No. 07-4080

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CONRAD M. BLACK,

Defendant-Appellant

Appeal from the District Court for the
Northern District of Illinois
No. 05-CR-727 (Hon. Amy J. St. Eve)

APPELLANT CONRAD M. BLACK'S MOTION FOR BAIL PENDING APPEAL AND SUPPORTING MEMORANDUM OF LAW

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Conrad M. Black applies for release under the Bail Reform Act, 18 U.S.C. § 3143(b), following the Supreme Court's decision to vacate the judgment of this Court.

Mr. Black has been in federal custody for more than two years, serving a 78-month sentence for convictions on three mail fraud counts, 18 U.S.C. §§ 1341 & 1346, and one obstruction of justice count, 18 U.S.C. § 1512(c)(1). This Court affirmed the convictions in 2008, rejecting Mr. Black's challenge to the validity of the fraud instructions, the appropriateness of an "ostrich" instruction on the question of intent, and the legal sufficiency of the evidence on both fraud and obstruction. 530 F.3d 596 (2008). On June 24, 2010, the Supreme Court vacated this Court's judgment. Based on its ruling in *Skilling v. United States*, No. 08-1394, the Court found it "plain" that the challenged fraud instructions "were indeed incorrect," because honest-services fraud is limited to bribe or kickback schemes and "[t]he scheme to defraud alleged here did not involve any bribes or kickbacks." *Black v. United States*, No. 08-876, slip op. at 8 & 5 n.7. The Court further held that this Court erred in believing that Mr. Black forfeited his right to redress based on this error because he had not agreed to submit a special verdict form to the jury. *Id.* at 7-8 & n.12. After finding error of constitutional magnitude, the Court (as it had in *Skilling*) declined to address in the first instance whether that error may be found harmless as to any of the counts of conviction. *Black*, slip op. at 8 & n.14 ("leav[ing] . . . for consideration on remand" "whether the error was ultimately harmless" including whether "spillover prejudice from evidence introduced on the mail-fraud counts requires reversal of [Mr. Black's] obstruction-of-justice conviction"); *see also Skilling*, slip op. at 50-51 (leaving open for the Fifth Circuit on remand whether "[all] of [Skilling's] convictions . . . hinged on the [flawed] count and, like dominoes, must fall if it falls").

The circumstances surrounding the instant bail application thus differ quite significantly from those that existed when this Court denied Mr. Black's application for bail pending his original appeal: The Supreme Court has now unanimously ruled that a violation affecting Mr. Black's Sixth Amendment jury trial right occurred (*i.e.*, the jury instructions authorized conviction for conduct that is not an offense under the mail fraud statute) and the convictions must be set aside unless the government meets its heavy burden of demonstrating "that it is clear beyond a reasonable doubt that the jury would have convicted absent the error." *United States v. L.E. Myers Co.*, 562 F.3d 845, 855 (7th Cir. 2009).[1] Thus, the issue that now remains for this Court is *not* whether the government introduced legally sufficient evidence to secure a conviction absent the error—that is, whether "the case *could* have been won" without the error. *Id.* (emphasis in original). Indeed, as the Supreme Court has noted, the issue is not even "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original); *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1052 (7th Cir. 2005) ("If the error complained of contributed to the verdict obtained, then the error is not harmless"). A less exacting test, the Supreme

[1] At the time of this Court's 2008 ruling, the circuits were divided over whether harmless-error analysis applies to so-called *Yates* errors, *viz*, when the jury is given two alternative theories of criminality, one of which is not a crime at all. 530 F.3d at 602-03. The Supreme Court resolved that split a few months later in *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008), which held that such errors are indeed subject to harmless-error review. Because *Pulido* was a habeas case, the Court used the "substantial-influence" test derived from *Kotteakos v. United States*, 328 U.S. 750 (1946). *See Brecht v. Abrahamson*, 507 U.S. 619, 622-23 (1993). On direct review, however, the stricter beyond-a-reasonable-doubt standard of *Chapman v. California*, 386 U.S. 18 (1967), applies. *See Neder v. United States*, 527 U.S. 1, 10 (1999) (applying *Chapman* standard where "the erroneous instruction precludes the jury from making a finding on the *actual* element of the offense"); *Johnson v. Acevedo*, 572 F.3d 398, 403 (7th Cir. 2009); *see also Lowery v. Anderson*, 225 F.3d 833, 841 (7th Cir. 2000) (less searching review is used on habeas because "an earlier court has already reviewed the claimed error under the heightened *Chapman* standard").

