IN THE SUPREME COURT OF THE UNITED STATES

No. 08A1063

(No. 08-876)

CONRAD M. BLACK, APPLICANT

v.

UNITED STATES OF AMERICA

ON APPLICATION FOR BAIL PENDING CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General, on behalf of the United States, respectfully files this memorandum in opposition to the application for bail pending this Court's review on writ of certiorari.

STATEMENT

1. Applicant was Chief Executive Officer and Chairman of the Board of Hollinger International, Inc. (Hollinger), which owns newspaper companies. When Hollinger sold one of its newspapers, it sometimes entered into a non-competition agreement under which it agreed not to operate a newspaper near the newspaper it had sold for a certain period of time after the sale. Applicant and other Hollinger executives abused that practice to pay themselves

millions in bogus non-competition fees from funds that belonged to Hollinger. Based on that misconduct and his efforts to prevent its detection, applicant was convicted of three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346, and one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). Pet. App. 1a-2a; App., infra, Exh. A at 1-4, 6.[1]

Two of the mail fraud convictions involved $5.5 million that applicant and his co-schemers received in exchange for promises not to compete with APC, one of Hollinger's subsidiaries. Unlike other non-competition agreements executed by Hollinger, the APC agreement did not involve the sale of any newspapers, but was essentially a promise by applicant and the other executives not to compete with a company they themselves owned. No realistic prospect existed that applicant and the others would compete with APC, which owned only one newspaper in Mammoth Lake, California, a town of only 7000. Applicant and the others did not disclose the agreement to either Hollinger's board of directors or its audit committee, which was required to approve transactions between Hollinger's executives and the company or its subsidiaries. When the payments were eventually disclosed, in Hollinger's 10-K filing with the Securities and Exchange Commission (SEC), they were described as "non-competition" payments made "in connection with the sales

[1] As used in this memorandum, "Pet. App." and "Pet." refer to the petition appendix and the petition in No. 08-876. "Appl." refers to the application for bail submitted to Justice Stevens.

of * * * newspaper properties" "to satisfy a closing condition," with the "approval" of Hollinger's "independent directors." Every part of that description was false. Pet. App. 2a-4a; App., infra, Exh. A at 8-10, 16.

At trial, applicant and his co-defendants argued that the $5.5 million constituted management fees legitimately owed to them but mischaracterized as non-competition payments to obtain favorable tax treatment in Canada, where applicant and other recipients lived. No document, however, indicated that the $5.5 million was ever approved by Hollinger or credited to the management-fees account on its books; the checks were drawn on APC, from which the defendants had no right to management fees; the payments were made to the defendants personally, while management fees were generally paid to a company that they owned; and the payments came from the proceeds of a newspaper sale rather than from a management-fee account. Pet. App. 3a; App., infra, Exh. A at 11-12.

Applicant's other mail fraud conviction involved the theft of $600,000 in proceeds from the sale of newspapers to two other companies. No individual non-competition agreements were executed in connection with those sales; nor did the purchasers request any such agreements. Nonetheless, applicant and his co-schemers paid themselves $600,000 from the sale proceeds without disclosing the transactions to Hollinger's audit committee. And, as with the APC payments, the payments were falsely characterized in the SEC filing

as made to satisfy a closing condition, in connection with the sale of newspapers, pursuant to non-competition agreements, and with the approval of Hollinger's independent directors. App., infra, Exh. A at 14-16.

As the fraud scheme came to light, the SEC, as well as law enforcement authorities and a federal grand jury, opened investigations into applicant's misconduct. Applicant was aware of those investigations and proceedings. Although many documents had already been subpoenaed, on approximately May 19, 2005, the SEC sought additional documents from applicant. On May 20, 2005, applicant instructed his personal assistant to remove from his office at 10 Toronto Street 13 boxes containing files that included documents relevant to the SEC and criminal proceedings. After his assistant was prevented from removing the boxes, applicant drove to the building with his chauffeur and parked in a location where he did not typically park. Applicant, his assistant, and his chauffeur then removed the boxes from a back stairway. A security video showed applicant pointing out security cameras in certain parts of the building. Unbeknownst to applicant and his assistant, another video camera had just been installed the day before and captured applicant removing the 13 boxes from the premises. App., infra, Exh. A at 26-27; App., infra, Exh. B.

2. At trial, the government presented two overlapping theories on the mail fraud charges: (1) applicant and his co-

schemers stole money from Hollinger by fraudulently paying themselves bogus non-competition payments; and (2) applicant and his co-schemers, in making the bogus non-competition payments to themselves, deprived Hollinger of their honest services as managers of the company. The district court instructed the jury that it could find the defendants guilty under either theory. App., infra, Exh. C. Because the defendants objected to the use of a special verdict by which the jury would have indicated whether it relied on the money-or-property theory, the honest-services theory, or both, the jury rendered only a general verdict. Pet. App. 10a-11a.

