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 REPLY MEMORANDUM IN SUPPORT OF BAIL PENDING APPEAL

U.S.C.A. — 7th Circuit
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After losing on every argument it proffered to the United States Supreme Court—indeed, after failing to garner a single vote for *any* of its contentions—the government now opposes bail. But its brief does not properly address (much less satisfy) the relevant legal standards. It does not even try. Indeed, the government refuses even to acknowledge either the nature of the problem or the exacting burden it is required to meet. The problem is that the jury was instructed on two *alternative* legal theories of "mail fraud," one of which (1) isn't mail fraud at all *and* (2) was much easier for the jury to find than mail fraud. As the government concedes (Opp. 1), the law requires the government to demonstrate beyond a reasonable doubt that the jury did not take the easy way out and convict on the theory that isn't a crime. *United States v. L.E. Myers Co.*, 562 F.3d 845, 855 (7th Cir. 2009). The government does no such thing. Instead, it marshals *only* the evidence and the arguments that supported its theft theory to contend that the jury *must* have convicted on that theory merely because it *could* have. The government does not cite a single case that supports this sufficiency-of-the-evidence approach, most probably because (as we demonstrated without pertinent rebuttal by the government) it and analogous arguments consistently have been rejected in this Circuit and others. *See, e.g.*, *United States v. Cappas*, 29 F.3d 1187, 1194-95 & n.4 (7th Cir. 1994).

The government takes the same flawed approach with respect to the merits of the obstruction conviction, though it cannot resist suggesting first that Mr. Black "might very well have waived" a challenge to this conviction. Opp. 16. The government's quick appeal to yet another set of forfeiture contentions is a good barometer of the weakness of its argument on the merits. The government neglects to disclose that it raised the same forfeiture arguments in the Supreme Court—which received them with the same enthusiasm with which it greeted its "honest services" theories. Then, as it does now, the government argued that any consideration of the ob-

struction count was foreclosed because Mr. Black had not separately argued before this Court that obstruction would fall if fraud did. Mr. Black pointed out that his appeal before this Court did challenge the sufficiency of the obstruction conviction, that the government was confusing error with prejudice (on which the government bears the burden once error is established), and that, even assuming merit in the government's forfeiture argument, the government had itself forfeited it by not mentioning it in response to the certiorari petition as the Supreme Court Rules require. Sup. Ct. R. 15.2; *see also United States v. Caputo*, 978 F.2d 972, 975-76 (7th Cir. 1992) (appellee may "waive[] waiver"); *United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991) ("the government has now waived waiver as a defense"). It is obvious that the Supreme Court agreed with the latter point because the scope of the Court's remand does not include the preservation issue, which is what the Court provides when it believes that preservation is subject to real dispute. *Compare Christian Legal Soc'y v. Martinez*, No. 08-1371 slip op. at 31-32 (U.S. June 28, 2010) (Ginsburg, J) ("On remand, the Ninth Circuit may consider CLS's pretext argument *if, and to the extent, it is preserved*") (emphasis added), *with Black v. United States*, No. 08-876, slip op. at 8 n.14 (June 24, 2010) (Ginsburg, J) (remanding merits of spillover argument).

It is also clear that the Court rejected on the merits the government's attempt to conflate error and prejudice. *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"). And despite the government's *assertion* that *its* evidence on obstruction was "strong" (Opp. 17), the *fact* is that the jury had an ample evidentiary basis for crediting Mr. Black's innocent explanation for moving his personal effects out of Hollinger's offices: he had been *evicted* and needed to find a new place for decades' worth of accumulated effects. Indeed, the removal of *thirteen boxes* in broad daylight, with two staffers in train and in full view of security cameras,

does not exactly bespeak an intent to hide documents from investigators, especially when (1) the government produced *no* evidence that anyone told Mr. Black of a *sixth* document request, (2) he fully complied with all prior ones, and (3) apart from personal papers, the boxes contained nothing of relevance that had not already been produced. Had the jury been aware that the government's "honest services" theory was bunk, it easily could (and likely would) have acquitted Mr. Black on obstruction.