Court has explained, would nullify the Sixth Amendment's guarantee of trial by jury. *Sullivan*, 508 U.S. at 279.

In *this* trial, the jury resoundingly rejected the great bulk of the government's charges, so it is not remotely probable that the few counts that survived the jury's deep skepticism of the government's case to produce *this* verdict were untainted by the fact the jury was told that it could convict defendants for conduct that *isn't* a crime. More to the point, it is literally impossible on this record for the government to meet *its* burden of demonstrating that the verdict was not tainted *beyond a reasonable doubt*. Indeed, the Supreme Court's rejection of the government's fraud theory goes to the heart of the most hotly contested issues at Mr. Black's trial—whether there was a scheme to defraud and whether Mr. Black "corruptly" intended to obstruct the investigation of this non-crime—whereas errors have been found harmless in exactly the opposite situation, when they involved *uncontested* matters *and* the relevant proof on those matters was overwhelming. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 18 (1999) ("omitted element . . . supported by uncontroverted evidence"); *id.* at 19 ("defendant did not, and apparently could not, bring forth facts contesting the omitted element"); *L.E. Myers Co.*, 562 F.3d at 855 (error not harmless because "instructions went to the heart and most hotly contested aspect of the case: whether [the defendant's] conduct was willful").

If the government elects to contest prejudice as to any count, Mr. Black is prepared to brief in greater detail the merits of the prejudice question on any expedited basis that is convenient for this Court. But in the interim Mr. Black is entitled to bail because, whatever the Court's ultimate resolution of the question, the harmless-error question left open by the Supreme Court's decision is "substantial" within the meaning of the Bail Reform Act. That is obvious as to the three fraud counts, because the instructions and the government's arguments expressly permitted the jury to convict on two *alternative* theories of fraud, one of which (nondisclosures that purportedly violated Delaware corporate law) is simply not mail fraud at all and the other of which (theft of money) was rejected by the jury on each count that cleanly presented it. For good measure, the instructions that the jury received required jury unanimity on whether there was a "scheme to defraud," but not on the theory—theft or honest services—on which each juror based her conclusion that a "scheme" existed. Thus, the government could disprove prejudice as to the fraud counts only by showing, beyond a reasonable doubt, that *not a single juror* relied on the "honest services" contentions it repeatedly and earnestly pressed at trial.

The government fares no better on obstruction. The government's proof of corrupt intent was desperately threadbare. Even if this Court correctly deemed it legally sufficient to satisfy a hypothetical rational jury (the standard on motions for acquittal) in the original appeal, the harmless-error inquiry, unlike a motion for acquittal, does not permit the Court to examine the evidence in the light most favorable to the government or to resolve credibility disputes in its favor. *E.g.*, *United States v. Hands*, 184 F.3d 1322, 1330-31 & n.23 (11th Cir. 1999) (court must review record *de novo* and take into account factors that could have affected the jury's assessment of the credibility of the government's case); *Al-Qaadir v. Gallegos*, 56 F.3d 70 (Table), 1995 WL 330628, at *3 n.5 (9th Cir. June 2, 1995) ("It is impossible to determine whether an error was harmless beyond a reasonable doubt by construing evidence in the light most favorable to the prosecution"); *cf. United States v. Cappas*, 29 F.3d 1187, 1194 n.4 (7th Cir. 1994). Thus, while it is of course legally *possible* for a person to be guilty of obstruction even when he is acquitted of the underlying crime, the question here is whether *this* jury *undoubtedly* would have ruled for the government on the crucial, disputed element of "corrupt" intent if it had been aware that the offense Mr. Black was supposedly endeavoring to obstruct was, as he maintained all along, not a crime at all. After all, joinder of fraud and obstruction charges for trial ordinarily is deemed proper precisely because these types of allegations are "logically connected" and "'mutually dependent upon and inextricably connected with one another, in spite of the fact that the evidence proving them individually [is] not identical.'" *United States v. Berardi*, 675 F.2d 894, 900 (7th Cir. 1982) (quoting *United States v. Rajewski*, 526 F.2d 149, 155 (7th Cir. 1975)). It would be odd for the government now to contend—much less could it establish beyond a reasonable doubt—that the fraud and obstruction offenses had nothing to do with each other. And, even if the government could somehow demonstrate beyond a reasonable doubt that the obstruction conviction survives, the Guidelines sentence for that offense would be sufficiently short that, given the time already served by Mr. Black, bail would be warranted during the remaining proceedings in any event.

