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IN THE
 UNITED STATES COURT OF APPEALS
 FOR THE SEVENTH CIRCUIT

U.S.C.A. - 7th Circuit
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UNITED STATES OF AMERICA,	)	USCA No. 07-4080
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Northern District of Illinois,
v.	)	Eastern Division
	)	
CONRAD BLACK,	)	USDC No. 05 CR 727
	)	
Defendant-Appellant.	)	Judge Amy J. St. Eve

**Government's Response to Defendant Conrad Black's
 Motion for Bail Pending Appeal**

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this Response to Defendant Conrad Black's Motion for Bail Pending Appeal. For the reasons explained below, there is no substantial question as to the harmlessness of the erroneous honest-services instruction on both the money-fraud theory of liability underlying the fraud convictions and the obstruction of justice conviction. In support of this position, the government states as follows:

I. The Actual Honest-Services Fraud Liability in this Case was Co-extensive with the Money-Fraud Liability.

Despite the defendant's attempt to re-cast the actual trial evidence, actual jury instructions, and actual closing arguments in the district court, the actual record shows that the honest-services fraud liability in this case was co-extensive with the money-fraud liability. Thus, the error in the honest-services instruction was harmless beyond a reasonable doubt, *Neder v. United States*, 527 U.S. 1, 17 (1999), because the evidence,

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instructions, and parties presented the honest-services theory to the jury based on the same fraudulent conduct that supported the money-fraud theory.

Indeed, in its prior opinion, this Court has *already* explained that very same basis for harmlessness. After an extensive review of the trial record, the panel concluded that, even if honest-services liability could not be premised (as a matter of law generally) on obtaining a tax break from the Canadian government, the error was harmless (in this case specifically) because “whether they [the defendants] also got (or hoped to get) a tax break from the Canadian government was *not an issue at trial*.” 530 F.3d 596, 602 (7th Cir. 2008) (emphasis added), *vacated on other grounds*, 2010 WL 2518593 (2010). As this Court pointed out, in briefing the appeal, the absence of the tax theory at trial was a point that “the defendants acknowledged, albeit backhandedly,” in their reply brief. *Id.* (quoting reply brief).¹ But, simply put, “It was not the government’s theory at trial.” *Id.* Nothing in the Supreme Court opinion affects that reading of the record.

In explaining the harmlessness of the honest-services instruction, this Court repeated that correct analysis of the record: “The prosecution did not ask the jury to convict the defendants because their private gain was at Canada’s expense.” *Id.* at 602-03. Instead, the record showed that “[t]he government’s honest services theory was straightforward,” namely:

¹Similarly, in their opening brief, the defendants stated that “the main thrust of [the government’s] trial case,” was that defendants stole millions of dollars from their company by fraud, Br. 44, 46, and that such a fraud would “certainly be *both* an honest-services deprivation and a money/property misappropriation,” Br. 48-49 (emphasis added).

It was that the defendants had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete. Had the jury believed that the payments for the covenants not to compete were actually management fees owed the defendants, as the defendants argued, it would have acquitted them.

Id. at 603. Thus, the honest-services liability was co-extensive with the money-fraud liability, and there is no substantial question allowing the defendant to overcome the presumption against bail on appeal. 18 U.S.C. § 3143(b)(1)(B). At the risk of repeating the Court's own analysis of the record, we now detail the arguments, instructions, and evidence, demonstrating that the grounds for liability were the same.

1. *Closing Arguments.* The closing arguments demonstrate the correctness of this Court's determination that the government's straightforward honest-services theory was that the defendants "line[d] their pockets with phony management fees disguised as compensation for covenants not to compete." 530 F.3d at 603.

a. *Initial Closing Argument.* From the get-go of the government's initial closing argument, the government equated the money-fraud theory with the honest-services theory:

Ladies and gentlemen, we are not here because somebody made a mistake. We are not here because somebody forgot to dot their i's or cross their t's. We're not here because somebody was late on a disclosure or because somebody forgot to identify something as a related-party transaction. We are here because five men – these four defendants (indicating), together with David Radler – *systematically stole over \$60 million from the shareholders of Hollinger International; and, because these same five men checked their fiduciary duty to the shareholders of the company at the doorstep.*

Tr. 13631-32 (emphasis added) (first paragraph of government's closing argument).

