IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 10-3964
	)	
Plaintiff-Appellee,	)	Appeal from the United States
	)	District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
GEORGE H. RYAN, SR.	)	
	)	10 CV 5512
Defendants-Appellant.	)	Honorable Rebecca R. Pallmeyer

GOVERNMENT'S RESPONSE TO DEFENDANT RYAN'S
EMERGENCY MOTION TO GRANT BAIL PENDING APPEAL

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this response in opposition to George Ryan's "Emergency Motion to Grant Bail Pending Appeal" of the denial of his motion, filed pursuant to 28 U.S.C. § 2255, to vacate, set aside, or correct sentence.

INTRODUCTION

This Court should deny defendant Ryan's motion for bail pending appeal because Ryan has not shown that his appeal is likely to succeed. This Court has repeatedly cautioned that the courts' limited authority to grant bail in the context of collateral proceedings should be exercised "very sparingly." *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985). Here, the district court correctly denied Ryan's § 2255 motion, and his related motion for bond, after

concluding, based on a thorough review of the record, that error in the instructions provided to the jury was harmless because this was a paradigmatic bribe/kickback case, and because a reasonable jury would not have found that the fraud scheme involved an undisclosed conflict without also finding that the scheme involved bribery. The district court also correctly determined that the "exceptional circumstances" raised by Ryan did not warrant special treatment. This is particularly true in light of the fact that Ryan was able to visit his wife on January 5, 2011, under normal prison procedures. Because the district court's analysis of Ryan's § 2255 claim was correct and Ryan's circumstances are not "exceptional," his motion should be denied.[1]

ARGUMENT

I. Applicable Standard.

No statute authorizes the release of a defendant on bail while his § 2255 motion is pending before the district court or the court of appeals. While courts have inherent power to grant bail under these circumstances, this Court has held that such power should be exercised "very sparingly." *Cherek*, 767 F.2d at

[1] The following citation conventions are used herein: (1) citations to the district court's Memorandum Opinion denying defendant's § 2255 motion and related motion for bail are to "Mem. Op."; (2) citations to defendant's Memorandum in Support of His Emergency Motion to Grant Bail Pending Appeal are to "Def. Memo."; (3) citations to defendant's Memorandum of Law in Support of Bail Motion, filed in the district court, are to "Def. D.Ct. Memo."; and (4) citations to the government's response to Ryan's § 2255 motion, are to "Gov. D.Ct. Resp."

337; *accord*, *Kramer v. Jenkins*, 800 F.2d 708, 709 (7th Cir. 1986). *Cf. Bolante v. Keisler*, 506 F.3d 618, 620 (7th Cir. 2007). Given the heightened interest in finality applicable to collateral proceedings, the standard for bail pending collateral review is even higher than the demanding standard for bail pending direct appeal. *See Cherek*, 767 F.2d at 337.[2]

If Ryan were seeking bail pending direct appeal of his conviction, he would be required to show that, among other things, his motion raises a "substantial question" of law or fact "likely to result" in reversal or a reduced sentence, 18 U.S.C. § 3143(b)(1)(B), meaning "a close question or one that very well could be decided the other way." *United States v. Eaken*, 995 F.2d 740, 741 (7th Cir. 1993). In the district court, Ryan suggested that the appropriate standard for bail pending resolution of his § 2255 motion was whether the court would "more likely than not" order his release after full consideration of the merits. Def. D.Ct. Memo at 4-5. Now, before this Court, although he acknowledges this Court's precedent setting a higher standard for bail pending resolution of post-conviction proceedings, Def. Memo. 4 (citation omitted), Ryan seeks bail on the standard applicable to bail pending direct appeal, claiming that the instant

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[2] Ryan cites a brief in a case in the Eastern District of North Carolina, where the government advocated for application in § 2255 cases of the standard set forth in 18 U.S.C. § 3143 for bail pending appeal. Def. D.Ct. Memo at 2-3. In this Circuit, precedent is clear that § 3143 presents "a more favorable standard than the defendant [is] entitled to." *Cherek*, 767 F.2d at 337, 338.

appeal raises a close question that "could very well be decided the other way." He argues there are as "exceptional circumstances deserving of special treatment" – first, the *Skilling* decision, and, second, his wife's medical condition. *Id.*

Consistent with this Court's precedent, the Court should not grant bail in the appeal of the denial of habeas relief based on less than a showing that reversal is likely.

