address the issue that Ryan presented, the Seventh Circuit asserted a procedural default. It declared that, although Ryan had objected repeatedly to the instruction authorizing his conviction for undisclosed conflicts and although he had argued repeatedly that the honest services statute was unconstitutionally vague, he had not specifically objected that the honest services statute should be limited to schemes to obtain bribes and kickbacks. App. 3a. The objection that the court held necessary was one that no litigant in the United

States appears to have made prior to *Skilling*.[1]

In fact, no default occurred, and the government never suggested that any did. Indeed, when the Seventh Circuit requested its position, 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." Government's Supplemental Memorandum at 6, Doc. 38, *Ryan* v. *United States*, 645 F.3d 913 (7th Cir. 2011) (No. 10-3964).

In *Day* v. *McDonough*, 547 U.S. 198, 202 (2006), this Court wrote, "[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense." The Court's statement concerning the government's waiver of a limitations defense applies equally to its waiver of a defendant's procedural default.

The Seventh Circuit's failure to follow *Day* and implement *Skilling* warrants, at a minimum, a *per curiam* reversal and remand with directions to address the issues presented by the parties. See S. Ct. Rule 10(a) (noting that certiorari is appropriate when a court of appeals has "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power"). Without action by this Court, *Skilling* will remain a dead letter in the Seventh Circuit.[2]

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[1] 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.").

[2] Conrad Black, who remains in prison, appears to be the only litigant in the courts of the Seventh Circuit to have benefitted in any way from *Skilling*. On remand from this Court, the Seventh Circuit held the instructional errors in his case harmless as to

The Court, however, ought to do more. Granting Ryan's petition and ordering a full briefing of the case would permit the Court to address an issue that has been the subject of confusion in the lower courts and on which its own decisions are conflicting: How likely must it be that a post-conviction petitioner was convicted of noncriminal conduct to entitle him to a new trial?

B. A History of this Case

At the conclusion of a six-month trial, Ryan was convicted of seven counts of mail fraud and of a RICO conspiracy predicated on the mail fraud violations.[3] A divided Seventh Circuit affirmed his conviction, *United States* v. *Warner*, 498 F.3d 666 (7th Cir. 2007), and this Court denied certiorari. 553 U.S. 1064 (2008).

After Ryan began serving his 78-month sentence,

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two of his mail fraud convictions but not as to two others. *United States* v. *Black*, 625 F.3d 386 (7th Cir. 2010). For rulings in the Seventh Circuit and the Northern District of Illinois denying *Skilling*-based claims, see *United States* v. *Segal*, 644 F.3d 364 (7th Cir. 2011); *United States* v. *Lupton*, 620 F.3d 790 (7th Cir. 2010); *United States* v. *Joshua*, 648 F.3d 547 (7th Cir. 2011); *United States* v. *Hargrove*, 412 F. App'x 869 (7th Cir. 2011); *United States* v. *Cantrell*, 617 F.3d 919 (7th Cir. 2010); *Sorich* v. *United States*, No. 10C 1069, 2011 WL 3420445 (N.D. Ill. Aug. 4, 2011); *Loren-Maltese* v. *Phillips*, No. 10C 6415, 2011 WL 687488 (N.D. Ill. Feb. 16, 2011); *United States* v. *Rezko*, 776 F. Supp. 2d 651 (N.D. Ill. 2011); and *United States* v. *Lopez*, No. 10C 5075, 2011 WL 1630900 (N.D. Ill. Apr. 29, 2011).

[3] The jury initially convicted Ryan on nine counts of mail fraud, but the district court found the evidence insufficient to support two of these convictions. In addition, the jury convicted Ryan of false statements and various tax offenses. In this proceeding, Ryan does not challenge his tax and false statements convictions.

this Court held that § 1346 "covers only bribery and kickback schemes." *Skilling*, 130 S. Ct. at 2907. The Court declared that "[c]onstruing the * * * statute to extend beyond that core meaning * * * would encounter a vagueness shoal." *Id.* It rejected the government's argument that a public official's nondisclosure of a conflicting interest can justify a mail fraud conviction. *Id.* at 2933-34.

1. Jury Instructions

The instructions in Ryan's case marked four paths to conviction for honest services fraud, and three of them directed conviction for noncriminal conduct. First, the instruction that is the central focus of this petition declared:

> A public official or employee has a duty to disclose material information to a public employer. If an official or employee conceals or knowingly fails to disclose a material personal or financial interest, also known as a conflict of interest, in a matter over which he has decision-making power, then that official or employee deprives the public of its right to the official's or employee's honest services if the other elements of the mail fraud offense are met.[4]

App. 218a-19a. The court defined "materiality" as having the "tendency to influence or [being] capable of influencing [a] decision * * * *" App. 217a.

Both the district court and the court of appeals acknowledged that this instruction directed

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[4] The other elements of mail fraud were presumably material misrepresentation, fraudulent intent, mailing, and private gain. See App. 52a.

conviction for noncriminal conduct. App. 10a-11a, 41a-42a. As the court of appeals observed, "the honest-services form of the mail fraud offense * * * covers only bribery and kickback schemes," App. 2a, while "the question under the instructions * * * was whether Ryan had received a secret financial benefit." App. 10a.

A second instruction declared, "Where a public official * * * misuses his official position or material nonpublic information he obtained in it for private gain for himself or another, then that official * * * has defrauded the public of his honest services if the other elements of the mail fraud offense have been met." App. 224a. A nearly identical instruction led to a reversal of the defendant's conviction in *Black* v. *United States*, 130 S. Ct. 2963, 2967 (2010).