ARGUMENT

Mr. Black Meets the Statutory Requirements For Bail

1. The government's defense of the fraud convictions studiously ignores both the jury instructions and the evidence in the case because it refuses to accept the governing legal standards. And it accuses Mr. Black of portraying the prosecutors' summation arguments "out of context" even though the pages of additional "context" that it believes relevant actually demonstrate why the government is wrong. On the instructions: one would never know from the government's opposition that, as the Supreme Court expressly noted, it pursued at trial "alternative theories" on which the jury was charged "discretely." *Black*, slip op. at 1, 2. Nor would a reader know that the "honest services" instructions extensively informed the jury of Delaware law requirements, which even if violated fall quite short of fraud by theft. Indeed, the jury could convict by finding nothing more than naked nondisclosure in violation of a fiduciary duty, which certainly would not require any findings on the key elements of *real* mail fraud. And, of course, the jury was instructed that it need *not* be unanimous on which theory supported the "scheme" element, and thus the government now must demonstrate beyond a reasonable doubt that *not a single juror* relied on the flawed Delaware theory. The government disputes none of this. Yet the government, which regularly urges appellate courts that juries are presumed to follow instructions, *see*

Richardson v. Marsh, 481 U.S. 200, 211 (1987), here ignores both the instructions and this legal rule.

The government asserts that the jury must have convicted on theft because the government *argued* to the jury that the same evidence supported both of its theories. One would think the one thing that it is obvious from this verdict is that the jury did *not* convict based on what the government *argued*—the jury *acquitted* Mr. Black on the bulk of the charges urged by the prosecutors, including their most incendiary "theft" allegations. Moreover, if the government's theory of the case was indeed solely "theft," there is no explanation for why the government fought tooth and nail at every conceivable opportunity during this long trial to present the jury with a theory of conviction that required much *less* than theft. Asking jurors to decide whether stealing one's employer blind also suggests "dishonesty" makes as much sense as asking them whether stealing also shows poor manners. The "honest services" theory manifestly was submitted to the jury to give them an *easier* basis for finding fraud *apart* from theft.

Moreover, what the government leaves out, but what the law requires this Court to consider, is not what the government *argued* but the evidence and arguments that supported the *defense*. The Supreme Court long ago rejected the notion that harmless error analysis is a sufficiency-of-the-evidence test—what the government is arguing here—even for non-constitutional errors that require much less of a showing than the "beyond a reasonable doubt" burden that the government is required to shoulder here. *See, e.g.*, *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Yet the government ignores this rule as it ignores the compelling record evidence that undermines its "theft" arguments. For example, the government's own star witness consistently testified that the money in the APC counts (counts 1 and 6) was not stolen but had been earned by the defendants (and approved by the Board) as management fees. And the evidence also sup-

ported defendants' contention that the non-competes that underlay count 7 had been approved by Hollinger's Executive Committee (and later the full Board, unanimously) but were not documented because of an oversight by Kipnis. Given the honest-services instructions, however, the jury could easily convict on these counts if it believed that the defendants stole nothing but nonetheless failed to comply with this or that nicety of Delaware law—including simply failing to disclose the receipt of a *lawful* tax benefit abroad.[1] That is especially likely here because the jury did not believe the bulk of the government's evidence.

Citing *United States v. Powell*, 469 U.S. 57 (1984), the government faults Mr. Black for "speculating" on the meaning of the raft of acquittals with which the jury greeted the government's "theft" arguments. Opp. 11, 13. *Powell*, of course, states the venerable rule that an inconsistency in the jury's verdict is not itself an *error* that warrants reversal. Here, however, the Supreme Court already has found (unanimously at that) that there was indeed an *error*—the jury was given the option to convict for something that isn't mail fraud. It is the government's burden now to demonstrate beyond a reasonable doubt that *this* jury did not convict on the basis of the legally erroneous theory.[2] The fact that the jury was not prepared to buy the bulk of the government's evidence is *highly* relevant to this *prejudice* inquiry, as this Court and others have observed in numerous cases the government does not trouble to cite. *See United States v. Santos*,

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[1] In the precious few lines that the government accords to the jury instructions, it asserts that the jury would have to find theft because one snippet of the Delaware instructions required the jury to find "fair dealing." (Opp. 15). But the instructions permitted the jury to find an absence of "fair dealing" solely on the basis that something was not "*disclosed*" to the directors. This would fully permit conviction even if defendants stole *nothing* but the jury believed that they should have more fully apprised the Board of their Canadian tax status or any other fact. Moreover, neither this nor any other Delaware-law instruction required the jury to find a *specific intent to defraud*, as we have noted without any pertinent rebuttal from the government. Mot. 7. *See 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] The point here, unlike in *Powell*, is that there *wasn't* an inconsistency in the verdicts. The jury rejected every count grounded in theft and convicted on those that could be supported by the government's invalid honest-services fraud theory.