STATEMENT

Mr. Black was tried in 2007 on seventeen counts of mail fraud, tax violations, money laundering, and RICO. The government accused Mr. Black and his co-defendants of defrauding Hollinger International, Inc. ("Hollinger"), a Delaware public company that owned and operated several large newspapers and hundreds of smaller publications. The government did not even get to the jury on the money-laundering charges, and the jury, for its part, acquitted the defendants on the most serious remaining charges, including RICO, tax, and most fraud counts. The jury convicted defendants on three fraud counts, and Mr. Black on one count of obstructing an investigation into whether he had engaged in the alleged fraud. Mr. Black's total sentence of 78 months, which he began serving in March 2008, was dictated under the sentencing guidelines by the three mail-fraud counts.

The jury was presented with two alternative theories of fraud—conventional fraud by theft, or deprivation of another's right to the defendants' honest services. *Black*, slip op. at 2-3 (noting that district court "instructed the jury, discretely, on the theft-of-money-or-property and honest-services deprivation theories"). Because these two theories were alternative means of establishing the "scheme to defraud" element, the jurors were told they had to be unanimous only on whether a scheme existed, not on which theory supported that element—in other words, each juror who voted to convict might choose theft, honest services, or both. Tr. 13476-78. No juror was required to find a scheme to steal money or property in order to convict. To the contrary, the instructions effectively turned the "honest services" option into a much slimmed-down version of traditional fraud, permitting convictions for "fraud" on the basis of nondisclosures by fiduciaries if a defendant obtained a "gain"—even a wholly lawful gain such as a foreign tax advantage. Any juror who rejected key elements of the government's claim that defendants had engaged in "theft" could still convict by finding that they were "dishonest" because they were not sufficiently fair and loyal to Hollinger.

Specifically, the government's "honest services" theory depended entirely on a detailed exposition of the requirements of Delaware corporate law, which the jury instructions, at the government's behest, said the defendants could violate by not being "entirely fair" to Hollinger. Government Appendix ("GA") 20-21; Tr. 13632, 13669. As further elaborated in the jury charge, this required the jury to find nothing more than a bare nondisclosure by a corporate fiduciary. GA 20-21. The jury had no need to find that the defendant intended to cause a property injury, as is required in conventional fraud cases. *See, e.g.*, *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993); *United States v. Starr*, 816 F.2d 94, 100 (2d Cir. 1987). Nor was the government required to prove the type of specific intent that long has characterized conventional fraud: Instead, a juror could find the requisite intent if she decided that the defendants intended to "deceive" Hollinger by depriving it of "honest services" in the form of the "loyalty" they owed Hollinger under Delaware law. As further defined by the district court (and in keeping with other circuits' then-extant law), this essentially meant that if the defendants "knew" they had failed to disclose facts that the government asserted they should have disclosed, the deception element was satisfied. GA 19-21, 39; *see also United States v. Kincaid-Chauncey*, 556 F.3d 923, 949 (9th Cir. 2009) (Berzon, J., concurring) ("'an official's intentional violation of the duty to disclose provides the requisite deceit'") (quoting *United States v. Woodward*, 149 F.3d 46, 63 (1st Cir. 1998) (brackets omitted)).[2]

Fully cognizant that the "honest services" charge authorized conviction on much less than money/property fraud—on mere intentional nondisclosure, in fact—the prosecutors repeatedly reminded the jury that this alternative theory was enough, *by itself*, to convict in this case. At the beginning of her opening summation, the prosecutor noted

[2] Once this case reached the merits stage at the Supreme Court, the Solicitor General could not bring herself to defend the elaborate edifice of Delaware corporate-law civil duties that the government and the district court had fashioned as a fully sufficient basis for conviction. The government's merits brief did not so much as mention Delaware law, and in the companion case of *Weyhrauch v. United States* the Solicitor General argued that it would be wrong to make "state law an ingredient of mail fraud." Brief of Respondent at 42, *Black v. United States*, No. 08-876 (2010); Brief of Respondent at 44, *Weyhrauch v. United States*, No. 08-1196 (2010); *Weyhrauch* Oral Arg. Tr. at 50. The question, the government urged, was solely one of federal law. That switch in position would have left the government without any apparent basis for opposing a new trial in this case, *e.g.*, *Chiarella v. United States*, 445 U.S. 222, 235-37 (1980) (a conviction cannot be affirmed on the basis of a theory not presented to the jury), even if the Court had not rejected the government's argument that fiduciary nondisclosure is a crime under 18 U.S.C. § 1346.