This equivalent basis of the two fraud theories was repeated over and over, including using the explicit term, “honest services”:

And because the top four executives could not take all the money that they wanted from the company openly and honestly, they lied about it. They lied to the shareholders about the true reasons why over \$60 million went not to the shareholders, but instead to the top four executives and to the company that Mr. Black controlled – Hollinger, Inc.

They *stole money and property* from Hollinger International. They robbed the shareholders of their right to *honest services*, to honest executives who were focused on doing their job loyally for the company. *That is fraud.*

Tr. 13633 (emphases added).

And when simplifying the “legal terms that define these men’s crimes” for the jury, once again the government referred only to the defendants’ stealing of millions via the phony non-competes, with no mention of a tax-break premise:

Now, there are a lot of legal terms that define these men’s crimes, but what it boils down to is really quite simple: Conrad Black, David Radler, Jack Boulton and Peter Atkinson decided on their own to take a slice of the company’s profits – the profits that they were making on these U.S. and Canadian newspaper deals – and, with Mark Kipnis’ help, they created a phoney paper trail to make their actions appear legitimate.

Tr. 13633.

Throughout, the government did not distinguish the *grounds* for the two fraud theories, not even in the passages to which the defendant cites in his bail motion. Def. Mot. at 8. Those passages merely state, not surprisingly, that there *are* two theories of liability. For example, the defendant cites transcript pages 13638-39, but the government did not distinguish the grounds for liability, and instead equated the same conduct as violative of *both* theories:

Stealing money and property is one kind of intent to defraud, and that is serious. Depriving the company and the shareholders of honest services, breaching this duty of loyalty, is just as serious; and, it's part of the fraud that is alleged in this case.

Let's start with the U.S. non-compete scheme. Conrad Black, together with David Radler and other members of his team, built up Hollinger International so that by the time we get to the late 1990s, when all of this starts, it's the massive newspaper empire you've all heard so much about. . . .

Tr. 13639-40. The government's closing then went on at length about the fraud scheme *without* hinting that the honest-services fraud was premised on the Canadian tax-break theory and *without* distinguishing the facts underlying the money-fraud theory from the honest-services theory.

Indeed, later in the closing argument, the government was again explicit in describing the honest-services liability as the fraudulent obtaining of *money* from the *company* via the phony non-competes, not at the expense of the Canadian tax authorities:

And, ladies and gentlemen, I told you at the beginning that this is partly about the theft of money. And it is, because this is stealing 9-and-a-half million bucks. But there's the other part of it, too. *That loyalty, that honest services* that all five of these men owed to the company. Mr. Black owed it, Mr. Radler, Mr. Boulton, Mr. Atkinson, and Mr. Kipnis. . . .

In this deal, they robbed the shareholders of that, too. Because Conrad Black and David Radler and Jack Boulton and Peter Atkinson, they have an obligation to protect *the company's money, to protect the assets. If the buyer wasn't requiring it, they had a duty to make sure that that money went to the shareholders.*

Tr. 13699 (emphases added).²

²Yet another example of the equivalence of the fraud theories was the government's distinction between the conduct of CNHI lawyer (Tom Henson) and CNHI representative

Finally, the wrap-up of the government's initial closing argument equated the grounds for the two fraud theories, again with nary a word about the tax-break as a liability theory:

The crime here is the defendants' lies to the shareholders about why over \$60 million went to Inc. and to the top four executives and not to the company. . . .

* * *

When they're asked about it, they lie about it. And the same pattern, the same thing is true on all these other transactions. It's about stealing money, ladies and gentlemen. And this, this honest services, acting in the corporation's best interests, refraining from taking actions that either conflict with the corporation's interests or that harm the corporation, that meant nothing to them. Nothing."

Tr. 13880-81 (emphases added).³

b. *Rebuttal Argument.* What was true of the government's description of the honest-services theory during the first closing argument is equally true of the government's rebuttal argument. The defendant's citations to particular passages of

(Mike Reed), Tr. 13645, who did not owe an honest-services duty to Hollinger International, and the conduct of defendant Mark Kipnis, who did. Tr. 13829-30 ("Mr. Reed put it a little more succinctly: 'It just didn't seem like the right thing to do.' Mr. Kipnis, Mr. Henson and Mr. Reed are in a room. Mr. Kipnis is asking them to wire this money. They know it stinks to high heaven; but ladies and gentlemen, Mr. Reed and Mr. Henson don't owe a fiduciary duty of loyalty to the shareholders of the company. They don't owe *honest services*. And, frankly, this isn't their *money* that's being taken. *It's Hollinger International's money that's being taken. Mark Kipnis is the one in that room who owes the duty.*") (emphases added).