A third instruction declared, "I instruct you that the following state laws were among the laws applicable to state officials * * * *" App. 221a. It then recited a series of Illinois laws that had nothing to do with bribes or kickbacks—for example, a statute requiring an accurate annual statement of an official's economic interests. The court told the jury that a violation of any of these laws to produce a personal gain for the defendant or anyone else would constitute honest services fraud if the other elements of mail fraud were established. App. 224a.

The district court acknowledged that all of the foregoing instructions were erroneous. App. 31a-32a, 41a-44a. The government did not suggest that Ryan had failed at any stage to make appropriate objections to them.

Finally, a series of instructions directed conviction for improperly receiving financial benefits. App. 219a-

21a. Ryan contended that these instructions encompassed benefits that do not qualify as bribes under federal standards and that they too directed his conviction for noncriminal conduct. The district court, however, held that these instructions reached only bribes and that they remained correct after *Skilling*. App. 37a-39a. Moreover, the government noted that Ryan had failed to reiterate his objections to two of these instructions on direct appeal.[5]

To simplify this petition, Ryan assumes *arguendo* that the district court was correct and these instructions reached only bribes. On this assumption, the instructions marked three invalid paths to conviction and one valid path. Without examining the evidence and arguments, one cannot know which path the jury took. See *Skilling*, 130 S. Ct. at 2934 ("[C]onstitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory.") (describing *Yates* v. *United States*, 354 U.S. 298 (1957)).

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[5] Ryan maintained that the "cause and prejudice" standard of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), allowed the consideration of objections he had not reiterated on direct appeal. Contrary to the suggestion of the court of appeals, he did not argue that "cause" existed simply because it would have been futile to present these objections to the Seventh Circuit. See App. 4a. Cause exists, however, when the Supreme Court has issued a decision overturning "a longstanding and widespread practice to which [it] has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Reed* v. *Ross*, 468 U.S. 1, 17 (1984) (quoting *United States* v. *Johnson*, 457 U.S. 537, 551 (1982)). Prior to *Skilling*, an entirely unanimous body of lower courts had approved broader standards of honest services fraud than the one approved in that case. See *Stayton* v. *United States*, 766 F. Supp. 2d 1260, 1266-69 (M.D. Ala. 2011).

2. Ryan's Objections to the Conflicts of Interest Instruction and to the Vagueness of § 1346

Before trial, the government asked the district court to preclude the defense from "argu[ing] or suggest[ing] to the jury that * * * specific quid pro quo evidence is a prerequisite to a finding of guilt on the particular mail fraud charges here." United States' Motion For Pretrial Ruling On Jury Instructions Related To Mail Fraud Allegations at 3, Doc. 280, *United States* v. *Ryan*, No. 02 CR 506 (N.D. Ill. Aug. 31, 2005) (emphasis removed). It explained, "Other circuits * * * have upheld public corruption prosecutions rooted in * * * the failure of a public official to disclose a financial interest or relationship affected by his official actions." *Id.* at 4.

Ryan responded that the other circuits' rulings "do not conform to the controlling Seventh Circuit law on honest services mail fraud as articulated in [*United States* v. *Bloom*, 149 F.3d 649 (7th Cir. 1998)]." Ryan's Response to United States' Motion at 6, Doc. 323, *United States* v. *Ryan*, *supra* (Sept. 15, 2005).

Bloom established the Seventh Circuit's pre-*Skilling* standard of honest services fraud—a violation of fiduciary duty for private gain. Ryan contended that the government's proposed instructions went well beyond *Bloom*. Moreover, his arguments came close to anticipating *Skilling*'s bribes and kickbacks standard: "A *Quid Pro Quo* Is Required Where Mail Fraud Charges Are Predicated On The Receipt Of A Campaign Contribution," and "A *Quid Pro Quo* Is Required Where Federal Criminal Charges Are Predicated On The Receipt Of A Gift." Ryan's Response to United States' Motion, *supra*, at 8

& 12.

To support the proposed conflicts of interest instruction, the government relied on two First Circuit decisions, *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996), and *United States* v. *Woodward*, 149 F.3d 46 (1st Cir. 1998). See United States Motion for Pretrial Ruling, *supra*, at 5-7. These decisions abandoned any *quid pro quo* requirement and included within the ambit of honest services fraud "a more generalized pattern of gratuities to coax 'ongoing favorable official action.'" *Woodward*, 149 F.3d at 55 (quoting *Sawyer*, 85 F.3d at 730). The court said that juries should be instructed that it is lawful for lobbyists to entertain legislators to cultivate "business or political friendship" but felonious for them to do so "to cause the recipient to alter her official acts." *Id.* The Court acknowledged that the benefits it made criminal "may not be very different, except in degree, from routine cultivation of friendship in a lobbying context." *Id.*

Ryan and the government renewed their argument over the conflicts of interest instruction at the conference on jury instructions, Tr. 22063-88, and the court approved the government's position. The words "bribe," "kickback," and "*quid pro quo*" do not appear in the instructions. The words "conflict of interest" do.

Ryan objected again to the conflicts of interest instruction on direct appeal. See Brief of Appellants at 61, *United States* v. *Warner*, 498 F.3d 666 (7th Cir. 2007) (Nos. 06-3517 & 06-3528) ("Similarly in tension with *Bloom*, the district court instructed that a failure to disclose a 'conflict of interest' in a matter over which a public official has decision-making power constitutes a deprivation of honest services * *

* *"). The government responded, and Ryan replied. The Seventh Circuit addressed the question and upheld the challenged instruction. *Warner*, 498 F.3d at 698-99.