that "one of the theories behind this fraud" was that "defendants stole money and property from the company," but quickly emphasized that "[t]here's also a second theory, and we are alleging both. The second theory has to do with something called honest services." Tr. 13638-39 (AUSA Ruder). The essence of the latter, she argued, was a "breach [of] this duty of loyalty" which "is just as serious; and it's part of the fraud that is alleged in this case." *Id.*; *see also id.* at 13699 ("They stole the money and they stole the trust, the loyalty . . . ."). She repeatedly referenced the honest-services theory throughout her summation as the key factor that the jury should bear in mind. *E.g.*, *id.* at 13726 ("And because they had that duty of loyalty, this [indicating] doesn't fly, ladies and gentlemen. It does not fly.").

In rebuttal, another prosecutor homed in on the government's "key points," to wit that defendants were required to "act in the corporation's best interests," which meant "putting the shareholders' interests number one." *Id.* at 14947-48; *id.* at 14949 ("keep in mind what we talked about with honest services. These guys, shareholders' interests first"). Indeed, the argument that the case was about "honest services"—loyalty, pure and simple—became a virtual leitmotif for the government's summations. *E.g., id.* at 15019 ("They owe their duty to Hollinger International. So when I put on here honest services and duty of loyalty, that's what I'm talking about. *That's the fraud in this case*") (emphasis added). Although the sheer repetitiveness of the government's argument ensured that even the most inattentive juror could not miss the point, the prosecutor hammered it again as the *sine qua non* of his case in conclusion:

> Honestly, when you go back to the jury room, ladies and gentlemen, I have one request. When you consider the transactions in this case, think of those two words. Think of "honest services." And ask yourself, when you consider each transaction, whether that is what the shareholders received. Be-

> cause, you know, when you buy a share of stock in a public company, there are very few guarantees. The stock could go up. You could lose your shirt.
>
> But one of the things you should be able to rely upon is the honest services of your officers and directors; the fact that they would be loyal to your interests as a shareholder.
>
> When you evaluate the transactions in this case, ladies and gentlemen, and you just look at those two simple words, you're going to see that that's not what the shareholders in this case received.

Id. at 15143-44 (AUSA Sussman).

The jury convicted Mr. Black and his co-defendants of three counts of mail fraud and Mr. Black alone of obstruction. The centerpiece of the obstruction conviction was the government's evidence that Mr. Black removed 13 boxes of papers from Hollinger's Toronto headquarters, six business days before he was due to be evicted from his office there—an office he occupied for 27 years—as a result of the scandal created by this investigation. The government had argued that the removal was suspicious because it came on the heels of the government's *sixth* request for documents (all previous ones having been fully complied with) but presented no evidence that *anyone* informed Mr. Black a new request was forthcoming or that anything in the boxes had not previously been produced. Aside from previously produced documents, the boxes contained personal papers and effects such as photographs, as well as documents relating to the estate of Mr. Black's late brother. Separate Appendix ("SA") 431-34; Tr. 14132.

Two of the fraud counts (1 and 6) related to the so-called APC transactions and comprised the great bulk of the "loss" that ultimately drove the total sentence. As to those transactions, the government's own star witness, David Radler, had testified at trial (as he had before the grand jury) that the money at issue ($5.5 million) was not stolen at all because the outlay had been duly approved by Hollinger as management fees. The payments had been re-characterized as consideration for certain covenants not to compete executed by some defendants in order to take advantage of favorable tax treatment that Canada then accorded to payments received for non-compete covenants.[3] The remaining fraud conviction (count 7) involved a sale of newspaper properties to Forum and Paxton that had been approved by Hollinger's Executive Committee (and later the full Board, unanimously) with a number of provisos, including the negotiation of non-compete agreements between the purchasers and Hollinger's "executive officers." SA 540, 557. Mr. Black received $285,000 as a result of that transaction (all defendants collectively received $600,000). The evidence showed that the officers did not sign non-compete agreements in this instance; Radler testified that Kipnis, Hollinger's counsel, had simply neglected to draft the necessary paperwork. SA 367-68. Kipnis was convicted on this count, but the district court granted him a post-verdict judgment of acquittal.