³Other references to "honest" or "honesty" in the context of fiduciary duties were also explicitly premised on stealing money from the company. *E.g.*, Tr. 13734 ("They trusted these defendants to be honest with them; to be performing these fiduciary duties that each one of the officers had. And by trusting these defendants so much, the defendants were able to steal from the company.")

the rebuttal argument do not show otherwise, Def.'s Mot. at 8-9, and indeed the defendant's quotations leave out key context that makes clear the equivalence of the grounds for liability. For example, the defendant seizes on the government's statement that the defendants had a duty to "act in the corporation's best interests." Def.'s Mot. at 8 (quoting Tr. 14947). But the defendant's motion omits the lead-up to that statement, which explains that fraudulently stealing the *company's money* is the violation of honest services:

And Conrad Black knows this, too, and that's why what he tells the board and the Audit Committee in the May 2001 memo and the shareholders at the shareholders meetings are lies. But why is this fraud they ask you? It's a fair question. They say, well, why is it fraud?

Well, the answer, of course, is it's *Hollinger International's money*. It's the *shareholders' money*, and it's a violation of honest services. Ms. Ruder told you that two of the key points or what I would call two of the key points, but you'll have the judge's instructions, are that these individuals act in the corporation's best interests, that they not do something that conflicts with the corporation's interests or to harm the corporation.

Tr. 14947 (emphases added).

The same flaw applies to the defendant's quotation and criticism of the rebuttal's reference to "shareholders' interests," Def.'s Mot. at 8 (quoting Tr. 14949), where the motion leaves out key context (literally from the next breath) linking the honest-services liability to stealing the company's money:

Keep in mind what we talked about with *honest services*. These guys, shareholders' interests first. *So there's a pot of money on the table*. It's August of 2000. It's the moment of truth. If you have any, any question in your mind about how these guys viewed their fiduciary responsibilities to Hollinger International, please, please come back to this moment in August of 2000 and take a look at what they did behind closed doors. When the shareholders weren't

watching, when no one was watching, take a look at what they did with this pot of \$80 million.

Tr. 14949 (emphases added). The government then went on to explain how at least \$4 million of the non-compete money should have gone to Hollinger International, but instead the defendants split it among themselves. Tr. 14950-53; Tr. 14952 (arguing that Atkinson and Boulton, combined, stole \$4 million).

And the same out-of-context problem undermines the defendant's complaint that the government stated, "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.*" Def.'s Mot. at 8 (emphasis supplied by defendant). But the out-of-context problem is more egregious in this quotation, because the motion literally leaves out the *immediately* preceding sentence and the *immediately* following sentence, both of which demonstrate that the honest-services theory was premised on the same ground as the money fraud:

No. *These are Hollinger International's assets that are being sold. 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. The shareholders of Hollinger International are getting defrauded out of that \$16.5 million because the buyers never wanted this stuff.*

Tr. 15019 (emphases added).

Contrary to the defendant's claim that the government's rebuttal reflected an unanchored honest-services "virtual leitmotif," Def.'s Mot. at 8, the *actual* theme of the rebuttal was the straightforward argument that fraudulently stealing money from the company also comprised the honest-services fraud. Similar to the government's initial

closing argument, the rebuttal also boiled down the honest-services definition to the money-fraud equivalent:

You know, . . . ladies and gentlemen, you'll read the Judge's instructions and you'll see that there is a scheme to deprive the shareholders of honest services of the executives. And you'll see what that means is to *take money from the shareholders or the company, or to gain money from the shareholders of the company*, by means of fraud and deception. Okay? You will see that in the jury instructions."