Ryan also argued that the honest services statute was unconstitutionally vague. See Brief of Appellants, *supra*, at 60-62. Again, the Seventh Circuit addressed and rejected Ryan's argument. *Warner*, 498 F.3d at 698.

3. The Evidence and Arguments Presented at Trial

Over the course of Ryan's six-month trial, the government presented much evidence that had no tendency to establish bribes or kickbacks. The jury heard that Ryan violated his announced personal policy of declining gifts worth more than $50, that he awarded low-digit license plates to campaign contributors, that he concealed a consulting fee paid by the Phil Gramm presidential campaign, and more. All of this evidence was alleged to establish a single fraudulent scheme that began when Ryan was elected Secretary of State and ended when he left the Governor's office twelve years later.

Specific mail fraud counts alleged mailings in furtherance of particular aspects of the scheme. The counts of which Ryan remains convicted concern his relationship with Lawrence Warner and Harry Klein. Counts 2, 4, 5, and 7 alleged mailings in furtherance of contracts awarded to lobbying clients of Warner, and Counts 3 and 8 alleged mailings in furtherance of two leases of property in which Warner had interests. Count 6 alleged a mailing in furtherance of a lease of a property owned by Klein.

Warner, a longtime Ryan family friend and

political associate, worked as a lobbyist and insurance adjuster. He hosted two fundraisers for Ryan's campaigns, raising a total of $250,000.[6] In addition, Warner adjusted an insurance claim without a fee when Ryan's apartment flooded on Christmas day. He provided no other benefits to Ryan himself. Two lobbyists who were longtime associates of Ryan testified, however, that Warner shared lobbying fees with them. In addition, Warner invested in two businesses owned by Ryan family members, waived an insurance adjustment fee for a Ryan son-in-law, lent money to a son-in-law, and paid for the band at the wedding of one of Ryan's daughters.

Klein, an owner of currency exchanges, hosted annual one-week vacations for Ryan and his wife at Klein's vacation home in Jamaica. Two years after the vacations began, Ryan approved a rate increase that benefitted Klein along with every other currency exchange owner in Illinois,[7] and four years after the vacations began, Ryan approved the lease that was the subject of Count 6.

The most damaging evidence presented during Ryan's trial was probably the testimony of his former chief-of-staff, Scott Fawell. Fawell testified that Ryan purported to pay for his Jamaican vacations by

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[6] *McCormick* v. *United States*, 500 U.S. 257, 273 (1991), holds that campaign contributions may be treated as bribes only when "the payments are made in return for an explicit promise or undertaking * * * to perform or not to perform an official act." No evidence suggested an explicit *quid pro quo* for Warner's fundraisers, and the government did not claim that there was one.

[7] It had been ten years since the last increase.

writing checks to Klein and taking cash back. Fawell explained that, because Klein's currency exchanges were regulated by Ryan's office, Ryan did not want Klein's hospitality known. Tr. 2844.

Fawell's testimony gave the government a strong case that Ryan had concealed a conflict of interest, and the government pressed this case. "[T]his is the heart of the matter," its closing argument declared. "For the first ten counts of the indictment [the mail fraud and RICO counts] it is the heart of the matter. It's about trust. Mr. Ryan's honest services." The government then recited the conflicts of interest instruction in full and told the jury, "So folks, on this honest services, on this scheme * * * it can be met with a conflict of interest." Tr. 23771-72.

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

> That's what this instruction is about, folks. And that is the heart and soul not only of the South Holland [Klein] situation, but each and every Warner situation, because [of] that flow of benefits I talked to you about, George Ryan was operating under a conflict of interest every time he dealt with Larry Warner, because benefits were flowing from Larry Warner. He had a duty to disclose them * * * and he didn't.

Tr. 23772-73.

Ryan's counsel cross-examined prosecution witnesses by asking such questions as, "[W]ere you ever aware of anybody ever giving any money to George Ryan to affect his decisions as secretary of

state?" and "[D]id you ever observe or see George Ryan do anything that indicated to you that he had received any money or benefit from anyone to influence or affect his judgment as secretary of state?" Every witness answered "no." E.g., Tr. 3758-59, 6922-24, 7316-17, 9520, 11773-75, 13499-502. Of the 83 witnesses the government called, none "testified that George Ryan took anything from anybody to perform his official acts." Tr. 23149.

A conflicting interest is any interest other than the public interest that may affect a public official's decisions—in the language of the instructions, any interest that has "the natural tendency to influence or is capable of influencing [a] decision." Tr. 23904. A legitimate gift creates a conflict of interest, for example, when an official makes a decision affecting the gift-giver. "[F]or bribery," however, "there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange for* an official act." *United States* v. *Sun-Diamond Growers*, 526 U.S 398, 404-05 (1999) (emphasis in the original). See also *McCormick*, 500 U.S. at 273 (quoted in note 6, *supra*); *id*. at 283 (Stevens, J., dissenting) (agreeing that "the crime does require a '*quid pro quo*'"); *Evans* v. *United States*, 504 U.S. 255, 268 (1992) (reiterating "the *quid pro quo* requirement of *McCormick*" and noting, "[T]he offense is completed at the time when the public official receives a payment in return for his engagement to perform specific official acts"); *id*. at 274-75 (Kennedy, J., concurring) (declaring that the public official's "course of dealings must establish a real understanding that failure to make a payment will result in the victimization of the prospective payor or the withholding of more favorable treatment").

The government recognized that its case that Ryan had taken bribes was weak. Although it sometimes intimated that Ryan's favoritism for friends who had done favors for him and his family was akin to bribery,[8] its closing argument never described or recited any of the bribery instructions and never suggested that any of these instructions provided a basis for conviction.