This Court affirmed, finding no infirmity in the honest-services instructions and rejecting Mr. Black's challenges to the legal sufficiency of the fraud and obstruction evidence. *Black*, 530 F.3d at 600. This Court readily acknowledged that on many points the evidence was conflicting and inconsistent, but accepted that the jury could legally have rested its verdict on the government's version of events. *See, e.g.*, *id.* at 599 ("Or so the jury was entitled to find; the evidence was conflicting"); *id.* (government's star witness testified the non-compete payments had been approved as management fees, but "the members of the committee testified otherwise and the jury was entitled to believe

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[3] The government initially charged defendants with defrauding the Canadian fisc, but was forced to abandon that claim before trial. It was undisputed that Canadian law (as it then stood) deemed nontaxable any payments received for non-competition agreements, even if the payments were in lieu of other income the payees might have received, so long as the payees were legally bound not to compete, which indisputably was true here. SA 462-73; Tr. 15007 (prosecutor's closing concession that "[t]here's nothing wrong with legitimate tax planning" and that if non-competes are not taxable in Canada "it doesn't matter a w[h]it to this case").

them").[4] This Court "further determined that Defendants could not prevail even if [the honest-services] instructions were wrong," because defendants had "forfeited their objection to" them "by resisting the government's proposal for separate findings on money-or-property fraud and on honest-services fraud." *Black*, slip op. at 3-5.

The Supreme Court has now ruled that the honest-services instructions were in error because the honest-services statute is limited to bribes and kickbacks, which are not at issue in this case. The Supreme Court also disagreed with this Court's ruling on forfeiture, holding that Mr. Black's objection to the "honest services" instruction was sufficient to preserve the error and require the government to demonstrate the error did not affect any part of the verdict. *Black*, slip op. at 5 & nn.7, 8. Mr. Black now seeks bail pending this Court's consideration and ultimate disposition of the Supreme Court's remand.

ARGUMENT

Mr. Black Meets The Statutory Requirements Specified In 18 U.S.C. § 3143(b) For Release Pending Proceedings On Remand.

The Supreme Court has now made clear that it is *not* mail fraud to engage in the conduct that the district court instructed Mr. Black's jury was a violation of the honest-services fraud statute. Section 1346 is limited to bribery and kickbacks, and "[t]he scheme to defraud alleged here did not involve any bribes or kickbacks." Slip op. at 5 n.7. On *all* fraud counts, the government strongly urged (and the jury charge expressly permitted) a conviction based on findings that could not remotely establish a conventional property fraud. The jury was instead instructed to convict Mr. Black and his co-defendants if, as officers and directors of a public company, they used their positions for

[4] The audit committee members actually testified to something different—that they were unaware of the non-compete agreements themselves, *e.g.*, GA 197—a statement the jurors could have credited without discounting Radler's testimony showing that the source of the money for the non-compete payments was approved management fees.

private gain without making full disclosure consistent with their fiduciary duties of loyalty under Delaware law. Thus, a juror could have found defendants guilty of fraud on counts 1 and 6 if money they received was money they fully earned, and Hollinger had duly approved, as management fees merely because the payments were styled as non-competition fees in order to obtain a *lawful* tax advantage in Canada. A juror also could vote to convict Black of the alleged "similar fraud" (530 F.3d at 600) charged in count 7 even though the non-competes were authorized by the Board and were not executed solely because Kipnis (who received an acquittal on this count) neglected to prepare them. Finally, as to obstruction, the parties strongly fought whether the government even met the bare legal minimum for submitting the case to the jury on whether Mr. Black had a "corrupt" intent to obstruct a fraud inquiry. The government cannot remotely show that the jury would have resolved that hotly contested issue in the same way had it been aware that the government's boundless conception of "fraud" was wrong.

1. Section 3143(b)(1) sets forth the standard for release pending appeal. A defendant is entitled to bail if a court finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" on conditions; and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in – (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1).