The jury found all of the defendants guilty of the three mail fraud counts described above and found applicant guilty of obstruction of justice, based on his removal of the 13 boxes of documents from his office. App., infra, Exh. A at 6. The district court denied applicant's motions for judgments of acquittal on the fraud counts, concluding that the evidence was more than sufficient for the jury to find him guilty on both a money-or-property fraud theory and an honest-services fraud theory. Id. at 6-16. The court also concluded that there was more than ample evidence for the jury to find applicant guilty of obstruction of justice. Id. at 25-27. The court sentenced applicant to 60 months of imprisonment on each mail fraud count and to 78 months of imprisonment on the obstruction of justice count, to be served concurrently. App., infra, Exh. D at 2.

3. Applicant filed a motion in the district court seeking release pending appeal. The court denied the motion, finding that he had not raised a "substantial question of law or fact" likely to result in reversal or a new trial. Appl. Exh. G at 1. Applicant renewed his motion in the court of appeals. The court of appeals found that he had raised a "substantial" question about the validity of two of his mail fraud convictions based on his challenge to the jury instructions on honest-services fraud. Appl. Exh. H at 1. But the court nonetheless denied bail because applicant had also been convicted of obstruction of justice and "sentenced on that count to 78 months, substantially longer than the normal course of an appeal." Id. at 2.

4. The court of appeals affirmed the convictions of applicant and his co-defendants. Pet. App. 1a-17a. The court found that the evidence was sufficient to establish "a conventional fraud, a theft of money or other property from Hollinger by misrepresentations and misleading omissions." Id. at 4a. And, because that theft was also "a misuse of [the defendants'] positions at Hollinger for private gain," the court concluded that the evidence was also sufficient to support a finding that the defendants "deprived their employer of its right to their honest services." Id. at 5a. The court also rejected applicant's challenge to the sufficiency of the evidence on his obstruction conviction, concluding that the government presented "ample" evidence that he had concealed

documents with the intent to impair their availability for use in an official proceeding. Id. at 13a.

In addition, the court rejected the defendants' contention that the jury instructions on honest-services fraud were deficient because they failed to require a finding that the defendants' fraudulent scheme contemplated harm to Hollinger. Pet. App. 6a-9a. The court further held that, even if the instructions on honest-services mail fraud were incorrect, the error was harmless. Id. at 9a-10a. The court rejected the possibility that the jury might have found the defendants guilty based solely on a finding that they fraudulently mischaracterized management fees to which they were legitimately entitled in order to gain a tax benefit in Canada. The court noted that the government did not ask the jury to find the defendants guilty of honest-services fraud based on that theory; rather, the government's theory 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." Id. at 10a. Accordingly, the court concluded, if the jury had believed that the payments were actually management fees, as the defendants argued, then it would have acquitted them. Ibid. The court of appeals also held, in the alternative, that the defendants had forfeited their challenge to the jury instructions by objecting to the government's request for a special verdict. Id. at 10a-11a.

5. This Court subsequently granted the petition for a writ of certiorari in No. 08-876, filed by applicant and co-defendants John A. Boultbee and Mark S. Kipnis. The petition presented two questions: (1) whether the jury instructions on honest-services fraud were deficient because they did not require the jury to find that the defendants contemplated economic or other property harm to Hollinger; and (2) whether the court of appeals erred in holding that the defendants forfeited their claim of instructional error because they objected to the use of a special verdict. The petition did not present any question about the validity of applicant's conviction for obstruction of justice. Nor did it present any issue relating to applicant's 78-month sentence on the obstruction conviction. See Pet. i.

ARGUMENT

BAIL SHOULD BE DENIED BECAUSE A RULING IN APPLICANT'S FAVOR ON THE QUESTIONS ON WHICH THE COURT GRANTED CERTIORARI IS NOT LIKELY TO RESULT IN REVERSAL OF ALL HIS CONVICTIONS OR A PRISON SENTENCE SHORTER THAN THE TIME IT WILL TAKE THE COURT TO ISSUE ITS DECISION

As applicant recognizes (Appl. 6), he may obtain bail only if he can show that a favorable ruling on the questions on which this Court granted certiorari would likely result in either reversal of all the counts on which he was convicted or resentencing to a prison term that will end before this Court is expected to issue its merits decision. Applicant cannot make that showing. A merits ruling in his favor will at most result in reversal of his fraud convictions, leaving his obstruction conviction intact. And

applicant cannot show that it is likely that resentencing on the obstruction conviction will result in a sentence shorter than the time it will take this Court to render its merits decision.[2] In any event, if this Court had any doubt about the length of the sentence applicant would receive on an obstruction conviction alone, the Court should not itself speculate about the likely sentence but should deny the application for bail with leave to re-file in the district court, which has not yet had the opportunity to address that issue.