Indeed, the government expressly acknowledged that it had failed to prove a *quid pro quo*:

> How did George Ryan reciprocate this longtime friendship [with Warner]? Government business is how he did it. $3 million worth of government business. *Was it a quid pro quo? No, it wasn't. Have we proved a quid pro quo? No, [we] haven't. Have we charged a quid pro quo? No, we haven't.* We have charged an undisclosed flow of benefits back and forth. And I am going to get to the instructions in a minute, folks, but that is what we have charged* * * * We have charged an undisclosed flow of benefits, which, under the law, is sufficient * * * *

Tr. 23764 (emphasis added).[9]

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[8] At one point, while describing the "various undisclosed financial benefits" Ryan and his family received, it declared that he "sold his office." Tr. 22836. At another, it said that the "type of corruption here" was like a meal plan or open bar. Tr. 22853.

[9] The government also said:

> [I]t's important to remember that it is not necessary for us to prove a quid pro quo. I used that term before, I think. In other words that it

The jury in Ryan's case did not find that he took bribes. The instructions and argument marked a far easier path to conviction, and there is no reason to doubt that the jury took it. What answer it would have given to the question that *Skilling* makes critical remains unknown.

The jurors in fact had difficulty reaching a verdict even when directed to convict for failing to disclose a conflict of interest. After they had deliberated for eight days, the court replaced two jurors who had given false answers on jury questionnaires. The reconstituted jury then deliberated for ten days before reaching a verdict. See *Warner*, 498 F.3d at 675-77.

4. The Opinions of the District Court and Court of Appeals

The district court recognized that its conflicts of interest instruction was erroneous but held the error harmless. It reasoned (a) that all of the surviving mail fraud counts concerned leases and contracts beneficial to Warner and Klein, (b) that the jury's convictions on these counts must have rested on the "stream of benefits" that Warner and Klein provided,

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> was I give you this, you give me that; it doesn't have to be that sort of relationship.
>
> The defense * * * has repeatedly attempted to focus you on corrupt payments of money or cash bribes, but that's not the case that we have charged here. What the government's case is about is that George Ryan received these financial benefits for himself and steered other benefits to third parties, benefits that were not disclosed to the public * * * *

Tr. 22956-57.

and (c) that the court's bribery instructions determined when the receipt of financial benefits was unlawful. Because the "stream of benefits" was the only conflict of interest alleged, the jury could not have found an undisclosed conflict without also finding bribery.[10]

The parties' briefs in the Seventh Circuit focused on this ruling, and Ryan argued that the district court's analysis was fallacious. This analysis assumed that, if the jury convicted Ryan on the basis of the benefits provided by Warner and Klein, it must have found that Ryan's *receipt* of these benefits was unlawful. The jury, however, had no reason to address that question. Whether the benefits provided by Warner and Klein were bribes or lawful gifts, Ryan allegedly had a duty to disclose them. The important thing about the "undisclosed stream of benefits" was not that they were improperly received but that they were undisclosed.[11]

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[10] In fact, the "stream of benefits" was not the only conflict alleged. Unlike the standard the government proposed and the Supreme Court rejected in *Skilling*, which would have criminalized only failing to disclose a conflicting financial interest, 130 S. Ct. at 2932, the instruction in Ryan's case directed conviction for failing to disclose a personal *or* a financial interest. App. 218a-19a. If Ryan awarded government contracts to friends without revealing the conflict created by his friendship, this instruction directed his conviction of honest services fraud without proof that he had received any benefits at all. The government's closing argument told the jury that § 1346 prohibited Ryan from "using his official decision-making power to steer benefits * * * to Larry Warner." Tr. 23773. It declared, "The evidence has established that again and again Ryan steered these contracts and leases to Warner or other friends, like Klein." Tr. 22834.

[11] The government declared, "[I]t's this undisclosed flow of benefits that was charged in the indictment, it's this undisclosed

The Seventh Circuit did not consider the issues that Ryan and the government presented. Before Ryan's counsel reached the second sentence of his oral argument, the presiding judge, Chief Judge Easterbrook, announced that he was "puzzled why we are talking about jury instructions in this case." App. 186a.[12] He declared that *Davis* v. *United States*, 417 U.S. 333 (1974), and *Bousley* v. *United States*, 523 U.S. 614 (1998), do not allow challenges to jury instructions in post-conviction proceedings. These decisions allow a petitioner to show only that the

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flow of benefits that is in violation of the law, and it's this undisclosed flow of benefits that were proven in this case beyond a reasonable doubt." Tr. 22957-58.

The district court also concluded that the jury could not have found an undisclosed conflict of interest without finding a fraudulent deprivation of property. By failing to disclose the benefits he had received from Warner and Klein, Ryan had stolen state contracts and leases, not for his benefit, but for theirs. In the Seventh Circuit, Ryan argued that convicting someone of pecuniary fraud for failing to reveal legitimate friendships and gifts would resurrect the conflicts of interest standard the Supreme Court rejected in *Skilling*.

In response, the government disclaimed any contention that Ryan could be convicted of pecuniary fraud for failing to disclose legitimate gifts; he could be convicted only if the benefits he received were bribes. Ryan observed that if the benefits he received were bribes, he was guilty of honest services fraud. Convicting him of property fraud as well would not increase his guilt. By acknowledging that Ryan could be convicted of property fraud only if he were also guilty of honest-services fraud, the government effectively removed the property-fraud issue from the case.

[12] An unofficial written transcript of the argument appears in the appendix. App. 186a. A recording of the argument can be found at http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=10-3964&submit=showdkt&yr=10&num=3964.

evidence was insufficient to support his conviction under an appropriate standard. App. 186a-87a. (In fact, one searches *Davis* and *Bousley* in vain for any hint of the propositions attributed to them. See pp. 26-30, *infra*.)