It is indisputable that Mr. Black is unlikely to flee, that he poses no danger to the safety of any other person or the community if released on conditions, and that he pursues his appeal for a legitimate reason and not for purposes of delay. *See* Transcript of Sentencing Proceedings (Dec. 10, 2007), at 129:25-130:3 ("I do find by clear and convincing evidence that Mr. Black is not likely to flee or pose a danger to the safety of any other person or the community if he is released under conditions . . . ."). Accordingly, the key issue is whether Mr. Black has "raise[d] a substantial question of law or fact" likely to result in at least a new trial or a substantially shortened sentence should he prevail on that question.

2. "A substantial question" within the meaning of Section 3143(b)(1) "is a close question or one that very well could be decided the other way." *United States v. Molt*, 758 F.2d 1198, 1200 (7th Cir. 1985) (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)). The petitioner need not show that the judgment "probably will be reversed, in order to find that an issue is 'substantial.'" *United States v. Thompson*, 787 F.2d 1084, 1085 (7th Cir. 1986). Rather, the test is whether "the appeal could readily go either way." *United States v. Greenburg*, 772 F.2d 340, 341 (7th Cir. 1985); *see also United States v. Eaken*, 995 F.2d 740, 742-43 (7th Cir. 1993) (affirming release pending appeal because the court was "unsure that the evidence" supported the conviction).

The question presented here is undeniably substantial. "A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 129 S. Ct. 530, 530 (2008). Where, as here, the jury was improperly instructed on an element of the offense, the government must negate the possibility of prejudice beyond a reasonable doubt. *Neder*, 527 U.S. at 15. It is unlikely that the government can meet this standard, particularly where the jurors did not need to be unanimous on which manner of fraud they found. *Compare* SA 522-24 (lack of special unanimity instruction for mail-fraud elements) *with* GA 36 (juror unanimity instruction regarding which official proceedings Mr. Black intended to obstruct). To return a guilty verdict, only a single juror needed to conclude that Mr. Black violated his fiduciary duties—defined as not "act[ing] in the corporation's best interests" or being "entirely fair" to the corporation, SA 525-26.

The Court need not speculate on this point; the government has already argued that any reasonable juror could have reached precisely that conclusion. In urging the district court to deny defendants' post-verdict motions for judgment of acquittal, the government insisted that the jury was able to convict under the honest-services fraud theory even in the complete absence of a scheme to commit traditional fraud (R. 904 at 11):

> A reasonable jury could have determined that even if defendants honestly believed that the APC [non-compete agreement] money was nothing more than unpaid management fees, defendants still deprived the company and its shareholders of their right to honest services by making false statements concerning the nature of the payments and the circumstances under which they were paid. In other words, a reasonable jury could conclude that corporate officers and directors abused their positions of trust within the corporation to gain a favorable tax benefit—even if there were no "monetary loss or financial damage" to [Hollinger].

When this case was first before the Court, it noted that *Yates* errors might be subject to harmless error and suggested that any errors in the "honest services" instructions could be harmless in this case. 530 F.3d at 602-03. The government urged the Supreme Court to deny certiorari on this basis, but this tactic was rejected because this Court's brief discussion did not address the argument Mr. Black was urging before the Supreme Court and that the Court accepted, *i.e.*, that the government's allegations fell wholly *outside* any proper scope of the honest-services statute. Instead, and in keeping with the generally permissive view of courts of appeals before *Skilling*, this Court viewed Mr.

Black's challenge to the instructions as involving a quibble that scarcely raised a *Yates* issue at all. As this Court put it, "giving an instruction that omits a qualification required to make it unambiguously correct is different from submitting a case to a jury on an erroneous theory of criminal liability." *Id.* at 602.

Moreover, because this Court was responding to sufficiency challenges, its analysis focused on what the jury *could* have found had it been *properly* instructed. Thus, the evidence might have *permitted* the jury to credit the government's other theory: that defendants "abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete." *Id.* at 603. But apart from the fact that the jury *rejected* that theory on every one of the government's other nine fraud counts, the question under *Yates* and *Pulido* is not whether the evidence was sufficient under the properly instructed theory. The question is whether the government can establish beyond a reasonable doubt that the jury did not follow the unlawful theory. Ordinarily there is little basis for concluding the jury chose the *lawful* option. As this Court noted in the original appeal, "a jury that is given an illegal instruction cannot be assumed not to have followed it, since juries are neither authorized nor competent to make judgments of law." *Id.* at 602.

