No. _____

In the Supreme Court of the United States

ASHTON J. RYAN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit followed the authority and mandate of *Ciminelli* v. *United States*, 598 U.S. 305 (2023).

2. Whether the jury was properly instructed on what constitutes "property," under charging statutes, 18 U.S.C. §§1344, 1349, that is, whether the pattern instructions permitted the jury to return verdicts of guilty on the basis of the prohibitive right-to-control theory, rather than traditional property items, notions and interests, and whether the jury did so.

3. Whether the evidence of bank fraud and conspiracy, 18 U.S.C. §§1344, 1349, constituted an intangible right to control assets, as the element of property under these statutes, or constituted traditional property items, notions and interests.

4. Whether the Fifth Circuit followed the authority and mandate of *Thompson* v. *United States*, 504 U.S. 408 (2025).

5. Whether the jury was properly instructed, under charging statute, 18 U.S.C. §1005, on what constitutes "false statements," that is, whether the pattern instructions permitted the jury to return verdicts of guilty on the elements of false statements that were misleading, only, and not false, and whether the jury did so.

6. Whether the false statements alleged in the Second Superseding Indictment (E.D. La. ECF No. 318), and presented at trial, constituted false statements, or only misleading statements, and found by

the jury to be statutorily prohibited false statements, as the basis for its verdicts under 18 U.S.C. §1005.

7. Whether the Fifth Circuit disregarded its own authority, and in cases decided in the United States District Court for the Eastern District of Louisiana, and ruled that there was no breach of the attorney-client privilege and confidentiality committed by the Government in its privilege/taint review sufficient to justify a dismissal of the Second Superseding Indictment.

8. Whether the Government's breach of attorney-client privilege and confidentiality during the Government's privilege/taint review process was harmless and/or lacking actual and substantial prejudice.

PARTIES TO THE PROCEEDINGS

Petitioner, and defendant-appellant below is Ashton J. Ryan Jr.

Respondent, and plaintiff-appellee is the United States of America.

Fred V. Beebe, was a co-defendant in the proceedings below, and was acquitted of all counts by the jury.

Other defendants are William Burnell, Robert B. Calloway, and Frank J. Adolph. They were charged by the Second Superseding Indictment, pled guilty, cooperated and testified for the Government at trial. The Government also received pleas from Kenneth Charity, Jeff Dunlap, Gary Gibbs, Arvind Vira and Greg St. Angelo, who testified at trial under their plea-bargain and cooperation agreements.

RELATED PROCEEDINGS

United States District Court (E.D. La.):

United States of America v. *Ashton J. Ryan Jr., et al.*, No. 2:20-cr-00065-EEF-KWR (Aug. 5, 2021) (second superseding indictment)

United States of America v. *Ashton J. Ryan Jr., et al.*, No. 2:20-cr-00065-EEF-KWR (Feb. 9, 2023) (conviction)

United States Court of Appeals (CA5):

United States of America v. *Ashton J. Ryan Jr., et al.*, No. 23-30641 (Oct. 17, 2025) (jury verdict affirmed)

Supreme Court of the United States:

Ashton J. Ryan, Jr. v. *United States*, No. 25A819 (Jan. 15, 2026) (application to file petition for a writ of certiorari in excess of word limits denied)

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OPINION BELOW

The Fifth Circuit's opinion is reported at 156 F.4th 583, and is reproduced in the Appendix at App.1-30.

JURISDICTION

The Fifth Circuit's judgment was entered on October 17, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The verbatim quotations of U.S.Const., Amdts. IV, V, and VI, and 18 U.S.C.A. §§1005, 1014, 1344 and 1349, appears in the Appendix at App.31-36.

SUMMARY OF REASONS FOR GRANTING THE PETITION AND THE IMPORTANCE OF THE QUESTIONS PRESENTED FOR REVIEW

I

Ciminelli was not followed.

The Fifth Circuit, as did the district Court (EDLA ECF No. 1033), after trial, rejected application of *Ciminelli* v. *United States*, 598 U.S. 305 (2023), to this case; and, ruled that *Ciminelli* did not control or apply to the Second Superseding Indictment; and, to the evidence presented by the Government at trial; and to the jury instructions and verdicts; holding that the Government's case did not rely on the invalid right-to-control theory.

Ryan was not charged with lying to federal agents, under 18 U.S.C. §1001, or included under similar offense evidence, Fed.R.Evid.404(b), and there was no evidence that he did so.

In effect, according to the Fifth Circuit, loan money funding by the Bank, any bank, and its Board of Directors, obviates a finding of an obvious, prohibitive, intangible, non-property right to control assets theory, in violation of *Ciminelli*. The mere fact that there was a money object, i.e. loan financing by the Bank, now means per the Fifth Circuit that the Government's right to control assets theory can never be found, verdicts based thereon reversed, and *Ciminelli* applied to strike down that intangible right as the requisite "property" element under the 18 U.S.C. §§1344 and 1349. The Fifth Circuit, thus, permits the intangible right to control to be jurisdictional "property," and sufficient for guilt under 18 U.S.C. §§1341, *et seq.*, 1344, 1349. So, any time money is the object of a fraud, which deprives a Board of its right to manage its assets, here loans, that intangible right becomes the requisite property element, thereby expanding statutory property back to intangible rights. Such intangible right to control based on false information thereby becomes a traditional notion of money or property under the fraud statutes, 18 U.S.C. §§1341, *et seq.*, 1344, 1349, according to the Fifth Circuit. Contrariwise, the facts in *Ciminelli*, were ingrained in, and embedded with, *a money object*, i.e. bid-rigging fraud causing the award and loss of a $750 million public project through five fraudulently given contracts–a clear money object, and loss, the same as loans. Yet, the money object scheme in *Ciminelli* was stricken as "property," but the loan money object in the present case is blessed by the Fifth Circuit, even though they both have money objects and losses. That is contradictory, confusing, and nonsensical.

It makes no sense to rule out money objects from the purview of *Ciminelli*, such as loan proceeds, because *all* financial transactions, especially those alleged to be involved in a fraud, involve some type of money object loans, as in the present case, or rigged contracts, like *Ciminelli*. 509 U.S. 306.

The importance of this review, examination, and granting certiorari is obvious–the Fifth Circuit's decision expands the property element in fraud statutes, 18 U.S.C. 1341, *et seq*., 1344, virtually to any money based false information, intangible, claim essentially the same as in *Ciminelli*. Such expansive application is contrary to the binding precedent and restrictive jurisdictional rulings prohibiting intangibles as property, in *McNally* v. *United States*, 483 U.S. 350 (1987); *Cleveland* v. *United S*tates, 531 U.S. 12 (2000); (*including the rule of lenity therein*); *United States* v. *Skilling*, 561 U.S. 358 (2010); and now *Ciminelli,* 509 U.S. 306; and undermines them.