Counsel responded that he was not simply noting a misstatement of substantive criminal law. Rather, the conflicts of interest and other jury instructions violated the Constitution by directing conviction for noncriminal conduct. To counsel's statement, "We are saying that George Ryan was convicted in violation of the Constitution," the presiding judge responded: "I understand that. That's what the D.C. Circuit held in *Frady* and which the Supreme Court reversed." App. 189a. (Again, the judge's description bore no resemblance to the case he cited. See *United States* v. *Frady*, 456 U.S. 152 (1982).[13]) At the conclusion of the argument, the court directed the parties to file supplemental memoranda on the cases it had mentioned. App. 214a.

The government's memorandum declared, "[I]n the government's view, Ryan has not procedurally defaulted his claim that he was convicted for conduct that is not a crime." Govt. Supp. Memo, *supra*, at 6. It added, "In order to obtain review of his claim in a § 2255 proceeding, Ryan does not have to establish

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[13] In *Frady*, the D.C. Circuit, applying a "plain error" standard, granted relief from a procedural default. The Supreme Court reversed because the appropriate standard in a post-conviction proceeding is "cause and prejudice," not plain error. 456 U.S. at 162-75. Nothing in *Frady* (or *Davis* or *Bousley*) is in any tension with a rule of law well established by this Court's decisions: When jury instructions direct a conviction for noncriminal conduct, the error is (a) constitutional in character and (b) cognizable in post-conviction proceedings. See pp. 27-30, *infra*.

'cause' because his claim was not defaulted." *Id.* at 7 (emphasis removed).

Chief Judge Easterbrook's opinion for the Seventh Circuit nevertheless denied relief because Ryan had not properly objected at trial to the district court's instructions. Although Ryan had objected before trial, at trial, and on appeal to the conflicts of interest instruction, the court apparently concluded that he had not made the *proper* objection. He should have asked the Seventh Circuit to overrule *Bloom* and limit § 1346 to bribery and kickback schemes:

> [Ryan] never made the argument that prevailed in *Skilling*: that §1346 is limited to bribery and kickback schemes* * * * The forfeiture as we see it is that Ryan never made in the district court or on appeal an argument that §1346 is best understood to be significantly more limited than *Bloom* held* * * * [W]hile Ryan's lawyers proposed instructions based on *Bloom* * * * Skilling asked the Supreme Court to disapprove *Bloom** * * * Nothing prevented Ryan from making the arguments that Skilling did. Many other defendants in this circuit contended that *Bloom* was wrongly decided. Conrad Black was among them* * * * Because Black had preserved an objection to *Bloom*'s understanding of §1346, we inquired on remand from the Supreme Court whether the errors were harmless.[14]

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[14] The court's factual statements were inaccurate. As noted at the outset of this petition, no litigant anywhere in the United States appears to have argued for the *Skilling* standard prior to

App. 4a-5a.[15]

The Seventh Circuit did not mention the government's concession that there had been no default but did mention that the government had not asserted a default. It said, "On collateral review * * * a court may elect to disregard a prosecutor's

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Skilling. Moreover, Skilling did not "ask[] the Supreme Court to overrule *Bloom*." His brief in this Court did not mention *Bloom*, Brief of Petitioner, *Skilling*, *supra* (No. 08-1394), and in the Fifth Circuit, he cited *Bloom* only in support of his arguments. Brief of Defendant at 65, *United States* v. *Skilling*, 554 F.3d 529 (5th Cir. 2009) (No. 06-20885).

If many Seventh Circuit defendants (or any) contended that *Bloom* was wrongly decided, Ryan's research has not revealed them. Certainly Conrad Black was not among them. He, too, cited *Bloom* only in support of his arguments. See Brief 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); Brief of Petitioners, *Black* v. *United States*, 130 S. Ct. 2963 (2010) (No. 08-876). In its supplemental memorandum, the government observed that Black "was given the benefit of *Skilling*," reviewed the arguments Black presented, and declared that Ryan had "similarly preserved his claim." Govt. Supp. Memo, *supra*, at 6.

[15] The ellipses in this quotation denote substantial omissions. The passages quoted are the court's comments concerning Ryan's supposed default. The omitted passages appear to respond to an argument by Ryan that he should be relieved of this default under the cause and prejudice standard. Ryan, however, sought relief from an alleged default only with respect to two of the "financial benefits" instructions. As the government noted, he had challenged these instructions at trial but not on direct appeal. See note 5, *supra*. Ryan did not make a "cause and prejudice" argument with respect to the "conflicts of interest" instruction or either of the other instructions that the district court held erroneous. He had no reason to do so. The government had never suggested any default, and there was none.

forfeiture, because the Judicial Branch has an independent interest in the finality of judgments." App. 8a.

The court also declared, "Jury instructions that misstate the elements of an offense are not themselves a ground for collateral relief." It acknowledged that "[u]nconstitutional jury instructions are a different matter" but insisted, "*Skilling* is about statutory interpretation." According to the court, "The right question under *Davis* and *Bousley* is whether, applying current legal standards to the trial record, Ryan is entitled to a judgment of acquittal." App. 9a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD NOT ALLOW A CONCOCTED FINDING OF PROCEDURAL DEFAULT TO NULLIFY *SKILLING*.

Before trial, during trial, and on appeal, Ryan argued that § 1346 does not reach undisclosed conflicts of interest. *Skilling* held that § 1346 does not reach undisclosed conflicts. That should be the end of the matter; there was no default.