Tr. 15071 (emphasis added). So, although the defendant alleges that the rebuttal "hammered" the honest-services theory, Def.'s Mot. at 8 (quoting Tr. 15143-44), the rebuttal did no more than rely on the same ground as the money-fraud theory. Indeed, the rebuttal's final factual point, immediately following yet another out-of-context quote by the defendant, was to highlight the damning e-mail from the defendant to Radler in which the defendant celebrated "the splendid conveyance of the non-competition agreements from which you and I profited so well (and deservedly)," and which the rebuttal argued was the "cover story" for the fraud. GA601, Tr. 15144.⁴

c. *Defense Closing Arguments.* As further corroboration of this Court's description of the government's honest-services theory, the defendants' closing arguments also reflected the same understanding, namely, that the honest-services theory was premised on the same conduct as the money-fraud theory. The defendants' closings made no distinction of the premise of the two fraud theories. For example,

⁴"GA" refers to the government's appendix and "SA" to the defendants' separate appendix, both appendices from the initial appeal.

defendant Black's attorneys did not distinguish the two theories, and indeed only mentioned "honest services" one time.⁵

And the other defendants' attorneys anchored the two fraud theories – as did the government – to the same factual premise, not to some Canadian tax-break premise. For example, the defense attorney for defendant Jack Boulton stated, without objection or contradiction by the government:

As I understood it, the nature of the charges in general terminology – let's forget about the legalisms – is that Jack Boulton sat down with people and schemed to defraud at Hollinger International and its *stockholders of money and property*; and, also, *by virtue of that*, he deprived International and its stockholders of his *honest services*.

Tr. 14197 (emphases added). Same for the attorney for defendant Peter Atkinson:

And regardless of whether the government calls it a scheme to steal money or a scheme to deprive of honest services, the intent element is pretty much the same. Either way, the prosecution – oh, and importantly, it's really – when I say it's really essentially the same, it's really the same. It's got to be an intent to defraud, deceive and cheat to get money.

And it's got to be – the most important part of that is they must show that as Peter was receiving these payments, he intended to defraud, deceive and cheat Hollinger.

Tr. 14388-89 ("So, it's got to be getting some kind of money other than compensation in the regular course of business through above-board channels. *But either way, it's to get money.*") (emphasis added). The closing argument, too, for defendant Mark Kipnis did not attempt to rebut any (non-existent) distinction between the grounds for the two

⁵Tr. 14006 ("CanWest was a good transaction. A little rough, a little sloppy, . . . but not illegal, but not . . . a violation of the law. Not a violation of fiduciary duty. Not a violation of honest – of defrauding of honest services. There is nothing wrong with CanWest.")

theories, and instead linked the two fraud theories by their similarity.⁶ In sum, nothing in the government's closing and rebuttal arguments, and nothing in the defendants' arguments, characterized the honest-services theory as anything other than the straightforward stealing of money via the disguised non-competes.

2. *Trial Evidence.* Not surprisingly, the trial evidence too conformed with the overlap in presentation of the two fraud theories. The defendant strives mightily to read much into the jury's acquittals on certain counts, Def.'s Mot. at 3-4, 5-6, but that tea-leaf reading, *see United States v. Powell*, 469 U.S. 57, 68 (1984) (warning that there is no self-evident interpretation of verdicts of acquittal), ignores the simplest explanation of the distinction between the acquitted charges and the counts of conviction. The charges on which he was acquitted all involved payments pursuant to actual non-competition agreements that were, for cover story purposes, at least reduced to writing and made in connection with actual sales by Hollinger of newspaper companies that it owned. In contrast, the counts of conviction were such brazen money frauds that either no newspaper sale was connected to the payments or the non-compete cover story was not even reduced to writing.

Specifically, two of the charges (Counts 1 and 6) on which the defendant was convicted involved payments for a non-competition agreement with one of Hollinger's own subsidiaries that did not involve any newspaper sale. The defendants paid

⁶Tr. 14657 ("And, then, after that, you've heard about the fiduciary duties and all of that. That comes after you find those elements. All 'honest services' are is another kind of property. So, it's money or property or honest services. But you cannot . . . commit a crime by breaching your fiduciary duty without the intent to deceive or cheat.")