Only Congress can supply that intangible element, as it did for honest services in *McNally*, when it enacted 18 U.S.C. §1346. It has not done so for false information causing the deprivation of accurate information to reach economic decisions and control assets, such as a loan money.

The Fifth Circuit was clearly wrong when it stated that, "[i]nstead, the thrust of Ryan's argument is that, in light of *Ciminelli* and *Yates*, his conduct, while perhaps unwise, did not rise to the level of fraud under 18 U.S.C. §1344. He is wrong." App.11. That is not entirely correct. The "thrust of Ryan's argument" is that information necessary for management of assets is intangible, and *not* "property," under 18 U.S.C. §§1344 and 1349, as repeatedly held in *McNally*,

Cleveland, Skilling, and *Ciminelli*, regardless of a money motive and loss.

The pattern jury instruction under 18 U.S.C. §1344, the charging fraud statute, must be limited under *Ciminelli*, to actual money or other tangible traditional property interests, and cannot be information, even though valuable and necessary in the hands of the Board of Directors. But, the instruction herein did not so instruct. The Fifth Circuit did not impose any mandate on the district court, to instruct the jury that the fraud statutes, 18 U.S.C. §§1341, *et seq*., and 1344, are limited to traditional notions of money or property interests, and not the intangible of false information depriving the Board of its rights to manage its assets. The jury was left to do what it erroneously pleased under the pattern instruction.

II

Thompson was not followed.

The Fifth Circuit was similarly wrong when it failed to apply *Thompson*, and distinguish truly false statements, from solely misleading statements, which are not criminal false statements, as ruled in *Thompson* v. *United States*, 604 U.S. 408 (2025). Following trial and sentencing, and prior to Ryan's Reply Brief and oral argument in the Fifth Circuit, this Court decided *Thompson*, which was noted by defense letter under Fed.R.App.28(j) (EDLA ECF No. 213), fully briefed in the Reply Brief (EDLA ECF No. 215-1), and presented in oral argument. Contrary to *Thompson*, the Fifth Circuit did not distinguish and recognize the literally true, albeit arguably misleading, statements in the Second Superseding Indictment, and presented to the jury, and on which Ryan was convicted. The Fifth

Circuit made no effort to review each one against the record presented by Ryan to show that they were misleading, at most, and not wholly and truly false and criminal.

Just as with the bank fraud counts and jury charges, the court gave the standard pattern charge on false statements, under 18 U.S.C. §1005, and did not instruct the jury, or given any definition, that misleading, statements, without falsehood, were not criminalized under the false statement counts, exactly as mandated under 18 U.S.C. §1014, in *Thompson*. The jury was free to, and did, violate *Thompson*. In effect, the Fifth Circuit's decision expanded 18 U.S.C. §1005, as did the reversed Second Circuit under 18 U.S.C. §1014, to criminalize misleading statements, and gave the jury the opportunity to return a verdict based solely on misleading statements.

III

Violation of Attorney-Client Privileges and Confidentiality

Left untouched, without review and reversal, the Fifth Circuit permitted the Government to disregard its own well-settled Fifth Circuit and district court authority for managing attorney-client privileged and confidential communications contained in texts and emails between attorneys and clients, seized by the Government with a secret search warrant, including the use of review/taint teams, thus resulting in attorney-client communications between petitioner and his undersigned counsel being produced to the Government prosecution team, and all co-defendants, without prior notice to, or consent by, petitioner or his counsel. The Fifth Circuit in *Harbor Healthcare*

System, LP v. *United States*, 5 F.4th 593 (CA5 2021), and more than sufficient district court cases, *In Re: Ingram*, 915 F.Supp.2d 761 (EDLA 2012); *Heebe* v. *United States*, 2012 WL 3065445 (EDLA Jul. 27, 2012); *United States* v. *Neill*, 952 F.Supp. 834 (DDC, 1997), provided well notified procedures and safeguards for the Government management of attorney-client privilege and confidential material once seized by the Government with search warrants served on Google and other servers. The Government disregarded those procedures, at its risk, with the end result that a key attorney-client communication memo, the "Dunlap memo," discussing facts and strategies, in confidence, between petitioner and undersigned counsel, was disclosed to the Government agents and prosecutors, and co-defendants, long before trial. The Fifth Circuit merely said that the Government's conduct was not outrageous, and, in any event, constituted harmless error. Nothing can be farther from the truth and reality.

STATEMENT OF THE CASE

On July 10, 2020, a Grand Jury returned a 46-count Indictment against petitioner Ashton J. Ryan, Jr., and co-defendants William J. Burnell, Robert B. Calloway, and Frank J. Adolph, alleging violations of bank fraud and false entries in bank records, in violation of 18 U.S.C. §§1344, 1349, 1005, and 2. (CA5.ROA.46–78). A Superseding Indictment was returned on January 29, 2021 against the same defendants, and added Fred V. Beebe, as a named defendant. (CA5.ROA.129). Finally, a Second Superseding Indictment (hereinafter the Indictment) was returned on August 5, 2021 for the same offenses, and against the same defendants.

(CA5.ROA.920). Extensive pretrial discovery and motion proceedings ensued throughout this case.

Ryan filed, under seal, a Motion to Suppress Evidence and Conduct a *Franks* Hearing, and a related Motion to Dismiss. (CA5.ROA.126692, 126763) The District Court ordered an evidentiary hearing, which was held under seal on August 24, 2022. (CA5.ROA.128253). Following that hearing, and other due proceedings, the Court denied both motions, except for the suppression of certain privileged emails that the Government had already allowed to be released in general discovery. (CA5.ROA.127531).

Prior to trial, co-defendants Burnell, Calloway and Adolph, entered plea agreements with requisite cooperation, and pleaded guilty. Defendants Messrs. Ryan and Beebe, were the remaining defendants at trial.

Trial was held from January 9, 2023 to February 9, 2023. (CA5.ROA.4421-10795). On February 9, 2023, the jury returned verdicts of guilty against Ryan, for Counts 1–25, 27, 29–41, 43, 44, 47 and 48. Co-defendant Beebe was acquitted on all counts.