The Seventh Circuit offered no reason for its conclusion that Ryan should have done more. Why, for example, should he have asked the Seventh Circuit to overrule its leading decision on honest services fraud when he had a strong argument that the conflicts of interest instruction was incompatible with this decision? And why was he required to advance the still unheard-of argument that § 1346 must be limited to bribery and kickback schemes? Why wasn't it enough for him to object to the

unconstitutional thing that happened to him—his conviction of a nonexistent crime? (In fact, Ryan did come close to anticipating the *Skilling* standard when he argued that "A Quid Pro Quo is Required Where Federal Criminal Charges are Predicated on the Receipt of a Gift." See p. 9, *supra*.)

Requiring a defendant not merely to object to instructions directing his conviction for noncriminal conduct but to anticipate precisely the standard this Court would articulate when it held the conduct noncriminal would make post-conviction relief unavailable to ordinary mortals. Only soothsayers could gain relief from unconstitutional confinement. The requirement might, however, lead defendants to fill motions and briefs with alternative arguments for every conceivable standard this Court might approve.

Moreover, as the Seventh Circuit acknowledged, App. 4a, Ryan objected repeatedly that § 1346 is unconstitutionally vague. Early in *Skilling*'s discussion of honest services fraud, the Court noted that Skilling made the same constitutional objection. 130 S. Ct. at 2925. At the end of its opinion, the Court held that Skilling was entitled to the benefit of its new construction of the statute. *Id.* at 2934-35. Apparently the claim of unconstitutional vagueness was itself sufficient to entitle him to this relief.

Such a claim should indeed be sufficient. If a defendant like Ryan were not afforded the benefit of this Court's narrowing construction of § 1346, the statute would be unconstitutional as the courts applied it to him. His claim of unconstitutional

vagueness would be meritorious.[16]

II. THIS COURT SHOULD NOT ALLOW THE SEVENTH CIRCUIT TO NULLIFY *SKILLING* BY DISREGARDING THE GOVERNMENT'S EXPRESS WAIVER OF A NONJURISDICTIONAL DEFENSE.

Until the Seventh Circuit requested a memorandum stating its position, the government had merely forfeited or failed to assert any claim of procedural default with respect to the conflicts of interest instruction. In the requested memorandum, however, the government expressly waived this claim: "[I]n the government's view, Ryan has not procedurally defaulted his claim that he was convicted for conduct that is not a crime." Govt. Supp. Memo, *supra*, at 6. And further: "In order to obtain review of his claim in a § 2255 proceeding, Ryan does not have to establish 'cause' because his claim was not defaulted." *Id.* at 7.

The Seventh Circuit cited only one authority for the proposition that it could disregard the government's answer: "On collateral review * * * a court may elect to disregard a prosecutor's forfeiture, because the Judicial Branch has an independent

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[16] Although *Skilling* said that its narrowing construction of the statute was necessary to avoid a "vagueness shoal," it did not *quite* hold that the statute would be unconstitutional in the absence of this construction. Its narrowing construction eliminated the need to resolve the constitutional issue. The Court, however, could not avoid the issue if defendants like Ryan could still assert that the statute was unconstitutional in the unreconstructed form applied to them. The practice of construing statutes narrowly to avoid constitutional issues can work only if the Court gives defendants who were tried earlier the benefit of its narrowing construction.

interest in the finality of judgments. See, e.g., *Day* v. *McDonough*, 547 U.S 198 (2006) * * * * * " App. 8a.

Day held that a court may dismiss a post-conviction petition as untimely even when the government has failed inadvertently to invoke the applicable statute of limitations, but the Court said, "[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, 207-11. The Court added, "[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. The Seventh Circuit's disregard of the government's express waiver flouted this Court's authority and revealed the extent of its determination to keep the petitioner in this case imprisoned.[17]

III. THIS COURT SHOULD SETTLE WHICH OF SEVERAL COMPETING STANDARDS DETERMINE A § 2255 PETITIONER'S ENTITLEMENT TO A NEW TRIAL.

In this case, the Seventh Circuit found a procedural default when there was none and disregarded an express governmental waiver of a nonjurisdictional defense. This Court might reasonably reverse on either of these grounds without

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[17] Prior to this case, the Seventh Circuit had recognized that a court may not override the government's waiver of a procedural default. See *United States* v. *Blagojevich*, 612 F.3d 558, 560 (7th Cir. 2010) (Easterbrook, J.) ("The possibility of forfeiture thus has been waived, and as the subject is not jurisdictional the prosecutor's waiver is conclusive.").

full briefing or argument.[18] Ordering briefing and argument, however, would permit the Court to address an important, recurring, unresolved issue—one upon which its own decisions as well as those of the courts of appeals are conflicting. When jury instructions have directed conviction for noncriminal conduct, what standard determines whether a § 2255 petitioner is entitled to a new trial?

In 2008 and again in 2010, this Court rejected declarations by courts of appeals that directing a conviction for noncriminal conduct constitutes "structural" error not subject to harmless-error review. See *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008); *Skilling*, 130 S. Ct. at 2934 n.46. The Court, however, has not settled how likely it must be that a post-conviction petitioner was convicted of noncriminal conduct to entitle him to a new trial.

This Court and others have conceptualized the issue in two ways. Sometimes they have declared that an instruction directing conviction for noncriminal conduct violates the Constitution and then examined whether the error was harmless. See, e.g., *Pulido*, *supra*. Sometimes they have gone directly to the bottom line, examining the circumstances of the case in a single step to determine whether the erroneous instruction "so infected the entire trial that the resulting conviction violates due process." See *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973).