201 F.3d 953, 965 (7th Cir. 2000) (Posner, C.J.) ("Although the evidence against Santos was considerable, the case was not so completely one-sided against her . . . . The jury acquitted Santos of about half the counts in the indictment and might have acquitted her of some or even all of the rest had the trial judge not committed the litany of errors that we have enumerated.").[3]

Finally, the government asserts that this Court already found that the error at issue is harmless and, "[a]t the risk of repeating the Court's own analysis," proffers a long list of quotations purporting to show that it consistently *argued* both of its theories to the jury. Opp. 3. What this Court already found is that *Yates* errors may be susceptible to "harmless error" analysis (as indeed they are), and that an honest service instruction that omits a qualification is not necessarily *Yates* error. Mot. 14-15. That has nothing to do with the issue that is now before this Court, because the Supreme Court has found that the case was submitted to the jury on alternative theories of liability one of which *is* erroneous. Moreover, the analysis that the government fears "repeating" has never been proffered by this Court, and it is wrong on its own terms. The italicized language in the quotations from the summations actually demonstrate our point: the government repeatedly urged *alternative* theories, theft *and* checking "fiduciary duty to the shareholders of the company at the doorstep" were each mail fraud. Opp. 3 (emphasis omitted). The government seems to believe that "context" is needed to demonstrate that it argued that Mr. Black stole money. The government assuredly did argue that, though without much success in the jury box. The *Yates* problem is not that the government failed to argue theft but that it consistently proffered "honest services" as a basis for conviction as well, that the Delaware law instructions made

[3] *See also United States v. Acker*, 52 F.3d 509, 518 (4th Cir. 1995) ("The government argues that admission of this statement was harmless error, but we cannot say that it was harmless beyond a reasonable doubt. The defendant was tried on four counts of bank robbery and was acquitted on two of these counts, and we are in no position to say that, absent the hearsay testimony, she would not have been acquitted on the other counts."); *United States v. Slade*, 627 F.2d 293, 308 (D.C. Cir. 1980) ("The Court cannot [find the error harmless] here. The jury did not believe most of the evidence against Watson. He was acquitted on four substantive counts.").

this option the easy way out for the jury, and that the prosecutor urged the jury in rebuttal that "honest services" were the two words it should take back to the jury room. *See, e.g.*, Tr. 15143-44 (AUSA Sussman: "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."). The government has no answer to that, because it has previously conceded that the jury easily could have convicted even if Mr. Black stole nothing. *See* Mot. 14. That concession, apparently, is no longer operative. Opp. 15 n.11. Nothing better illustrates the government's willingness to say anything in order to retain these manifestly flawed convictions.

2. The government does not dispute that the obstruction charge was closely intertwined with the fraud charges, but asserts that this conviction should survive because (1) much the same evidence could have been admitted in the absence of an honest services charge, and (2) its evidence of "corrupt intent" was "strong." Opp. 16-17. Whether or not the same evidence would come in if the minutiae of Delaware law were not at issue, the government's spillover argument does not even address the argument we made: that *this* jury, which *acquitted* Mr. Black on the bulk of the government's case, would likely have credited his innocent explanation for removing his effects if they had known that the honest services theory (on which the three fraud convictions most likely rested) was not mail fraud. The supposedly "strong" evidence the government touts is not merely consistent with, but actually supports, that innocent explanation. The removal of a near truckload of property, in the sight of witnesses and cameras, while the sun is high in the sky is not a mark of surreptitiousness. And the evidence that the government leaves out, such as the testimony that his lawyers had not advised him of the latest document request, the fact that he had given his lawyers free rein to produce everything under the sun, and the testimony of his assistant that he was not even aware of the precise contents of the boxes made that

interpretation compelling. The jury could well believe that his defiant conduct showed pique, arrogance or even anger at the forces that were driving him out of the great company that he created from a single newspaper. But none of that is obstruction of justice. The error cannot possibly be harmless where it affected the most "hotly contested aspect" of the obstruction charge: whether Mr. Black acted with a corrupt intent. *See L.E. Myers Co.*, 562 F.3d at 855.