Ryan filed post-trial motions and memoranda, Motion for Judgment of Acquittal, Motion to Arrest Judgment, and Motion for New Trial (CA5.ROA.3059) and Reply Memoranda. (CA5.ROA.3310). Ryan presented multiple arguments, including the new case of this Court, *Ciminelli,* which was decided shortly after the close of trial. Ryan's motions were denied on July 1, 2023. (CA5.ROA.3289).

On or about September 20, 2023, Ryan filed a Motion for New Trial–Newly Discovered Evidence (Rule 33(b)(1)) (CA5.ROA.127933), on the grounds that cooperating Government witness, former bank attorney, Gregory J. St. Angelo, through his counsel, filed a

twenty-six page letter to St. Angelo's Probation Officer, in his separate sentencing proceeding, that contradicted his Factual Basis, his trial testimony, and, thus, *recanted*. By Order and Reasons, filed on October 20, 2023 (CA5.ROA.127981), the Court denied the motion.

Prior to sentencing, Ryan filed Objections to his Presentence Report and sentencing motions for downward departure and variance. On September 6, 2023, Ryan was sentenced to 170 months imprisonment, and other terms, including restitution of $230,451,111.67, under the Amended Judgment in a Criminal Case (CA5.ROA.3665), filed January 5, 2024. Ryan is now incarcerated and serving his sentence in, or attached to, a medical facility due to the same health conditions that were documented in Ryan's Presentence Report, and, without reviewing prison medical records, other illnesses during incarceration.

The following facts were not seriously in dispute:

Ashton J. Ryan, Jr., age 77, is a lifelong native of New Orleans. He graduated from Jesuit High School with honors in the class of 1965. He attended Tulane University and received his undergraduate degree in physics in 1969, with a straight A academic record. In 1971, he earned his MBA from Tulane, and later became a CPA. He was hired as staff auditor at Arthur Anderson and Co., and audited banks, particularly the original National Bank of Commerce (CA5.ROA.10324-10330).

Shortly prior to Hurricane Katrina, a group of prominent and esteemed businessmen and professionals, lawyers, civic leaders and officeholders, got together to create a new community bank. Their unanimous choice for President, CEO and Chairman of the

Board (CA5.ROA.4975), was the equally esteemed and prominent CPA, banker, civic leader and prolific non-profit volunteer, Ashton J. Ryan, Jr., and for good reason (CA5.ROA.4975, 4976). At least seven Government witnesses testified to firsthand observations and opinions attesting to Ryan's competence, integrity, honesty and good character, and reputation in the community for honesty and integrity, (CA5.ROA.4685, 4683); (CA5.ROA.4919); (CA5.ROA.6878, 6879); (CA5.ROA.8661); (CA5.ROA.8831, 8832, 8840): (CA5.ROA.5544, 5583); and (CA5.ROA.9592); along with a character witness (CA5.ROA.10317, et seq.)

Following Hurricane Katrina, it became increasingly needful that the new Bank, which was named First NBC Bank (hereinafter FNBC or the Bank), be formed, organized, and operated primarily to contribute to the re-build and growth of New Orleans. "The plan was not just to start any Bank, it was to start a community Bank to take advantage of the opportunities to help this community rebuild after Katrina." (CA5.ROA.4930).

With Ryan at the helm, and with the full support of the Board, the First NBC Bank opened for business, on May 19, 2006, at 210 Baronne Street, New Orleans, Louisiana, which was the headquarters for the previous NBC Banks. It would employ more than 500 people. It was later closed by the FDIC on April 28, 2017.

Expressly according to the First NBC Bank Business Plan, Exh. 1000.040, (CA5.ROA.4916), the mission and description of the business of the First NBC stated, as follows:

> During the organizational phase, Hurricane Katrina struck New Orleans,

> causing widespread destruction. The officer corps of First NBC Bank has adjusted its business plan to make maximal use of its capital resources in accelerating the recovery and rebuilding of the New Orleans MSA…

Consistent with this purpose, it was openly recognized, agreed, and approved in the FNBC Bank Loan Policy Manual, that "*Workout Loans*" would be normal and best Banking practices. (Exh. 152.002, CA5.ROA.5638.) The FDIC and governing Louisiana authorities were always aware of, and approved, this policy.

Because of Ryan's contacts in the business community, and good management according to the FDIC, the Bank grew, from its beginning to closing, according to the FDIC reports, (CA5.ROA.4898; CA5.ROA.4900; CA5.ROA.4900; CA5.ROA.4901; CA5.ROA.4902; CA5.ROA.4902; CA5.ROA.4902; CA5.ROA.4902; CA5.ROA.4902, 4903, as follows:

(1) Assets–3/31/07–3/31/16: $189,709,000 *to* $4,953,702,000;
(2) Outstanding loan amounts: 3/31/07–3/31/16 - $140,782,000 to $3,737,158,000;
(3) Capital–3/31/07–3/31/16: $61,056,000 *to* $401,296,000;
(4) Liquidity - 3/31/07–3/31/16: $41,661,000 *to* $703,658,000;
(5) Earnings–2007–2015: $707,000 *to* $70,700,000. (CA5.ROA.4936-4940.)

The $3,737,158,000 in outstanding loans, far outweigh the $230,000,000 attributable to loan losses for

the seven criminal borrowers described in the Indictment and presented at trial. (CA5.ROA.5060.)

According to the FDIC, its examiners and reports, the Bank's FDIC composite rating was a consistent CAMEL composite Level 2, from March 31, 2007, the first annual report, to December 31, 2014, with 1 being the highest ranking, and 5 the lowest. Each FDIC report recognized or red flagged most of the seven problem loans listed below. The composite rating dropped to a level 4 during its last year when the Bank had write-downs due to an auditor disallowance of tax credits, et al., unrelated to any claim of fraud.

Throughout the Indictment, and all witnesses and evidence presented by the Government at trial, there were *no* counts or charges, and no evidence, allegations, accusations, or even innuendo, express or implied, that Ryan received bribes or kickbacks, or committed theft of any kind, and at any time during his employment and tenure at the Bank, or any other time. The only financial gain Ryan received was his salary and benefits package, consistent with market rates, and unanimously approved by the full Board, and well known by the FDIC at all times.

There was also no evidence that Ryan intended to harm the Bank.

The gravamen of the Indictment and Government case rested on seven loans, or borrower relationships, in order of appearance at trial, to wit:

(i) Kenneth Charity (CA5.ROA.6884, *et seq.*); and his co-borrower, Stephanie Carter (CA5.ROA.7461, et seq.);
(ii) Jeff Dunlap (CA5.ROA.7558, *et seq.*);
(iii) Warren Treme (CA5.ROA.7983, *et seq.*);

(iv) Gary Gibbs (CA5.ROA.8070, *et seq.*);
(v) Frank Adolph (CA5.ROA.8479, *et seq.*);
(vi) Arvind Vira (CA5.ROA.8662, *et seq.*);
(vii) Greg St. Angelo (CA5.ROA.9834, *et seq.*).