1. The Bail Reform Act of 1984 (Bail Act), 18 U.S.C. 3141 et seq., imposes stringent restrictions on the availability of bail pending appeal and certiorari. See Eugene Gressman et al., Supreme Court Practice § 17.15, at 884-885 (9th ed. 2007); United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir. 1985). The Bail Act mandates that a convicted criminal who has been sentenced to imprisonment remain detained pending appeal and certiorari unless he establishes that he meets specified, limited criteria. In addition to demonstrating by clear and convincing evidence that he is not likely to flee or to pose a danger if released, and that his appeal is not for the purpose of delay, he must show that his appeal raises a substantial question of law or fact likely to

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[2] Applicant is therefore not similarly situated to co-defendant Boultbee. The government consented to Boultbee's release on bail pending certiorari because Boultbee was not convicted of obstruction of justice, and therefore, unlike applicant, he satisfies the standards in 18 U.S.C. 3143(b)(1).

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 appeals process." 18 U.S.C. 3143(b)(1)(B). See United States v Zillgitt, 286 F.3d 128, 132-133 (2d Cir. 2002) (making clear that applicant bears the burden of proving the Section 3143(b)(1)(B) factors); United States v. Chilingirian, 280 F.3d 704, 709 (6th Cir. 2002) (same).

As Justices of this Court explained even before enactment of the Bail Act, "[a]pplications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, 'the lower court refused to stay its order pending appeal.'" Julian v. United States, 463 U.S. 1308, 1309 (Rehnquist, Circuit Justice, 1983) (quoting Graves v. Barnes, 405 U.S. 1201, 1203 (Powell, Circuit Justice, 1972)); accord McGee v. Alaska, 463 U.S. 1339 (Rehnquist, Circuit Justice, 1983); cf. Beame v. Friends of the Earth, 434 U.S. 1310, 1312 (1977) (Marshall, Circuit Justice, 1977) (when the court of appeals has denied a stay, the applicant's burden "is particularly heavy"). Applicant falls well short of demonstrating the necessary "extraordinary circumstances."

2. a. After the district court denied applicant bail pending his appeal to the Seventh Circuit, Appl. Exh. G, applicant renewed his request in the court of appeals. The court of appeals refused

bail because applicant had been convicted of obstruction of justice in addition to mail fraud. Appl. Exh. H. The court concluded that, even if it reversed applicant's fraud convictions on appeal, his obstruction sentence would keep him imprisoned past the time required to resolve the appeal. Id. at 2.

Applicant's request for bail pending certiorari should be denied as well because, even if he prevails on his challenge to his fraud convictions, he will face a sentence on his obstruction conviction longer than the time it will take this Court to issue its merits decision. The questions on which this Court granted review concern only applicant's mail fraud convictions. Pet. i. The petition for a writ of certiorari did not present any question about the validity of applicant's obstruction conviction, ibid., and this Court's decision thus will not overturn that conviction.[3] If this Court reverses his fraud convictions, applicant will be entitled to resentencing on his obstruction conviction, because his sentence on that count was based in part on grouping with the fraud counts under the Sentencing Guidelines. See App., infra, Exh. E at

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[3] Applicant asserted in a footnote to the facts section of the petition that reversal of his fraud convictions would require reversal of his obstruction conviction because of purported "prejudicial spillover" of evidence. Pet. 11-12 n.7. But applicant did not ask this Court to resolve that fact-bound claim, which would not have warranted this Court's review. See Pet. 12 n.7 (acknowledging that "the questions presented do not directly address this count"). Moreover, as explained below, applicant waived the claim by failing to raise it in the courts below, and the claim lacks merit in any event. See pp. 19-23, infra.

41; Sealed App., infra, 23; Sentencing Guidelines § 5G1.2(b) (recommending that the sentence imposed on each count "be the total punishment as determined in accordance with" the Guidelines). But applicant cannot show that, if he were resentenced on the obstruction conviction alone, his sentence would "more likely than not" be shorter than the time it will take this Court to issue its merits decision. Bilanzich, 771 F.2d at 298; see id. at 299 (holding that "likely" in Section 3143(b)(1)(B) has "its ordinary meaning of more probably than not").