II. No Exceptional Circumstances Warrant Giving Ryan Special Treatment.

Ryan has told this Court that, "[a]bsent bail, Ryan is very unlikely to see his wife again . . .," and that his wife's medical condition constitutes an "exceptional circumstance" warranting special treatment. Def. Mem. 5. Although the serious medical problems suffered by his wife are truly unfortunate, they do not warrant special treatment with respect to bail pending appeal in the context of post-conviction proceedings. The government does not dispute that Mrs. Ryan's medical condition is grave. In fact, recognizing the seriousness of her condition, on the evening of Wednesday, January 5, 2011, the Bureau of Prisons granted Ryan an escorted trip to the hospital where is wife is being treated. There, according to officials at the Bureau of Prisons, Ryan visited with his wife for approximately two hours between approximately 7:30

and 9:40 p.m. Thus, through normal prison procedures, Ryan has been able to visit with his wife. The district court correctly determined that Ryan should not receive treatment that other defendants would not receive based on his wife's medical condition.[3]

Similarly, Ryan's claim that the *Skilling* decision constitutes an "exceptional circumstance" should be rejected. The decision forms the basis of Ryan's arguments on the merits in the instant appeal, and it provided a basis for Ryan to pursue collateral relief that would otherwise have been time-barred. It is not an "exceptional circumstance" or special reason beyond the merits, if any, of his claim. Treatment of a change in the law as a special circumstance, absent a showing that it is likely that the change will result in reversal, is not

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[3] A two-hour visit obviously is much less time than Ryan wishes to have with his gravely ill wife. However, the sad circumstances of Mrs. Ryan's illness were fully appreciated by the district court:

> This court takes no pleasure in depriving any defendant of his or her liberty. The court has had the painful duty to take such action in circumstances more compelling than these-where a young defendant with little education or resources is the sole support of small children, or is the only caregiver for a disabled relative, for example. Any sensitive judge realizes that a lengthy prison term effectively robs the convicted person of what we all value most: months and years with loved ones, some of whom will no longer be there when the sentence has been served. Mr. Ryan, like other convicted persons, undoubtedly wishes it were otherwise. His conduct has exacted a stiff penalty not only for himself but also for his family.

Mem. Op. at 58.

consistent with this Court's admonition that courts should exercise the power to grant bail "very sparingly" in the context of collateral review. *Cherek*, 767 F.2d at 337.

III. Bail Should Not Be Granted Because Ryan's Appeal Is Not Likely to Result in Reversal.

Ryan has not met any applicable standard for bail because he has not shown that the *Skilling* decision entitles him to relief. To the contrary, the district court correctly concluded that *Skilling* does not alter Ryan's convictions.

In *Skilling*, the Supreme Court held that the honest services statute, while unconstitutionally vague when applied to mere "undisclosed self-dealing," 130 S. Ct. at 2932, is constitutional when limited to its "core" applications: mail fraud schemes involving bribes and kickbacks. *Id.* at 2905, 2929. The district court correctly found that this case presented such a scheme. As the district court recognized, this finding is consistent with observations made by this Court on direct appeal, and in its subsequent decision in *Sorich*. *See United States v. Warner*, 498 F.3d 666, 698-99 (7th Cir. 2007) ("Although the intangible rights theory of federal mail fraud may have its problems when applied to other fact settings, it is not unconstitutionally vague as applied here."); *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (explaining that Ryan "channeled state contracts and leases to a friend in return for paid vacations"); *see also Skilling*,

130 S. Ct. at 29-31). The district court found, however, that a conflict of interest theory was also presented to the jury, albeit based on the same evidence. Mem. Op. 21. Upon a detailed examination of the jury instructions, the court found that three instructions were not limited to bribery, and thus were incorrect after *Skilling*: (a) the instruction based on *United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998) (the "*Bloom* instruction"), Mem. Op. 13-14; (b) the conflict-of-interest instruction, Mem. Op. 18-19; and (c) the instruction listing duties owed by Ryan under state law, Mem. Op. 19-20.