themselves \$5.5 million in purported non-compete payments from American Publishing Company (APC), a subsidiary of their own company. No one from International's Board had expressed any concern about the defendants' leaving the company, or competing with APC, GA200, 208-09, and no one had suggested non-competes were necessary to protect International or APC, *id.*; *see also* GA205-06. As the district court recognized, defendants "initiated and executed the fraudulent non-competition agreements on their own," SA191, and there was substantial other evidence from which "the jury could reasonably have concluded that Radler's testimony was simply wrong, and that the \$5.5 million not only came from International (not as pre-approved management fees for Ravelston), but that Defendants knew it came from International," SA193. International's financial controller testified, corroborated with a back-dated documentary trail, that the APC payments did not represent management fees owed to Ravelston and that these payments were not charged against management fees that were due and owing. GA113, 117-18, 402, 407, 412, 417, 420, 438, 445-51, 599. As noted by the district court, "[n]one of these agreements mentions or even suggests that the money was a payment coming from Ravelston's management fees." SA194. Most significantly, there was nothing in the trial evidence that would lead the jury to conclude that some other theory of honest-services liability, not grounded in the money-fraud theory, was a permissible basis for liability on the APC payments.⁷

⁷If the payments were legitimate management fees, there would have been no reason for the defendants to lie to shareholders, in 2002, when shareholders were told the payments

The third conviction (Count 7, the Supplemental Payments) involved payments that were labeled non-competition payments even though no non-competition agreements even existed.⁸ In deals with newspaper-buyers Forum and Paxton, there was \$600,000 from the sales left in the company's reserves, so defendant Black and Radler agreed they would take it and distribute it among Black, Radler, Boulton, and Atkinson. GA249, 250-56. In dividing up the \$600,000, Black and Radler were not following any allocation that had been provided for in the transaction documents, because there were no individual non-compete agreements mentioned anywhere in the transaction documents. Rather, as the district court recognized, they simply decided how to divide up International's money "according to the same formula they had used in the past for non-compete payments." SA198. Again, no matter how the defendant now tries to speculatively interpret the acquittals on other counts, there was nothing about the trial evidence that would lead the jury to believe anything other than what the parties repeatedly argued to them – that the premise for honest-services liability

were "[i]n connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition," and that "[t]he Company's independent directors have approved the terms of these payments." GA577. All of this was false: as the district court noted, "[t]here was no seller, no buyer, no closing, and no transaction." SA190.

⁸Even the defendant himself identified this distinction in his reply brief for the initial appeal. See Def. Reply Br. 4 ("[T]he jury convicted only on counts that lacked non-compete agreements connected to the sale of a newspaper; it acquitted on every count in which a non-compete payment was part of a newspaper transaction.")

for the Supplemental Payments was the phony non-compete payments fraudulently stolen from the company.⁹

3. *Charges / Jury Instructions.* Finally, the charges themselves, as alleged in the superseding information (which the jury was given, R766(GA10-11), as well as the jury instructions, also did not distinguish the premise of the honest-services liability from the money-fraud liability. The superseding information alleged that defendants each had a “duty of undivided loyalty to International,” R407 ¶1(d)-(h), and “repeatedly abused their authority and fiduciary obligations as managers of International in order to fraudulently benefit themselves *at the expense of International and its public shareholders.*” *Id.* at ¶3 (emphasis added). With respect to the APC payments in particular, the information alleged that “[t]he issuance of these checks, as well as the preparation and signing of the *fraudulent non-competition agreements*, were breaches of the fiduciary duty owed by [defendants] because they were benefitting themselves to the detriment of International.” *Id.* at ¶30 (emphasis added).

Nor do the jury instructions create any confusion that the jury could convict on any other honest-services theory. There is not one mention of Canadian tax authorities in the entire jury instructions. R. 771. Indeed, the jury was given two instructions that would make little sense if the honest-services liability were premised on anything

⁹Although there were references to the Canadian tax consequences of non-competes in the evidence at trial, these references simply explained part of the *motivation* for the fraud. The tax consequences explains *why* defendants characterized these payments as bogus non-competes, but that does not mean – nor did the government argue, as exhaustively shown above – that honest-services liability could be premised on obtaining a Canadian tax break.

other than the straightforward theory of disguised non-competes: first, that there is no breach of the duty of loyalty if the financial transaction at issue was the product of “fair dealing” and the defendants set a “fair price.” R. 771 at 25. If the jury really believed that the non-compete payments were in fact legitimate, owed management fees, then the jury would have acquitted based on this instruction.¹⁰ Similarly, the jury was instructed that if the defendants disclosed all the material facts to the Board or Audit Committee, or the Board or Audit Committee had “approved or ratified the transaction,” that is, the payments were really legitimate, owed management fees, then again the jury must find no breach of the duty of loyalty. R. 771 at 26. But the jury did not do so. Based on the closing argument, the evidence, and the instructions, this Court was correct to conclude, in the first appeal, that any honest-services error would be harmless because the honest-services theory of liability was co-extensive with the money-fraud theory of liability.¹¹

¹⁰See 530 F.3d at 603 (“Had the jury believed that the payments for the covenants not to compete were actually management fees owed the defendants, as the defendants argued, it would have acquitted them.”)