Any alleged false and/or misleading statements by Ryan to the Board, pertained to these loans. They were arguably used by the Board to manage its money and assets, i.e., making and/or continuing these loans, which, for the most part, were losses to the Bank.

In each instance, Government witnesses, including William Burnell (CA5.ROA.5191, *et seq.*), and Robert Calloway (CA5.ROA.9378, *et seq.*), stated that, at the inception of each of these and all other loans, everyone from the borrowers to the bank officers, including Ryan, intended, in good faith, for the loans to be good, successful, and paid back timely, profitably and, with interest–no one believed or testified that there was anything fraudulent at the beginning of each loan, and all loans. Nevertheless, because of changes in circumstances and fact situations, the seven loans started to go bad, and ended up in default. Each of these seven borrowers pleaded guilty essentially to fraud and making false statements on their financial statements and other representations to Ryan, loan officers, the Board, and the Bank. Several claimed, without corroboration, that Ryan instructed them to do so.

When borrowers' loans became due, or monthly payments became due, and they were unable to make payments, the loans risked being placed on some type of default, overdraft, or classification list, at the end of every month. With full knowledge of all pertinent bank officers, directors, and employees, and the FDIC,

additional loans were made to make these loans current.

As to the causes for the Bank's failure, in April 2017, in spite of remarkable financial growth, assets and capital base, it was not seriously in dispute that the contributing causes were, as follows:

(1) 2014–2015 - Oil and Gas Crisis (CA5.ROA.4942, 9082);
(2) 2016–New Accounting Method for Tax Credits required by E&Y (Auditor) (CA5.ROA.4940, 5069, 5071, 9072-9079, 9088, 9089, 9099, 9106);
(3) 2016 - Restatement of Earnings on Bank's Financial Statement (CA5.ROA.4940, 5070);
(4) 2016–Depositor Run on the Bank (CA5.ROA.4940);
(5) April, 2017–No Opportunity to Cure–only a 2-Day Notice was given by FDIC (CA5.ROA.5064).

The only First NBC Board member called to testify for the Government at trial was William Aaron, a prominent local attorney, and one of the founders of the Bank, as shown above. He was also a substantial investor (CA5.ROA.4831), with an ownership interest. Aaron's testimony was completely consistent with, and supports, the above creation and formation facts. Aaron provided a detailed illustrative description of the opening and closing of the Bank, with over 500 employees, and the initial meetings and plans. (CA5.ROA.4927-4930, 4938). He described the above growth of the Bank as legitimate and phenomenal, and showed Exh. 1000.036 (CA5.ROA.4936-4938), a map of all of the branches and continuous growth.

(CA5.ROA.4937). He was part of the originating crew that hired Ryan to be President and CEO, to run the Bank, with the Board's oversight. He was not charged with any crimes.

Aaron explained that the Bank became very profitable under Ryan's tenure, opening with about $66,000,000 and growing to $4-5 billion in several years, employing over 500 employees. (CA5.ROA.4927), all for the purpose of doing good for the community, and filling needs that existed after Katrina. (CA5.ROA.4821). Following the discharge of general counsel, Gregory St. Angelo on September 28, 2016, the Board hired Aaron and his law firm, as general counsel of the Bank and Holding Company. (CA5.ROA.4822).

Aaron testified extensively about the details of the seven problem loans, which were disclosed and known to him, to the Board, and to the FDIC, showing his timely knowledge of each one. (CA5.ROA.4825, et seq.). *Nothing was hidden.*

Aaron's report of not being provided true and correct information about loans pertained to the management of loans, and the Bank's and Board's and management's ability to make financial decisions as to whether to make new loans, cover old ones, or other such work outs, or to stop making loans to certain borrowers, (CA5.ROA.4834, 4841, 4842, 4853, 4859, 4860, 4861, 4862, 4883, 4884, 4953); that is, assuming, *arguendo*, that the information was, in fact, false and misleading. His report was clearly a description of the Board being deprived of the right to information, and control its assets, and not proceeds or property required under 18 U.S.C. §1344, according to *Ciminelli.*

Aaron confirmed that the FDIC would regularly visit and examine whatever it wanted, and would usually visit in September and make its annual report to management and the Board (CA5.ROA.4894)–the examiners had full access to the books and records of the Bank at all times. (CA5.ROA.4894, 4896, 4897). There were always sit-down meetings with the examiners and the high-ranking officers of the Bank, prior to meeting with the full Board. (CA5.ROA.4896, 4897). Everyone was free to ask questions (CA5.ROA.4897, 4898). He received, read and signed each annual FDIC report, as did each Board member. (CA5.ROA.4904). Every FDIC report called out the aforesaid problem loans, in one form or another, thereby demonstrating the FDIC's knowledge of these loans (CA5.ROA.5031). The Gibbs and St. Angelo loans were approved, passed by the outside auditor, Ernst & Young (E&Y), as well as the FDIC (CA5.ROA.5090).

With regard to the policy and protocol for approving loans, Aaron confirmed that the Bank policy instituted by Ryan and the Board required multiple levels of committee and Board scrutiny, review, and approval.

Aaron stated that the Bank was closed, because of tax credit disallowances (CA5.ROA.4940, 4941), *and not fraud*. The cost of bad loans started as an $80 million problem and grew to over $400 million by 2017 for loans not being paid and delinquent. (CA5.ROA.4941). Yet, $400 million compared to the above-described financial growth structure, was relatively small. (CA5.ROA.5060). Aaron confirmed that there were still lots of good loans, from beginning to end. (CA5.ROA.5009). The Bank also lost on a "well from hell" oilfield loan that went bad due to unexpected

geological and drilling conditions. (CA5.ROA.4942), *with no fraud*.

Aaron agreed that paying past due loans from working capital loans, loans to pay debts including prior Bank loans, was not a violation of any laws or regulations. (CA5.ROA.4944, 4948, 4949), although it might not be best practices. He would prefer to have lines of credit in lieu of covering overdrafts with the loans at month's end (CA5.ROA.4950, 4951), but there was nothing criminal about that–only a banking practice one way or the other.