After conducting a detailed analysis of the indictment, evidence, arguments, and instructions, the district court correctly determined that a reasonable jury would not have convicted based on a conflict of interest without also convicting Ryan of bribery, as well as money-property fraud, and, therefore, the instructional error was harmless beyond a reasonable doubt. Mem. Op. 24, 39-49. With respect to the mail fraud counts related to Ryan's dealings with co-defendant Larry Warner, the evidence showed that Ryan and Warner reached an agreement that Warner would provide a stream of benefits to Ryan, his family, and his friends and, in return, Ryan would take state action to benefit Warner when opportunities arose. The jury heard that, shortly after Ryan was elected Secretary of State ("SOS"), Warner told Don Udstuen, another Ryan friend and political supporter, that Warner was going to capitalize on his

relationship with Ryan by entering the lobbying business. Gov. D.Ct. Resp. 4. Warner said Udstuen "should be part of it," and that Udstuen "deserved some of this." *Id.* Warner explained that he had talked to Ryan about this plan, and Ryan was "fine" with it, and Warner further told Udstuen,"I will take care of George." *Id.*

As the evidence showed, Warner and Ryan took care of each other for years after that: Warner provided Ryan with hundreds of thousands of dollars in payments, loans, and gifts to Ryan's family and friends, and Ryan awarded Warner numerous state contracts and leases that netted Warner millions of dollars. Mem. Op. at 31, 40. The government argued based on these actions that Ryan "sold his office" to Warner in exchange for the benefits Warner provided him and his family. *Id.* at 34. Ryan, on the other hand, argued that, rather than corrupt payments exchanged for official acts, the benefits Warner provided to Ryan were merely gifts between friends. *See id.* at 34, 23.

The district court found that the instructions and arguments provided the jury with a choice between the government's and Ryan's theories, and the jury sided with the government:

> The government demonstrated both circumstantial and direct evidence of a 'stream of benefits' flowing between Ryan and Warner. The jury received instructions that if Ryan received these benefits without the intent to be influenced, there was no criminal act. Ryan's defense argued for this proposition, and the jury rejected it.

> The jury was also instructed that if Ryan engaged in these activities in good faith, that would defeat the intent necessary for a scheme to defraud. The jury rejected this defense as well.

Id. at 38-39. In light of the evidence and instructions, the court correctly concluded that "no reasonable jury that believed [Ryan] concealed benefits and believed he played a role in these transactions could have believed one was not in exchange for the other." *Id.* For similar reasons, the district court correctly found that no reasonable jury that convicted Ryan of honest services fraud with respect to the mail fraud counts involving Larry Warner would have failed to convict him of pecuniary fraud. *Id.* at 48, 49, 50, 51.

With respect to the mail fraud count involving Ryan's dealings with Harry Klein, the evidence showed that Ryan took free vacations at Klein's Jamaican villa every year from 1993 to 2001, and pretended to pay for the vacations by writing checks to Klein for which Klein paid him back in cash. Gov. D.Ct. Resp. 8-9. In exchange, Ryan took official actions benefitting Klein, specifically, approving an increase in currency exchange rates and arranging for a state lease for a building in South Holland owned by Klein. Klein broached the topic of the lease while Ryan and Klein were relaxing at Klein's villa, and Ryan directed an SOS employee to work out the lease (ultimately netting Klein $600,000) upon return from his free Jamaican vacation. *Id.* at 9. When the SOS director asked Ryan's view about certain lease terms, Ryan responded, "What does Harry

want?" and then approved Klein's terms, saying he wanted "Harry to be happy." *Id.*