¹¹To be sure, in a post-trial response, the government did briefly join in the defendants’ post-trial speculation that the jury “could” have found liability on the tax-break theory. R. 904 at 11. But the government’s limited explanation did not closely analyze the evidence and jury instructions, and did not at all analyze the closing arguments; in other words, the post-trial response did not engage in harmless error analysis. Furthermore, the response immediately thereafter made clear that the money-fraud theory was the actual basis for guilt in light of the overwhelming evidence. R. 904 at 11-15. In rejecting defendants’ post-trial motions, the district court did not rely in any way on speculation that the jury could have found liability on the tax-break theory, R. 929, because there was no evidence or argument to support such a theory.

II. There Is No Substantial Question over the Obstruction Conviction.

Even if there was a substantial question on the fraud convictions, the obstruction conviction provides an independent basis to deny the bail motion because there is no substantial question over that conviction's validity. First, the defendant might very well have waived any argument that reversal of his fraud convictions would also require reversal of his obstruction conviction. The defendant raised many challenges to all of his convictions in the first appeal, but he never argued that his challenge to the jury instructions on honest-services fraud would require reversal of his obstruction conviction. The defendant attempts to transform the Supreme Court's ruling on the special-verdict form issue into support for the non-waiver of the argument, Def. Mot. at 17, but that issue does not come close to addressing the failure to raise challenges to other counts, nor does he explain how the government or this Court is supposed to divine, *sua sponte*, that a defendant who challenges one set of convictions is also, silently but presumably automatically, making a 'prejudicial spillover' argument as to other convictions. Imagine if during the first appeal, having said nothing in the opening brief about how the fraud convictions' vacatur would also result in the obstruction conviction's vacatur, the defendant had argued in his reply brief that the government should be faulted for not addressing what should happen to the obstruction conviction. The defendant has waived the spillover argument.

Second, in any event, the defendant's prejudicial spillover argument is meritless. Only if the purportedly prejudicial evidence "would not have been admitted but for the dismissed charges" is there even the need to evaluate prejudice. *United States v.*

Prosperi, 201 F.3d 1335, 1345 (11th Cir. 2000).¹² Here, almost all (if not all) of the evidence would have been admitted even if the government had not charged the defendant with honest-services fraud because, as explained extensively above, the money-fraud theory was premised on the same factual conduct, namely, that the defendants stole money from the company via the bogus non-competes.¹³ Thus, the defendant cannot show any erroneous introduction of evidence that could possibly give rise to prejudice.

Furthermore, the evidence of the obstruction, and the defendant's corrupt intent, was strong. With full knowledge of an SEC investigation, grand-jury investigation, and criminal investigation closing in on him, the defendant knowingly removed 13 boxes of pertinent documents from his Toronto office, sneaking them out the back after his assistant was prevented from removing them earlier in the day. The jury saw the defendant's actions on video tape – a building-security video camera had been installed in a position that the defendant did not know about. Everything the defendant did in sneaking out the boxes was evidence of corrupt intent: waiting until after the building was closed and the guards had changed shifts; carrying the boxes out himself rather than asking the security guard to help (as his assistant had done earlier in the day).

¹²See also *United States v. Cross*, 308 F.3d 308, 317 (3d Cir. 2002); *United States v. Edwards*, 303 F.3d 606, 640 (5th Cir. 2002); *United States v. Rooney*, 37 F.3d 847, 855-56 (2d Cir. 1994).

¹³Indeed, almost all of the evidence would have been admissible even if the government had charged the defendant only with obstruction of justice, because the evidence would have been relevant to prove that applicant acted with the requisite "corrupt[]" intent, 18 U.S.C. § 1512(c)(1); see Fed. R. Evid. 404(b).

Nothing about this Court's decision on the fraud counts will affect this evidence and the defendant's obstruction conviction.