Here, as the Supreme Court explained, "[t]wo theories were pursued by the Government on each mail fraud count." Slip op. at 2. The fact that "the evidence was conflicting," 530 F.3d at 599, supports—rather than detracts from—the conclusion that the instructional error was prejudicial. To be sure, a *properly* instructed "jury was entitled to believe" the witness who did not think that the non-compete payments were previously approved management fees, Tr. 3604-10 (Hollinger's controller), but the jury just as plainly was entitled to believe Radler, the government's own star witness—"who pleaded guilty and testified for the government"—when he "said that he thought the audit committee had approved the so-called management fees" (530 F.3d at 599) and that the Paxton payments were undocumented due to an oversight by Kipnis. SA 367.[5] As the Supreme Court noted decades ago in emphasizing that credibility determinations are the jury's province, "[h]ad the jury convicted on proper instructions it would be the end of the matter," but a court must also bear firmly in mind that a properly instructed jury "might have refused to brand" the defendant "a thief." *Morissette v. United States*, 342 U.S. 246, 276 (1952). "Had they done so, that too would have been the end of the matter." *Id.*[6]

3. Mr. Black was also convicted of trying to obstruct the government's investigation based on evidence that his assistant decided to move some of Mr. Black's belongings from their Toronto office to the assistant's Toronto home, where she was setting up a new office as a result of eviction by Hollinger's new management. The government contended that Mr. Black participated in removing certain documents at that time, just one day after SEC counsel informally told Mr. Black's lawyers that a new document request was forthcoming. Because the key issue at trial was whether Mr. Black acted with a "corrupt" intent, there is also a substantial question whether *this* conviction can survive given the prejudice that he suffered from instructions that misled the jury about the law-

[5] It also was for the jury to resolve whether the non-competes covered only a single small newspaper in California, as the government's witness remembered years after the fact, or instead whether they barred competition with every affiliated Hollinger publication (numbering over 100), as the language of the non-competes provided. SA 536; Tr. 9356-57; DX JB Newspapers 1.

[6] The government ultimately recognized this problem with its harmless-error argument. At the merits stage in the Supreme Court it no longer argued (as it had in opposing review) that the jury necessarily found defendants guilty of money-or-property fraud. Instead, it shifted to a theory of harmlessness that presumed—wrongly—that the Court would hold that § 1346 applies beyond cases of bribes and kickbacks. Brief of Respondent at 42.

fulness of the conduct under investigation. In particular, a jury finding that Mr. Black had committed no fraud would have been much more likely to conclude that Mr. Black acted innocently rather than with corrupt intent.

a. The district court denied Mr. Black's application for bail pending appeal in the Supreme Court on the ground that the appeal did not raise a "substantial question of law or fact" with respect to the obstruction conviction. R. 1112 at 2-4. Although Mr. Black's certiorari petition and merits briefs contended that reversal of the fraud counts would require reversal of the obstruction conviction as well, the district court concluded that the obstruction conviction was not properly before the Supreme Court. *Id.* at 3. The government tried the same argument before the Supreme Court but the Supreme Court was less impressed by it. As the Court ruled, Mr. Black's objection to the fraud charge was sufficient to preserve for review the *error* on the fraud counts and require the government to disprove *prejudice* as to all counts that survived the jury's panning of the government's case at trial. *Black*, slip op. at 7 n.12 ("We see little merit in the Government's attempt to divorce preservation of a claim from preservation of the right to redress should the claim succeed."). The government had no better legal basis for insisting that the scope of the prejudice be separately raised in the Supreme Court than it had for the proposition that defendants forfeited this Court's review by refusing to accept a special verdict form, though both contentions were equally directed at saving the government from the consequences of its trial tactics. On remand from the Supreme Court, however, the validity of the obstruction conviction is now squarely at issue in this Court.