The district court correctly found that in light of the evidence and instructions, the jury was once again presented with two opposing versions of the facts: (a) that Ryan received corrupt payments from Harry Klein and, in return, took official actions for Klein's benefit, as argued by the government; and (b) that the actions that benefitted Klein were mere favors to a political supporter, as argued by defendant. Mem. Op. 41. In this context, the court found that "[n]o reasonable jury would have believed that Ryan concealed the benefits he received from Klein, steered a lease to Klein, and accepted illegal benefits from Klein, without also believing that those benefits were given with the intent to influence his official action, and that he accepted those benefits with the intent to be influenced." *Id.* Furthermore, noting Ryan's use of sham cash-back transactions to conceal Klein's corrupt payment of Ryan's vacation expenses, the district court correctly found that the jury also must have convicted Ryan of pecuniary fraud on this count. Mem. Op. 50-51.

Ryan's criticisms of the district court's opinion fall far short of establishing that he is likely to win reversal. Ryan's claim that the jury instructions "allowed his conviction without proof that he took bribes," Def. Mem. at 5, is contrary to the position he took at trial. During Ryan's closing argument his attorney

advised the jury that the receipt of personal benefits is a crime only if the benefits were received with the understanding they were given with the intent to influence official action. *See* Mem. Op. 41. Defense counsel argued that the government had not met this burden, and urged the jury to acquit. *See id.*

Ryan contends that the jury probably convicted Ryan merely for failing to disclose benefits he received from Warner and Klein, which is not a crime after *Skilling*. Def. Mem. 5. This ignores that no instruction permitted the jury to convict based on a finding that Ryan merely failed to disclose benefits. The conflict-of–interest instruction Ryan criticizes permitted the jury to convict only "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," *and* "the other elements of the mail fraud offense are met." Mem. Op. 19-20. For purposes of the mail fraud counts of which Ryan was convicted, the matters over which Ryan had decision-making power were the state contracts and leases he awarded to Warner and Klein. And the only "material personal or financial interest" the jury heard that Ryan had in those matters was the stream of benefits he took in return for awarding Warner and Klein those contracts and leases—in other words, bribes. The district court correctly found that "the only conflict of interest that Ryan could have concealed was the benefits he was receiving from Warner." Mem. Op. 39.

In addition, Ryan ignores the multiple instructions that properly informed the jury about the requirements of bribery. Ryan pursued a similar argument on direct appeal and this Court rejected his argument, explaining that:

> The portion of the jury instructions quoted by the defendants about "conflict of interest" is taken out of context, as the jury instructions explicitly stated that a conflict of interest violated the statute only "if the other elements of the mail fraud statute are met." The district court explained that the government must also show that the public official allowed or accepted the conflict of interest with the understanding or intent that she would perform acts within her official capacity in return.

Warner, 498 F.3d at 698.

Ryan also criticizes a jury instruction relating to campaign contributions, claiming it conflicts with the decision in *McCormick v. United States*, 500 U.S. 257 (1991). But *McCormick* was decided nineteen years before *Skilling*, so any claim that the instruction was flawed was available to Ryan on direct appeal, and as such is procedurally defaulted. In any event, the instruction in question conforms to *McCormick*'s requirements. The instruction states that a campaign contribution may violate the honest services statute if it is "given in exchange for a specific official act," Mem. Op. 19, which accurately described *McCormick*'s requirement that a *quid pro quo* must be explicit. The law has never required that a *quid pro quo* be express. *See United States v. Siegelman*, 561 F.3d 1215, 1227 (11th Cir. 2009) (collecting cases) (vacated in light of *Skilling* on other

grounds by *Scrushy v. United States*, 130 S. Ct. 3541 (2010)). A public official need not state, "I will accept this campaign contribution and in exchange, I will perform this specific state action." An exchange is criminal "if it is express or if it is implied from [the official's] words and actions, so long as he intends it to be so and the payor so interprets it." *Evans v. United States*, 504 U.S. 255, 274 (Kennedy, J., concurring). Nothing in *McCormick* is to the contrary.