In determining applicant's sentence, the district court began by calculating that, under the Sentencing Guidelines, the total offense level for the fraud counts alone was 28. App., infra, Exh. E at 41. 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 applicant directed others who assisted in his obstruction offense. Ibid.; Sealed App., infra, 23. The court then applied the grouping rules to arrive at a combined adjusted offense level of 28, which together with applicant's criminal history category of I, yielded an advisory Guidelines range of 78 to 97 months. App., infra, Exh. E at 41-42. The court imposed a sentence on the obstruction count of 78 months, the bottom of the Guidelines range. Id. at 117.

If applicant were resentenced on the obstruction count alone, the total offense level of 24, combined with his criminal history

category, would yield an advisory range of 51 to 63 months. See Sentencing Guidelines, Ch. 5, Pt. A. Assuming the district court again imposed a sentence at the bottom of the range, applicant's sentence would be 51 months. Thus, even assuming applicant is correct (Appl. 14) that when this Court issues its merits decision, he will have 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.

b. Contrary to applicant's contentions (Appl. 13-14), the offense level of 24 that the district court calculated for the obstruction count at the initial sentencing would not change if applicant were resentenced for obstruction alone. Applicant would not be entitled to revisit that calculation because he made no objection to it at his initial sentencing, on appeal, or in his certiorari petition. Applicant did note in his brief in the court of appeals that reversal on some counts "would require resentencing on the remaining count(s)," Pet. C.A. Br. 100, a proposition that the government does not dispute. He further stated that reversal of the fraud counts "might also alter some of the enhancements applied by the district court in calculating the guidelines recommendation, including [applicant's] obstruction conviction." Ibid. But applicant did not make any particularized challenge to any of the offense level calculations on the obstruction count, and his vague assertion did not preserve any such claim. Applicant

therefore has no right to a second bite at the obstruction apple if his mail fraud convictions are reversed. 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.").

Although applicant may not have had the same incentive to challenge the obstruction calculations because the obstruction count was grouped with the mail fraud counts, he still should have preserved the challenge in the district court and made the specific claim in the Seventh Circuit because it would have been relevant had the mail 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. Bilanzich, 771 F.2d at 298.

Applicant also fails to carry that burden because his arguments about the obstruction calculation are mistaken. Applicant contends (Appl. 13-14) that, absent an underlying fraud conviction, his base offense level for the obstruction count would be only 14 and his total offense level (after the adjustment for

his role in the offense) would be only 16. That is incorrect. As the district court recognized (see App., infra, Exh. E at 41; Sealed App., infra, 23), the obstruction Guideline, Sentencing Guidelines § 2J1.2, provides that when a defendant's obstruction offense "involved obstructing the investigation or prosecution of a criminal offense," the court should calculate the base offense level using Sentencing Guidelines § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, rather than Section 2J1.2, if Section 2X3.1 would produce a higher offense level. Sentencing Guidelines § 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 (see App., infra, Exh. E at 41; Sealed App., infra, 23), applicant obstructed the investigation and prosecution of mail fraud, and the offense level for that mail 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 applicant's unsupported assertion (Appl. 13-14), the cross-reference to Sentencing Guidelines § 2X3.1 would still apply even though he would no longer stand convicted of mail fraud. 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). "[T]he point of the cross-reference is to punish more severely (and to provide a greater disincentive for) * * * obstruction[] of prosecutions with respect to more serious crimes." United States v. Arias, 253 F.3d 453, 459 (9th Cir. 2001). Thus, every court of appeals that has addressed the issue has concluded that the higher base offense level under Section 2X3.1 "must be applied without regard to the defendant's guilt on the underlying offenses." Ibid. (citing cases); see, e.g., United States v. Quam, 367 F.3d 1006, 1009 (8th Cir. 2004); United States v. Kimble, 305 F.3d 480, 486 (6th Cir. 2002); see also Rita v. United States, 551 U.S. 338, 343 (2007) (noting, in describing the application of the cross-reference to Sentencing Guidelines § 2X3.1 in a perjury case, that the "underlying offense" was a "possible violation" of a machinegun registration law).[4]

c. Applicant also suggests that, on resentencing for obstruction alone, the district court might impose "a below-Guidelines sentence on the ground that [applicant] would stand convicted of obstructing an investigation into lawful conduct." Appl. 14. But applicant was charged with money-or-property fraud

[4] Applicant does not argue that the district court incorrectly calculated the base offense level (or the adjustments to) the obstruction count if the cross-reference to Section 2X3.1 applies. Accordingly, even if applicant had not already waived any such argument by failing to raise it in the courts below (see pp. 13-14, supra), he has waived the argument in this Court.