Under either approach, whether a petitioner will receive a new trial depends on how likely it was that he was convicted of noncriminal conduct. This Part

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[18] Of course, the Court should obtain the government's views. Unless the government departs from its position below, however, it should confess error on the first of these grounds.

will consider four standards, each of which finds some support in the cases: (1) The evidence must have been insufficient to support the petitioner's conviction under the correct standard (a standard supported only by the Seventh Circuit's decision in this case); (2) there must be grave doubt whether defective instructions had a substantial and injurious effect on the verdict; (3) there must simply be a reasonable doubt whether the petitioner was convicted of conduct that constitutes a crime; and (4) there must be a reasonable likelihood that the petitioner was convicted of noncriminal conduct.

A. The Standard Approved by the Seventh Circuit in This Case: Insufficient Evidence

Of these four standards, the least defensible is the one the Seventh Circuit endorsed in this case—"whether, applying current legal standards to the trial record, Ryan is entitled to a judgment of acquittal." App. 9a. As authority for its position, the Seventh Circuit cited *Davis* v. *United States*, 417 U.S. 333 (1974), and *Bousley* v. *United States*, 523 U.S. 614 (1998).

In *Davis*, the government argued that this Court should deny a § 2255 petition because the petitioner had not alleged a violation of his constitutional rights. The Court responded that § 2255 authorizes relief when custody violates "'the Constitution *or laws* of the United States.'" 417 U.S. at 342-43 (quoting § 2255) (emphasis in original). *Davis* held that nonconstitutional error entitles a petitioner to § 2255 relief when this error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* at 346. See also *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979).

The Seventh Circuit concluded that Ryan must satisfy *Davis*'s standard for relief from nonconstitutional error. It declared that "*Skilling* is about statutory interpretation" rather than "unconstitutional jury instructions." App. 8a.

The court's reliance on *Davis* was misplaced for two reasons. First, nothing in *Davis* suggests that a miscarriage of justice occurs only when the evidence is insufficient to support a defendant's conviction. Second and more importantly, the decisions of this Court have held clearly and repeatedly that instructions directing conviction for noncriminal conduct violate the Constitution when they might have led the jury to convict without finding every element of the crime charged beyond a reasonable doubt.

As early as 1977, this Court considered a claim on habeas corpus that the failure of jury instructions to explain fully the causation requirement of a New York criminal statute created a risk of conviction for noncriminal conduct. The Court noted 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.'" *Henderson* v. *Kibbe*, 431 U.S. 145, 153 (1977) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). It denied relief only because an examination of the record revealed that the jury had in fact found causation beyond a reasonable doubt.

In *O'Neal* v. *McAninch*, 513 U.S. 432 (1995), another habeas corpus case, a prisoner claimed that confusing jury instructions might have led to his conviction without the state of mind required by an Ohio statute. This Court reversed the Sixth Circuit's

denial of relief because that court had required the petitioner to show that the instructional error was prejudicial. The proper standard, the Court said, was whether there was "grave doubt" about whether the error was injurious. 513 U.S. at 999.

Middleton v. *McNeil*, 541 U.S. 433 (2004), was a habeas corpus proceeding in which three jury instructions had correctly stated the California doctrine of "imperfect self defense" while a fourth misstated it. This Court reiterated the petitioner's due process right to proof of every element of the offense charged. After reviewing the record, however, it applied the standard of *Boyde* v. *California*, 494 U.S. 370 (1990), and held that there was no "reasonable likelihood" that the jury had applied the instructions in a way that violated the Constitution. 541 U.S. at 437-39.

In *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008), a habeas corpus petitioner claimed that a misstatement of California law permitted his felony murder conviction even if he joined the felony after the murder had been committed. A federal district court agreed, holding that the constitutional error was not harmless under the standard of *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). Although the Ninth Circuit affirmed, it declared that applying the *Brecht* standard was unnecessary because the error was "structural." This Court concluded that the error was not structural and was subject to harmless error review. 555 U.S. at 58-61.

In *Waddington* v. *Sarausad*, 555 U.S. 179 (2009), this Court once more resolved a claim on habeas corpus that a misstatement of state criminal law violated the Constitution by directing conviction for

noncriminal conduct. Applying the *Boyde* standard, it held that there was no "'reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." 555 U.S. at 191.

In *Skilling*, the Court reiterated, "[C]onstitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory." 130 S. Ct. at 2934 (describing *Yates* v. *United States*, 354 U.S. 298 (1957)). The Fifth Circuit had declared that *Pulido* applied only on collateral review and that, because Skilling's case was on direct appeal, he would be entitled to automatic reversal if the mail fraud theory presented to the jury was invalid. This Court rejected the Fifth Circuit's position and held pre-*Skilling* instructional errors subject to harmless error review. *Id.* at 2934 n.46.

In each of the cases described above, the Court recognized that a misstatement of state or federal criminal law can violate the Constitution by directing conviction for noncriminal conduct. Several other decisions have declared that rulings narrowing the scope of federal criminal statutes apply retroactively "because they necessarily carry a significant *risk* that a defendant stands convicted of an act that the law does not make criminal." *Schriro* v. *Summerlin*, 542 U.S. 348, 351-52 (2004) (quoting *Bousley*, 523 U.S. at 620, and *Davis*, 417 U.S. at 346) (internal quotation marks omitted) (emphasis added).

One of these decisions, *Bousley*, was the second decision upon which the Seventh Circuit relied for its holding that Ryan must show, not merely a significant risk that he was convicted of noncriminal

conduct, but that the evidence was insufficient to support his conviction. *Bousley* also noted, "[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." 523 U.S. at 620.