Aaron was familiar with the FDIC's composite rating for each annual report, and was proud that his Bank had a consistent Composite 2 level through 2015, which is the FDIC rating of a very healthy Bank. The FDIC also determined in its reports that capital was satisfactory and management was also a level 2. (CA5.ROA.4975, 4976). The Bank qualified for FDIC insurance every year (CA5.ROA.4982), which was part of FDIC examination and review CA5.ROA.4982), so deposits were always fully insured by the FDIC up to $250,000.

Aaron confirmed that the FDIC examiners reviewed all information about the Bank, *and nothing was hidden or secret.* (CA5.ROA.4990).

Aaron described, as well known in the Bank, Ryan's intention of going above and beyond to help distressed customers, rather than cutting them off. "President/CEO Ryan reiterated his belief it is the Bank's best interest to help those customers in economically challenged circumstances." CA5.ROA.5064.

Because of the accounting change, Ryan's stock, awarded as compensation and purchases, turned to zero–from a previous value of $20 million, plus

bonuses (CA5.ROA.5070). This was due to the E&Y report requiring the cost method over the equity method of recording tax credits, which had been approved for nine years. (CA5.ROA.5071), which negatively affected stock prices. (CA5.ROA.5072).

Aaron confirmed that all compensation paid to Ryan was approved by the Board. (CA5.ROA.5073). There were no golden parachutes. Ryan was an at will employee, and a majority of the Board could fire him. (CA5.ROA.5073).

With regard to loans, in general, Aaron was aware that reports by Burnell and Calloway were based on projections, or pro formas, and so were not necessarily misleading, and certainly not false. The loan committees and Board voted for these loans, because they and Ryan thought it was in the best interests of the Bank - if discontinued, the Bank had no chance of ever getting paid. (CA5.ROA.5182-5183).

REASONS FOR GRANTING THE PETITION

I. *Ciminelli* was not followed.

According to *Ciminelli*, 598 U.S. 306, *accord*, *United States* v. *Yates*, 164 F.4th 256 (CA9 2021), the alleged false information provided by Ryan, and others to the Bank and its Board, did not constitute, "moneys, funds, credits, assets, securities, or other property…" under the conspiracy and charging statutes, 18 U.S.C. §§1344 and 1349. Such alleged false information provided to the Board constituted the right to control information prosecutorial theory, only, and was insufficient for a conviction under §§1344 and 1349. *Ibid.*, *Ciminelli*. The Government's proof of alleged false statements to the Board, by Ryan and

others, in support of violations of §§1344 and 1349, therefor, did not constitute a federal crime.

By natural extension, this type of alleged false information also prohibits sufficiency under 18 U.S.C. §1005, the false entry counts. They would lack materiality, and risk of overlap.

This entire case, and the Government's prosecution under the Superseding Indictment (EDLA ECF No. 318, CA5.ROA.920), particularly the Bank fraud Counts 1–37, and by logical extension, the false entry Counts 38–49, are controlled by this Court's decision in *Ciminelli*, as well as the Ninth Circuit's decision in *Yates*, 164 F.4th 256 (CA9 2021). Every single count of the Indictment - Counts 1–49, alleged false statements by the defendants, including Ryan. There are no allegations claiming theft, bribery or kickbacks. These authorities are fatal to the Indictment. The heart and soul of the Indictment are destroyed by *Ciminelli* and *Yates*, and other grounds for granting this petition.

At bedrock, the Indictment alleges as its purpose, its essence, under the charging statutes, conspiracy to violate bank fraud, 18 U.S.C. §§1344 and 1349, and substantive bank fraud by alleged (i) unjust enrichment for certain gains, such as salary and other employment benefits; and, (ii) to deprive the Bank and its Board of Directors from receiving and learning true and correct information regarding the financial condition of certain borrowers, including false statements in loan documents, thereby concealing from the Bank and its Board correct information on which it might better manage its assets and make loans and loan management decisions accurately (¶1, Pg. 7, CA5.ROA.926); and, (iii) that it "masked the true

financial condition of troubled loans…" in multiple ways to prevent the Bank and its Board from learning the true financial status of certain borrowers, and their inability to make loan payments, and to grow the debt of these borrowers. (¶2, Pg. 1, CA5.ROA.920). (Emphasis added.) This underlying theme in the Indictment pervades the Government's description of the seven loan relationships with Gary Gibbs (¶3, Pg. 7, et seq., CA5.ROA.926), Kenneth Charity (¶9, Pg. 10, et seq., CA5.ROA.929), Gregory St. Angelo (¶25, Pg. 13, et seq., CA5.ROA.932), Frank J. Adolph (¶30, Pg. 14, et seq., CA5.ROA.933), Arvind Vira (¶38, Pg. 16, et seq., CA5.ROA.935), Warren Treme (¶46, Pg. 18, et seq., CA5.ROA.937) and Jeffrey Dunlap (¶60, Pg. 21, CA5.ROA.940); with the purpose and intent of depriving the Board of true and correct financial information about them to decide whether to make additional loans to them and/or terminate and cancel their relationships, or seek work out loans with them so that they could survive, and steps in between.

There was no claim in the Indictment that Ryan, or anyone else, committed theft or received bribes and kickbacks for the alleged efforts to deprive the Board of such information–the alleged concealment and deprivation were strictly for information, for better management of the Bank and its assets, its loan operations, with the sole financial benefit to Ryan and others that their salary and benefits would be maintained.

If the entire trial record were viewed without prohibitive *Ciminelli* false statements and omissions, i.e. false *information* to the Board, which the Government wrongly cast as "property" under federal fraud statutes, there would be nothing left to the Indictment and the Government's case. All of the Government's

case was devoted to false information allegedly provided to the Board by Ryan, the borrowers, and certain loan officers, including cooperating witnesses, William Burnell and Robert Calloway, who testified that neither of them believed they were committing fraud at the time of commission. And, there was nothing in the Indictment, or evidence at trial, of any property or financial gains flowing to Ryan, except for his salary and benefits, which were at market rates. This Indictment, and the Government's presentation of evidence under it, must fall under the authorities of *Ciminelli* and *Yates* and other authorities.

Ciminelli dictates what is, and is not, *property* sufficient for a conviction under 18 U.S.C. §1344, to wit:

(i) *It is* "moneys, funds, credits, assets, securities or other property…," (18 U.S.C. §1344(2) *Ciminelli,* 598 U.S. at 306) and real property; i.e., "traditional property interests," *Id.* at 309 or 316;

(ii) *It is not* true and correct information in the hands of a company and/or its Board of Directors to manage their assets "necessary to make discretionary economic decisions…" *Id*. at 309, 310, 313, such as making a loan– it is *not* a property right under this fraud statute for the bank and its Board to be given true and correct information by an employee, officer or director, needed for decision making.