Next, the defendant argues that, even if there is no substantial question over the obstruction conviction, the potential for a reduced sentence on that count justifies bail. That argument assumes, of course, that there is a substantial question on the fraud counts (there is not), but even if there is on those counts, there is no substantial reason to believe that the obstruction sentence would be reduced so much that the defendant should be released pending appeal.

Specifically, in determining applicant's sentence, the district court began by calculating that the total offense level for the fraud counts alone was 28. The court next calculated that the total offense level for the obstruction count alone was 24 – a base offense level of 22, plus a two-level enhancement because the defendant directed others who assisted in his obstruction offense. The court then applied the grouping rules to arrive at a combined adjusted offense level of 28, which together with defendant's criminal history category of I, yielded an advisory Guidelines range of 78 to 97 months. The court imposed a sentence on the obstruction count of 78 months.

If the defendant were resentenced on the obstruction count alone, the total offense level of 24, combined with his criminal history category, would still yield an advisory range of 51 to 63 months. Assuming the district court again imposed a sentence at the low-end of the range, the defendant's sentence would be 51 months. Thus, even assuming the defendant is correct that he has effectively served 32 months

of imprisonment (taking into account credit for good behavior), he would still have a substantial portion of his sentence left to serve.¹⁴

Contrary to the defendant's argument, Def. Mot. at 19, the offense level of 24 would not drop to level 14. First, the defendant again has waived this argument: he would not be entitled to revisit that calculation on remand because he made no objection to it at his initial sentencing or on appeal. See *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) ("A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal [where] the remand did not affect it."). The defendant should have raised the challenge in the district court or at least with this Court because it would have been relevant had the fraud counts been reversed. In any event, speculation about whether the lower courts would permit recalculation of the offense level for the obstruction count and how the district court might recalculate that offense level would not suffice to carry applicant's burden of showing that it is "more likely than not" that he would receive a sentence shorter than the time it will take this Court to issue its merits decision. See *United States v. Bilanzich*, 771 F.2d 292, 298 (7th Cir. 1985).

Even if the Guidelines argument was preserved, the offense level would not drop as the defendant contends. As the district court recognized, the obstruction Guideline provides that when a defendant's obstruction offense "involved obstructing the investigation or prosecution of a criminal offense," the court should calculate the base

¹⁴The parties will file position statements within 21 days of the Supreme Court's issuance of the judgment, which will issue around 25 days after June 24, 2010. Cir. R. 54.

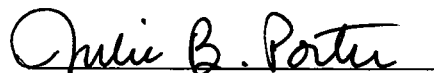
offense level using Sentencing Guidelines § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, rather than § 2J1.2, if § 2X3.1 would produce a higher offense level. U.S.S.G. § 2J1.1(c)(1). Section 2X3.1(a)(1) provides for a base offense level six levels lower than the offense level for the criminal offense the investigation or prosecution of which was obstructed. Because, as the district court determined, the defendant obstructed the investigation and prosecution of fraud, and the offense level for that fraud offense was 28, the base offense level for the obstruction count would be 22. With the adjustment for his role in the offense, the total offense level would be 24.

Contrary to the defendant's unsupported argument, Def.'s Mot. at 19, the cross-reference to § 2X3.1, and the corresponding incorporation of the fraud-loss increase, would still apply even without the fraud convictions. The cross-reference applies "without regard to whether [the] defendant or anybody else was convicted of the underlying offense, or whether an offense could be shown to have been committed at all." *United States v. McQueen*, 86 F.3d 180, 182 (11th Cir. 1996); *United States v. Arias*, 253 F.3d 453, 459 (9th Cir. 2001) (citing cases); *United States v. Quam*, 367 F.3d 1006, 1009 (8th Cir. 2004); *United States v. Kimble*, 305 F.3d 480, 486 (6th Cir. 2002). Bail should be denied.

Respectfully submitted,

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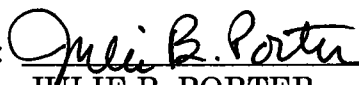
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 07-4080
	)	
Plaintiff-Appellee,	)	Appeal from the United States
	)	District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
CONRAD M. BLACK,	)	05 CR 727
	)	
Defendant-Appellant.	)	Honorable Amy J. St. Eve

Certificate of Service

I, Julie B. Porter, hereby certify that on July 15, 2010, I caused a copy of the Government's Response to Defendant Conrad Black's Motion for Bail Pending Appeal to be served upon the following by first-class, postage-paid mail, and by electronic mail:

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