There was a serious dispute at trial, well supported by the record, whether Mr. Black "corruptly" intended to obstruct a government investigation. "'Corrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil." *Andersen v. United States*, 544 U.S. 696, 705 (2005) (finding a "clear answer" from this "natural meaning" in interpreting a related subsection of § 1512). Although the government sought to infer the requisite evil intent from the timing of the conduct—one day after the SEC's call to counsel announcing a new upcoming document request—the government had no evidence that anyone even told Mr. Black about this call. In fact, the only evidence showed that Mr. Black's lawyers told him about the call only *after* the materials had been moved. SA 424-28. The government was reduced to arguing that Mr. Black had many lawyers and that surely *someone* told him of the request. Tr. 13872-73. Moreover, Mr. Black fully complied with every request for documents, giving his lawyers free rein to search his office and home in response to each of the *five* previous SEC document requests. SA 485-96; R. 695 (stipulation). Even if there was enough evidence (if barely) to affirm that conviction on sufficiency grounds—the issue before this Court on the initial appeal—now that the Supreme Court has declared the honest-services fraud instructions invalid, the prejudicial effect on the obstruction conviction is ripe for this Court's review. The government cannot reasonably posit that the jury in this case would have been indifferent to the fact that the "crime" that the government primarily urged upon the jury—those enigmatic "two words" that the prosecutor wanted the jury to remember as "*the* fraud in this case"—was not a federal crime at all. Given Mr. Black's compliance with previous requests, the absence of any evidence he even knew about the particular one at issue, the innocent explanation for the removal of the boxes (his imminent eviction), and the absence of any *reason* for obstruction (there was no crime to obstruct), had this jury been properly instructed it would likely have acquitted on this count as well. More relevantly, the government cannot establish beyond a reasonable doubt that the jury would have convicted.

b. Bail would be required even absent a close question on the continued validity of the obstruction conviction. Section 3143(b)(1)(B)(iv) also provides for release when the substantial question on appeal is likely to result in "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." The government has conceded that reversal of the fraud counts would dictate a lower sentencing range for the obstruction count. R. 1112 at 3. The only issue is *how much lower* the sentence might be. *Id.* (government argues that the range would still include a minimum of 51 months). With good-time credit, Mr. Black has already served 32 months of his sentence. If the obstruction count alone remains in place, and if the enhancements to the obstruction sentence based on the amount of fraud for the reversed fraud counts are removed, the range would drop to 15–21 months. R. 1112 at 3; USSG § 2J1.2 (Nov. 1, 2000 edition).[7] The enhancement for $6 million in loss would not apply unless (1) the obstruction of which Mr. Black was convicted "involved obstructing the investigation or prosecution of a criminal offense," USSG § 2J1.2(c)(1), and (2) the amount of loss for which he is held accountable was "known, or reasonably should have been known," by him, USSG § 2X3.1, cmt. (n.1) (Accessory After the Fact guideline, as applied by cross-reference from the Obstruction guideline). With the fraud convictions reversed because the jury may have convicted for conduct that isn't a fraud at all, there would be at least a substantial basis for not applying that fraud loss enhancement.

[7] Under the version of the Guidelines that the district court found applicable, the base offense level would be 12. Even with a two-level enhancement for an aggravating role in the offense, the range (at offense level 14 and criminal history category I) would be 15–21 months.

Nearly a year before the Supreme Court handed down its decision, the district court concluded that the degree to which the sentence would be affected by such a ruling was "simply too speculative" to warrant release. R. 1112 at 4. That no longer holds true. The Supreme Court has now ruled that the honest-services fraud statute does not apply to this case at all. Because the instructional error allowed the jury to convict for something other than money-or-property fraud, it is at least a close question whether a new sentence for obstruction of justice would "likely" be shorter than the time it takes to complete the appellate process. 18 U.S.C. § 3143(b)(1)(B). Even assuming the proceedings are completed in six months, Mr. Black will have served nearly 40 months of his sentence.

CONCLUSION

Mr. Black has been in custody for over two years. At nearly 66 years of age, he has a particularly strong interest in bringing finality to these proceedings. Society's interest in seeing Mr. Black complete his sentence will not be frustrated in the least if, after being released on bail, he does not prevail on remand. But the additional time he spends in prison between now and a favorable ruling can never be returned to him. Mr. Black should be granted release pending appeal.

Respectfully submitted.

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July 6, 2010

CERTIFICATE OF SERVICE

The undersigned, counsel for the Defendant-Appellant, Conrad M. Black, hereby certifies that on July 6, 2010 the following counsel was served with a copy of the foregoing **MOTION FOR BAIL PENDING APPEAL AND SUPPORTING MEMORANDUM OF LAW** by overnight carrier, postage prepaid:

Patrick J. Fitzgerald
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Dated: July 6, 2010

Miguel A. Estrada
by Marc W. Martin
MARC W. MARTIN
ATTY

Miguel A. Estrada