Bousley did hold that when a petitioner has defaulted his constitutional claim and cannot show cause for the default, he must demonstrate a miscarriage of justice (actual innocence) to obtain post-conviction relief. 523 U.S. at 623-24. Because Ryan did not default his claim, this holding has no application to his case. Unlike *Bousley*, however, *Davis* did not involve a procedural default. The Seventh Circuit's reliance on *Davis* shows that it would have applied the same "insufficient evidence" standard in the absence of Ryan's alleged default. The decisions of this Court provide no support for this onerous standard—one that would leave a petitioner imprisoned even when it appeared highly probable that he had never been convicted of a crime.

B. The Standard Favored by the Government: A Substantial and Injurious Influence on the Verdict

In the courts below, the government supported a more plausible standard. In *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995), this Court developed a harmless error standard for habeas corpus actions brought by state prisoners.

Brecht asks whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 638. *McAninch* elaborates that "actual prejudice" is not required. 513 U.S. at

438. It declares, "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect * * *,' that error is not harmless." *Id.* at 436.

Although several courts of appeals have applied *Brecht* in § 2255 proceedings, e.g., *Ross* v. *United States*, 289 F.3d 677, 682 (11th Cir. 2002), that standard rests on federalism concerns inapplicable to post-conviction proceedings brought by federal prisoners:

> The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system * * * * We have also spoken of comity and federalism. "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."

Brecht, 507 U.S. at 635 (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)).

C. The Standard Favored by Ryan: Harmless Beyond a Reasonable Doubt

Seven years after *Brecht*, the Seventh Circuit held that the harmless error standard applicable in § 2255 proceedings is whether it is "clear beyond a reasonable doubt that a rational jury would have

found the defendant guilty absent the error." *Lanier* v. *United States*, 220 F.3d 833, 839 (7th Cir. 2000). Although the government has since argued that *Brecht*, not *Lanier*, should apply in § 2255 proceedings, district courts in the Seventh Circuit have adhered to *Lanier*. See, e.g., *Sorich* v. *United States*, No. 10 C 1069, 2011 WL 3420445, at *7 (N.D. Ill. Aug. 4, 2011). When the Sixth Circuit applied *Brecht* in a § 2255 proceeding, it noted the circuit conflict. *Ross*, 289 F.3d at 682.

Ryan argued in the Seventh Circuit that the court should adhere to *Lanier*.[19] Although *Brecht* and other decisions require federal courts to review state-court decisions with deference, the federal courts bear sole responsibility for correcting federal wrongs. Like state courts in state post-conviction proceedings, they occupy the front-line position. These courts should not countenance the continued punishment of federal prisoners who may be innocent.

D. The *Boyde* Standard: A Reasonable Likelihood of Conviction for Noncriminal Conduct

One of the decisions that developed the *Brecht*–*McAninch* standard—*McAninch*—was itself a case in which a state prisoner alleged that jury instructions had directed his conviction for noncriminal conduct. *Pulido* reiterated that the issue in cases of this sort is "whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict.'" 555 U.S. at 58 (quoting *Brecht*, 507 U.S. at 623). In two other cases in which state prisoners claimed that misstatements of state law

[19] The court did not address this question, presumably because it concluded that pre-*Skilling* instructional errors are not cognizable in § 2255 proceedings at all.

had directed their conviction for noncriminal conduct, however, this Court applied a different standard—one developed in *Boyde* v. *California*, 494 U.S. 370, 380 (1990). Both *Middleton* v. *McNeil*, 541 U.S. 433, 437 (2004), and *Waddington* v. *Sarausad*, 555 U.S. 179, 190-91 (2009), indicated that the issue was whether there was a "'reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington*, 555 U.S. at 190-91.

Reflecting the disorder of these decisions, lower federal courts outside the Seventh Circuit sometimes have applied *Brecht*, see, e.g., *Taylor* v. *Workman*, 554 F.3d 879, 893 (10th Cir. 2009), and sometimes have applied *Boyde*. See, e.g., *Williams* v. *Beard*, 637 F.3d 195, 223 (3d Cir. 2011).

In fact, lower courts occasionally have said that they must apply both standards, first reviewing an instruction in the context of the entire record to determine whether the jury was reasonably likely to have applied it in a way that violated the Constitution and then reviewing the instruction in the context of the entire record again to determine whether there is grave doubt about its effect on the verdict. See, e.g., *Richter* v. *Hickman*, 521 F.3d 1222, 1236-38 (9th Cir. 2008), *rev'd on other grounds by the court en banc*, 578 F.3d 944 (9th Cir. 2009), *en banc decision rev'd*, 131 S. Ct. 770 (2011). These contorted hybrid decisions draw some support from *Calderon* v. *Coleman*, 525 U.S. 141, 146 (1998) (declaring that *Boyde* determines when an instruction is constitutionally defective, not whether the error in this instruction is harmless).

This Part has reviewed four standards for determining how likely it must be that a § 2255 petitioner was convicted of noncriminal conduct to entitle him to a new trial. One of these standards is insupportable—the one the Seventh Circuit applied in this case. The decisions of this Court and the courts of appeals concerning the applicability of the other three standards are a tangle. This Court should unravel it.

CONCLUSION

Ryan is confined in a federal penitentiary for a crime that prosecutors and judges made up—failing to disclose a personal or financial conflict of interest. The apparent determination of the Seventh Circuit to keep him there led it to invent a procedural default when none occurred and to disregard unlawfully the government's express waiver of any claim of default. The court also applied a harsh standard for post-conviction relief that lacks any support in this Court's decisions.

This Court should grant Ryan's petition.

Respectfully submitted,

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