At least one Circuit has recognized the invalidity of this theory in the Bank fraud context, to wit: *Yates*, 164 F.4th at 256, 265, finding "[t]here is no cognizable property interest in 'the ethereal right to accurate

information,'" and recognizing that such a right "would transform all deception into fraud," because it always involves depriving a victim of accurate information.

Here, given the Government's virtual wholesale reliance on this flawed theory, in conjunction with its affirmative misrepresentation theory, there is no way to determine which theory the jury chose to convict for the conspiracy or the substantive bank fraud counts. When such circumstances are present, a jury's general verdict must be reversed and a new trial ordered, as a matter of law. See CA5.ROA.3061, 3090, 3091 (quoting *Yates*, 16 F.4th at 269, and *Skilling* v. *United States*, 561 U.S. 358, 414 (2010)); *id.* at 41 (quoting Fifth Circuit cases in accord). This outcome is not a matter of "speculation," as the Government contended, see CA5.ROA.3212, 3250, but one of law. CA5.ROA.3212, 3255-3257 (emphasizing, over and over again, the alleged failure to give the Board, auditors, and examiners accurate information.). The Government so constantly relied on a failure to provide accurate information theory, throughout the trial, that the record cannot be parsed to show when the Government did not do so, and there is no way of knowing on what theory the jury convicted.

The Government's *second* legally invalid theory, salary-maintenance, only compounds the reversible error inherent in the general jury verdict noted above in relation to the *first* legally invalid theory, accurate-information. *Yates*, 16 F.4th at 263–68 (requiring reversal because the presence of invalid theories). *Yates* also was a bank fraud case CA5.ROA.3212, 3258. The allegations and facts were virtually identical to the allegations and facts herein.

Finally, the rule of lenity applies, which additionally makes *Cleveland* relevant and binding. 531 U.S. at 25 ("ambiguity [...] should be resolved in favor of lenity").

There is no way to separate the salary-maintenance and accurate-information property theories out of the Government's presentation or to know what "property interest" motivated the jury's conviction for the conspiracy to commit and substantive Bank fraud counts. "The Supreme Court has held that 'constitutional error occurs' when a jury 'returns a general verdict that may rest on a legally invalid theory.'" *Yates*, 16 F.4th at 269 (quoting *Skilling*, 561 U.S. at 414).

The jury very well could have convicted Ryan on Counts 1-37, bank fraud and conspiracy, as well the false entry counts, Counts 38-49, under 18 U.S.C. §1005, based on the right to control assets. The jury was left with the distinct opportunity, erroneously, to define as "property," per the jury charge, the victims' "right to control information," i.e. the Bank's "right to control" its decision making, based on accurate information, regarding whether to make, workout, or cancel loans to borrowers. There is no way of knowing if the jury returned a verdict under the restrictions of *Ciminelli*, or otherwise. A serious reversible error occurred. There was nothing harmless about it, as claimed by the Fifth Circuit.

Because *Ciminelli*, rejected the accurate information theory as a species of federal fraud, the instructions given were erroneous. *Accord Yates.*

As previously stated, William Aaron testified on behalf of the Board. Aaron's facts show that the prohibited right to control theory was all that could have been proven by Ryan's alleged false statements, which

is not acceptable or sufficient as property under 18 U.S.C. 1344, per *Ciminelli.*

The Fifth Circuit had little or no regard for *Ciminelli*'s holding and application to the present fact situation. As aforesaid, it dispensed with *Ciminelli* and *Yates* "because Ryan's lies caused the bank to lose money rather than accurate information or salaries." App. 10. The Fifth Circuit went further to state that neither *Cininelli* nor *Yates*, control this case. App. 11. The Fifth Circuit reasoned that the Second Circuit in *Ciminelli*, affirmed the "right to control theory" as a basis for property deprivation and fraud under 18 U.S.C. §1343, and was reversed by this Court stating that such theory did not define the "traditional property interest" requisite under 18 U.S.C. §1343. *Ibid.* The Fifth Circuit then distinguished the present case from *Ciminelli*, because Ryan's so-called lies were to obtain loans to benefit the seven borrowers and keep them off of default lists, which necessarily involves money or a loss of money, and the management thereof. Yet, so did the bid-rigging in *Ciminelli* which resulted in a $750,000,000, money advantage to Ciminelli and loss to the non-profit or other victim. There is essentially no such distinction, except that the money objects and losses came from different types of transactions. Permitting the Fifth Circuit's non-application of *Ciminelli* to control any non-property interest, intangible loss or deprivation, which is not traditional money or property, the restrictive limitation in *Ciminelli* will be bypassed. To make *Ciminelli* applicable and enforceable, the Fifth Circuit decision must be reversed.

In addition, and most importantly, and as aforesaid, the jury was never instructed that the "property"

element, which is jurisdictional, must be a deprivation or loss, or the subject of a fraud, for traditional money and property assets. In no instance was the jury instructed that intangible, non-touchable objects, such as false information, did not constitute the fraud statute's elements of property, and that the jury must only make a determination as to whether traditional money and property interests, and not information, were the subject of the fraud. According to the pattern jury instruction, without any other instruction, the jury was free to decide and convict Ryan on his alleged false information in the hands of the Board of Directors, and deprivation of the Board's ability to manage loan funds and assets, instead of the loss of actual, traditional money or property made requisite by this Court in *Ciminelli*, as well as *McNally*, *Cleveland,* and *Skilling*.

The Fifth Circuit also did not contest or reject and rule out that the Government's allegations showed nothing more than, at most, violations of civil banking regulations, policies or practices, which were voluminous at trial. The law precludes federal convictions on such civil matters. *United States* v. *Riddle*, 103 F.3d 423 (CA5 1997); *United States* v. *Christo*, 614 F.2d 486 (CA5 1980); *United States* v. *Ramming*, 915 F.Supp. 854, 862 (SDTX 1996) (citing *United States* v. *McCright*, 821 F.2d 226, 229 (CA5 1987)). The court also did not address the mountain of evidence brought out by the defense, during the Government's case, through testimony of Government witnesses and exhibits, regarding problem loans were clearly and openly shown on the books and records of the bank, with nothing hidden or secret, and with no off book,

side loans, as a complete defense to fraud under the Second Superseding Indictment.