Ryan's motion also quotes out of context the government's statements in its closing rebuttal argument, arguing that the government expressly told the jury that it need not find a "*quid pro quo*" or exchange. Def. Mem. 8. Ryan's argument ignores the fact that the government was explaining, correctly, was that in order to convict Ryan, the jury did not have to find that Ryan had a conversation in which he expressly agreed to accept a specific benefit in exchange for a specific official act. The government emphasized that Ryan received benefits from Warner and Klein over many years, and in return, Ryan took official action for Warner and Klein as opportunities arose. The government explained this clearly in its first closing argument:

> Most importantly, keep in mind that this is not a case in which a public official had a specific price for each official act that he did, like a menu in a restaurant where you pick an item and it has a particular price. The type of corruption here—that type of corruption where you give me this, I will give you that, is often referred to as a *quid pro quo*. The corruption here was more like a meal plan in which you don't pay for each item on the menu. Rather,

> there is a cost that you pay, an ongoing cost, and you get your meals.

Mem. Op. 34. As the district court specifically found, in context, the government's argument "presented a valid 'stream of benefits,' 'retainer,' or 'course of conduct' bribery theory." Mem. Op. 34. The government did not erroneously state that the jury was free to convict in the absence of proof of intent to exchange benefits for official actions, as Ryan contends.

In sum, the district court correctly determined that, in light of the evidence presented at trial, the parties' arguments, and the jury instructions taken as a whole, any reasonable jury that convicted Ryan of honest services fraud must have concluded that Ryan accepted these benefits in exchange for state action; in other words, Ryan took bribes, and, therefore, any instructional error was harmless. Mem. Op. at 38-41. The district court correctly denied Ryan's § 2255 motion, and Ryan has not shown that reversal is likely.

IV. There Was No Prejudicial Spillover

Finally, Ryan has failed to establish that the district court's decision is likely to be reversed based on the admission of evidence purportedly inadmissible in light of *Skilling*. Def. Mem. at 12-13. In his § 2255 motion, Ryan claimed that seven types of evidence should not have been admitted; the district court rejected all of these claims save one. Mem. Op. 53-57. The district

court was correct, as the evidence defendant challenged was clearly relevant, such as to prove the existence and nature of the scheme, as well as defendant's plan and intent to defraud. [4]

CONCLUSION

For all of the foregoing reasons, the government respectfully requests that defendant Ryan's Emergency Motion to Grant Bail Pending Appeal.

Respectfully Submitted,
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[4] The district court concluded that evidence of Ryan's misuse of state resources for campaign purposes would have been inadmissible to prove honest services as limited by *Skilling*; however, the court also held that the evidence was admissible on the tax counts. The district court also observed that, although the evidence of such misuse of resources might have been relevant to pecuniary fraud, there was "no mailing in furtherance of this conduct," Mem. Op. 57. However, precedent provides that no mailing was required. *See United States v. Lanas*, 324 F.3d 894, 897 (7th Cir. 2003). In any event, the district court, who presided over the trial, correctly concluded that, "[n]othing in the record of Ryan's petition suggests this evidence constituted a significant or particularly persuasive part of the Government's case." Mem. Op. at 57. Therefore any error was harmless.

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Date: January 7, 2011

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CERTIFICATE OF SERVICE

I, Debra Riggs Bonamici, hereby certify that on January 7, 2011, I caused a copy of the foregoing GOVERNMENT'S RESPONSE TO DEFENDANT RYAN'S EMERGENCY MOTION TO GRANT BAIL PENDING APPEAL to be served upon the following by first-class, postage paid mail:

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