3. Even if the obstruction conviction stands, it is at least a close question whether the new sentencing range would likely produce a sentence shorter than the time Mr. Black has *already* served, let alone shorter than the time it will take to complete his appeal. The government opposes bail on this ground by again resorting to a spurious waiver argument—*i.e.,* Mr. Black was required to raise with the district court "or at least with this Court" the point that his obstruction offense level would need to be recalculated if his fraud convictions were ever reversed. Opp. 19. The government's authority, *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996), states nothing of the sort. It instead instructs district courts not to consider sentencing issues *unaffected* by an error that prompted remand. *Id. Parker* explicitly *permits* consideration of issues, such as the one here, that "aris[e] out of the correction" of an error on appeal. *Id.*[4]

The government does not dispute that the obstruction sentencing range—without the $6.1 million loss enhancement for the underlying mail fraud counts—would be 15 – 21 months. Instead, it contends that this "fraud-loss increase[] would still apply even without the fraud convictions." Opp. 20. But the issue is not whether a cross-reference to USSG § 2X3.1 is available absent conviction of the underlying offense. Instead, the district court first would need to find at resentencing that Mr. Black endeavored to obstruct the investigation or prosecution of a *criminal*

[4] In any event, Mr. Black *did* argue in this Court that reversal of the fraud counts "might also alter some of the enhancements applied by the district court in calculating the guideline recommendation, including Black's obstruction conviction." Opening Brief of Defendants-Appellants at 100, 530 F.3d 596 (7th Cir. 2008).

violation where one of its theories of corrupt intent was that Mr. Black tried to interfere with a *civil* investigation by the SEC.[5] And even then, the court would add to the base offense level of 6 for fraud only those *specific offense characteristics* based on facts "that were known, or reasonably should have been known, by the defendant." USSG § 2X3.1, cmt. (n.1) (2009); *United States v. Girardi*, 62 F.3d 943, 946 (7th Cir. 1995) ("'known' or 'reasonably known'" proof requirement applies to specific offense characteristics that would be added to the base offense level for the underlying offense). If the jury rejected money-fraud and instead convicted for deprivation of honest services—changing the loss from $6.1 million to zero—it is at least a close question whether there Mr. Black knew or reasonably should have known of *any* loss.

No case supports applying a multi-million dollar loss enhancement simply because an agent of the government suspected, at *some* phase of the investigation, that so serious an offense had been committed. The cases do not even allow the offense *as later charged* to control the outcome. "[W]e refuse to hold, as the Government has urged, that a district court must always find that the 'underlying offense' is the most serious charged offense." *United States v. Dickerson*, 114 F.3d 464, 468 (4th Cir. 1997). The government's cases instead address offenses that undeniably occurred—*e.g.*, *United States v. Arias*, 253 F.3d 453 (9th Cir. 2001) (obstruction of drug conspiracy and double homicide investigation)—and go on to hold that the government need not prove "that *the defendant* engaged in the underlying crimes." *Id.* at 458 (emphasis added).

If the fraud counts are reversed because the jury may well have convicted for something that was not fraud, it is far from clear that the loss enhancement essential to the government's

[5] The jury was allowed to find that Mr. Black endeavored to obstruct either civil *or* criminal proceedings, GA 36, and the verdict did not specify the object. In the analogous context of multi-object conspiracies, a higher sentence does not apply unless the district court, "sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense." USSG § 1B1.2, cmt. (n.4) (requiring "[p]articular care" in such cases).

sentencing range calculation would still apply. Because that question is also a substantial one, Mr. Black is entitled to bail.

CONCLUSION

Mr. Black should be granted release pending appeal.

Respectfully submitted.

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July 16, 2010

CERTIFICATE OF SERVICE

The undersigned, counsel for the Defendant-Appellant, Conrad M. Black, hereby certifies that on July 16, 2010 the following counsel was served with a copy of the foregoing **REPLY MEMORANDUM** by overnight carrier, postage prepaid:

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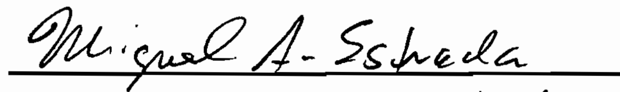

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