The Fifth Circuit also did not address the important defenses that a conflict of interest, which may have occurred in one of the loans (Jeffrey Dunlap), does not constitute a violation of federal law. *McCright*; *Riddle*, 103 F.3d at 433, *United States* v. *Baker*, 61 F.3d 317, 321-323 (CA5 1995); and, the entirety of testimony by FDIC Officer Timothy Strain, a major Government witness, who was fully aware of these loans and the Bank's open practice of continuing to extend lines of credit to cash impaired borrowers, including making loans to pay off and keep existing loans current (CA5.ROA.8827-9063), *United States* v. *Grossman*, 117 F.3d 255 (CA5 1997); thus obviating the requisite element of criminal intent to harm the Bank.

II. *Thompson* was not followed.

The application of *Thompson* to the present case is obvious.

This Court in *Thompson* held, in essence, that false statements under 18 U.S.C. §1014, must be truly false, and only false, as an element of §1014, to sustain the Government's burden of proof beyond a reasonable doubt. Statements that are misleading, rather than false, are not sufficient under that false statement statute, §1014, criminalizing false statements in applications for loans, et al., made to influence certain Government agencies, including banks insured by the FDIC. Except for the context of applications to certain agencies, the prohibited false statements under §1014, are essentially the same as false statements under §1005, charged in Counts 38–49 of the Second Superseding Indictment, (to which the

Government agreed in its Rule 28(j) letter; and, in principle and by logical and constitutional extension, false statements that form the basis of the bank fraud substantive and conspiracy counts, under §§1344 and 1349, in Counts 1–37 of the Indictment; just as in the other fraud statutes, 18 U.S.C. §§1341–1349. *Thompson* is, thus, dispositively favorable to Ryan's application and results, and is ever pervasive, prevalent, and applies to each count of conviction of Ashton Ryan in the present case, as the Government included alleged false statements to sustain its burden of proof in each count.

In particular, Counts 1, 2, 4, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 32, 33, 36, 37, under 18 U.S.C. §1344; and Counts 38, 39, 40, 41, 43, 44, 47 and 48 under, 18 U.S.C. §1005, of the Indictment (CA5.ROA.920), expressly describe and allege on their face false statements as requisite elements, and attempted sufficiency of evidence, and proof beyond a reasonable doubt. The balance of the counts in the Indictment, Counts 3, 5, 6, 8, 14, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 34, and 35, are similarly, and substantively, based on an alleged false statements made by Ryan. The factual allegations therein, that Ryan "caused," "directed," and "created," were, again, all based on some type of alleged false statement by Ryan. Accordingly, *Thompson* applies to all counts of conviction against Ryan, and refutes them, as they are all based on alleged false statements that were, in fact, true, or misleading at worst.

The Government, thus, erroneously sustained its burden of proof on all counts, conspiracy, bank fraud, and false entries, with statements that were arguably misleading, and not false.

The Court's jury instruction for 18 U.S.C. §1005, defined the requisite element of false statements, as simply being false, with no instruction or prohibition that misleading statements, without falsehood, are insufficient to sustain the Government's burden of proof (EDLA ECF No. 947-1, CA5.ROA.2893-2896; EDLA ECF No. 999, CA5.ROA.10778-10781),. There is no way of knowing whether the jury returned its guilty verdicts based on misleading statements, alone, or false statements, or both, but the door was open for the jury to convict based on misleading statements, alone. Actually, the district court's instruction on false statements and omissions expressly opened the door for guilty verdicts based on misleading statements, without total falsity, to wit:

> 18 U.S.C. §1005 makes it a crime for anyone to make a false statement in any book, report, or statement of a federally insured bank, knowing the entry is false, with the intent to injure or defraud the bank. For you to find the defendant guilty of this crime, you must be convinced that the Government has proved the following beyond a reasonable doubt:
>
> First, that the First NBC Bank was a federally insured bank;
>
> Second, that the defendant deliberately omitted a material fact in a book, report, or statement of First NBC Bank. A material omission is one that would naturally tend to influence or was capable of influencing the decision of First NBC Bank[.]

CA5.ROA.10780. According to this instruction, an alleged false statement with a material omission could be a true, but misleading, statement, that has a natural tendency "to influence or was capable of influencing…." That is all it would take–something, anything, solely misleading, that would influence someone, without being totally false, which is not at all a false statement under *Thompson*, its holding and intent. There was no instruction telling the jury it could *not* convict based on a true statement that was misleading. *Thompson*. No one will ever know if the jury did so, but they had the opportunity to convict under the Court's erroneous and misleading instructions.

The case of *Thompson* is identical in principle and application to the present case, even though decided under 18 U.S.C. §1014. The fact that the present case was decided under another false statement statute, §1005, as well as bank fraud, under §1344, is a distinction without a difference–§1014 pertains to false (only) statements on bank applications and documents, which is virtually the same, and tantamount to the false statements and false bank entries in the present case, under §1005, and conspiracy and bank fraud, under §§1344 and 1349. Both sets of statutes criminalize statements in bank records that are false, only, with no statutory inclusion of misleading statements.

The context of Ryan's alleged statements is crucially important, particularly considering Ryan's, and others', advocacy that the borrowers were in a workout situation, as permitted by Bank policy and the FDIC; the literal truth of the statements based on disclosed future expectations and *pro forma* evaluations, especially that a disclosed, yet to be open

business was cash flowing; and, cash flowing because of additional loans, which were well known to the Board and the FDIC. The FDIC declared to the Board and Ryan that the banking practice - loans to pay loans, and overdraft lending–was not prohibited or unlawful. So, if there is any truth to the so-called false statements alleged on the face of the Indictment, and as presented by the Government at trial, whether for false statements and/or bank fraud, albeit misleading, there cannot be a finding of guilt beyond a reasonable doubt. Under *Thompson*, it would be irrational and unreasonable for a juror to so find, as explained by *Thompson*, to wit:

> Certainly, *a* statute [any federal fraud statute] that criminalizes 'false' statements also criminalizes statements that for both false *and* misleading, or false statements made *with intent* to mislead. But the question before us is whether such a statute also criminalizes statements that are misleading but not false. *The answer to that question must be no.*

Thompson, 604 U.S. at 417 (emphasis and brackets added).

Similarly, mere puffing is not criminal federal fraud. *United States* v. *Coffman*, 94 F.3d 330, 335 (CA7 1996); *United States* v. *Causey*, No. CRIM. H-04-025-SS, 2005 WL 2647976, *3 (SDTX. Oct. 17, 2005)

To emphasize to the Fifth Circuit the Government's numerous and flagrant uses of the *Ciminelli* right to control theory, the Government's Brief of Appellee (EDLA ECF No. 181) contains examples used by the Government to sustain its burden on that erroneous

and reversed grounds for prosecution, as well as the numerous uses of misleading, only, statements attributed to Ryan, 28, and listed and presented them all to the Fifth Circuit. In response, the Fifth Circuit said nothing. The Government Brief, thus, exemplifies the Government's erroneous presentation to the jury throughout the trial, thereby treating misleading statements as if they were sufficient to prove the element of falsity in Counts 38–49, under § 1005.

If that were not enough, or more than enough, the trial transcript includes numerous instances where key Government witnesses testified that statements and information contained in the loan files of the seven problem borrowers were incomplete or misleading. Again the Fifth Circuit did not respond.

The statements that were repeated by the Government at trial, and listed in the Indictment, were Ryan's statements to the Board that certain borrowers' loans were not in default, or words to that effect, such as "performing as agreed," "stable," et al. Without mentioning the fact that the loans had been supported by additional loans, which was never illegal, the loans were no longer in default. But, it is not the omission under *Thompson*, that must be disclosed to avoid falsehood. It is only the utterance, statement, itself, and only the statement without the omission, that has to be examined for literal truth, falsehood or misleading. The omission–the non-utterance–was never stated or uttered to the Bank, so cannot constitute a statement of any kind. Examined only for the statement itself, and not the omission or non-statement, the current condition of the loans was a true statement, according to *Thompson*. It was literally true.

It is an absolute truth that throughout the trial additional loans to the borrowers, with the full knowledge of the Board and the FDIC, propped up these troubled loans while construction projects were in process, with the intent that the businesses under the loans would ultimately produce cash and pay back the loans–everyone knew that. It was literally true that the loans were performing as agreed, and stable–there was nothing false about that statement. It is actually more true and accurate, and less misleading, than Thompson's statement about what he borrowed, which was literally true, and not what he intentionally left out that he additionally borrowed, i.e., the omission of the entirety of his multiple loans, which was not stated and consequently could not become a false statement.

In response, the Fifth Circuit in a left-handed, offhand way, agreed: "'*To be sure, Ryan is correct that these instructions permitted the jury to return a verdict of guilty based on 'misleading statements*.' But Ryan overreads *Thompson* in proclaiming that a § 1005 conviction can no longer be supported by evidence of a defendant's misleading statements." App. 23–24 (emphasis added). The court obviously admitted that, without further instruction, the jury was permitted to return an erroneous verdict based on misleading statements. The court's attempt to distinguish the misleading statements in *Thompson*, and in the present case, is hardly rational: "Indeed, the defendant's statement in *Thompson* itself–that he borrowed hundred $110,000 when the full amount was $219,000–was misleading but true. 604 U.S. at 410. By contrast, Ryan statements about Gibbs in this case–that his credit risk rating was a '5,' that his loans were

'performing as agreed,' and that his loans status was 'stable'–were misleading and false. This distinction reveals that the district court's instructions were not erroneous. Plainly put, misleading material omissions can be false in context. See *id.* at 418 ('[C]ontext is relevant to determining whether a statement is false.'" The Fifth Circuit then gave its catch-all, to wit: "[f]inally, even if the district court erred in instructing the jury that error was likely harmless because, as discussed, the weight of the evidence establishes that Ryan's material omissions in Counts 41, 43, 44, 47 and 48 amount to literal falsehoods when viewed in context." App. 24.

That is a complete legal and professional, though respectful, copout and disrespect, of a clear holding and pronouncement of this Court in. *Thompson*, and amounts to a judicial acceptance of an erroneous ruling.

The Fifth Circuit's background or contextual review of what Ryan did not report, such as the additional loans to update existing ones, as known to everyone at the bank and the FDIC, could hardly be compared with the more misleading, yet true, statements made by Thompson, to wit: he well knew that he had borrowed $269,000, and included therein, he borrowed $110,000, and stated that he did, in fact, borrow the $110,000, without mentioning the balance that he borrowed. This statement of the $110,000 loan was literally true, and was not criminal under any false statement statute, per *Thompson*. The fact that it omitted important contextual information, i.e. the balance of the loan, was *not* covered by the criminal statute, and *not* a violation of law and its context of the whole loan package, according to *Thompson*. If that is not a false

statement, the fact that Ryan did not disclose to those who already well knew it, that the loans were not in default, *because of* additional loans that were not in default, cannot be a false statement by Ryan. The jury, the jury instructions, and the Fifth Circuit, were clearly wrong.

Finally, and most importantly, if any of this appears to be confusing when due process of law is mandated, the rule of lenity must apply. *Cleveland*, 531 U.S. at 25.

III. Government Violation of Attorney-Client Privileges and Confidentiality

The district court committed reversible error in denying Ryan's Motion to Dismiss (CA5.ROA.126763, 127531), which arose from the Government's April 20, 2020 search warrant served on Ryan's Google, LLC (hereinafter "Google"), account. The Fifth Circuit affirmed.

The Government directed the Google custodian of Ryan's privileged emails, to send its return to the lead FBI case agent and prominent member of the prosecution team; failed to give notice to the Magistrate judge that the subject of the warrant contained privileged emails; failed to give notice to the privilege and account owner, Ashton J. Ryan, Jr., that it seized and was in possession of his privileged communications; allowed members of the prosecution team to handle material known to contain privileged communications; failed to maintain custody or access logs showing the identities of the Government personnel who handled the privileged material, and refused to provide certain records that would show who accessed the material; performed a cursory and deficient search for

privileged communications; and made unilateral privilege determinations based solely on a word search performed by a non-attorney, Case Administrator, among other substandard actions and inactions. All such conduct, therefore, constituted violations of Ryan's Fourth Amendment rights, and rights to privacy, and to be free of unreasonable searches and seizures, as well as his right to a fair trial and effective assistance of counsel.

It is further shocking, but true, that the Government would even admit that "its process was '*im*perfect,'" (App. 29), which is an admission of the most obvious–that it was deliberately and outrageously *im*perfect. This was not harmless, because the lead FBI case agent admitted that she read the sensitive privileged Dunlap memo between Ryan and undersigned counsel, while it was in the Relativity discovery platform. The above authorities, from the district court and the Fifth Circuit, itself, in *Harbor*, mandated upon the Government a fair and methodical way to obtain its investigatory materials and discovery from the cell phone carrier, Google, protected from privilege violations, and bring in Ryan and/or his counsel to safeguard the filter and production process. And, most importantly, as stated in those cases, especially if there were doubt, give notice to the issuing Magistrate that privileged communications were about to be seized with that Magistrate's order of seizure upon Google, and when actually seized.

CONCLUSION

This Court should grant certiorari.

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