as well as honest-services fraud, and reversal of applicant's mail fraud convictions because the jury received erroneous instructions on the honest-services theory would not establish that applicant's conduct was lawful. Nor is there any prospect that the district court would reach that conclusion. The district court has repeatedly held that the government presented more than sufficient evidence to establish that applicant committed conventional money-or-property mail fraud offenses. See App., infra, Exh. A at 6-12, 13-16; Appl. Exh. G at 5. And, at sentencing, the district court expressly found that applicant (along with his co-defendants) had defrauded Hollinger of $6.1 million. App., infra, Exh. E at 19. The court rejected applicant's argument that the APC payments of $5.5 million were management fees that were owed the defendants and thus that the only harm to Hollinger was the improper characterization of the fees as non-competition payments. Ibid. Instead, the court adopted (ibid.) the PSR's finding that the money was an "actual loss to" Hollinger because it "would otherwise have accrued to the benefit of [Hollinger]." Sealed App., infra, 10-11. Thus, there is no reason to believe that the district court would impose a below-Guidelines sentence on the ground that applicant was not guilty of mail fraud.

Indeed, the district court's comments at sentencing indicate that the court would likely impose a sentence of at least 51 months of imprisonment if applicant were resentenced for obstruction

alone. The district court stated that applicant's obstruction was "[e]qually significant" to his fraudulent conduct in establishing the seriousness of his offenses. App., infra, Exh. E at 113. The court also relied heavily on the fact that co-defendant David Radler had received a 29-month sentence. Id. at 115. The court noted that Radler was "entitled to a lesser sentence" than applicant because Radler had cooperated with the government and that defendants who provide his level of cooperation often receive about a 50% reduction in their sentences. Id. at 115-116. Those comments suggest that the court believed that applicant's sentence should be at least double Radler's sentence, i.e., at least 58 months. Finally, in imposing a 78-month sentence, the district court stated that it "would still impose the same sentence" even if a different version of the Guidelines were applicable or different enhancements applied under the Guidelines, because that sentence was "sufficient, but not greater than necessary, to serve the goals of Section 3553." Id. at 119. Accordingly, there is no basis to believe that, if applicant's fraud convictions were reversed and he were resentenced on his obstruction conviction alone, he would receive a sentence shorter than the time it will take this Court to render its merits decision.

d. Because applicant has failed to carry his burden, this Court should deny bail. But even if this Court had any doubt that applicant's sentence on the obstruction count alone would be longer

than the time it will take the Court to render its merits decision, the Court should not grant bail based on speculation about his likely sentence. The district court is in the best position to predict applicant's likely sentence, yet that court has never ruled on the question. The district court denied applicant's request for bail pending appeal based on its conclusion that applicant had not presented a "substantial question" on the validity of his fraud convictions, Appl. Exh. G at 1-6, and the court therefore did not address the sentencing issue. After this Court granted certiorari on the validity of the fraud convictions, applicant chose to file a bail application in this Court rather than to return to the district court to give that court the opportunity to address the issue. In those circumstances, if this Court believes that applicant's entitlement to bail turns on the likely length of a sentence on his obstruction conviction alone and finds reasonable uncertainty about the likely length of that sentence, the Court should deny the application for bail without prejudice and direct that it be refiled in the district court. Cf. Sup. Ct. R. 23.3 ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof."). Alternatively, the Court could vacate the court of appeals' prior bail disposition and remand the matter for further consideration by the district court. See 28 U.S.C.

2106; cf. Ward v. United States, 76 S. Ct. 1063, 1065 (Frankfurter, Circuit Justice, 1956).[5]

3. Applicant argues (Appl. 2, 10-12) that his sentence on the obstruction count should not preclude bail because, if he prevails on his challenge to his fraud convictions, his obstruction conviction will also have to be reversed. That argument is fundamentally mistaken for several reasons.

a. As an initial matter, applicant has waived any argument that reversal of his fraud convictions will also require reversal of his obstruction conviction. Applicant raised multiple challenges to all of his convictions in the lower courts, but he never argued that his challenge to the jury instructions on honest-services fraud would require reversal of his obstruction conviction. Accordingly, applicant has not preserved the argument. See United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977) (refusing to consider argument not raised in lower courts); United States v. Ardley, 242 F.3d 989, 990 (11th Cir.) (per curiam) (refusing, after remand from this Court, to consider argument not

[5] A grant of bail based on speculation by this Court in the first instance about applicant's likely sentence would be particularly problematic, because the Bail Act requires that an order granting bail based on a likely reduced sentence provide that the defendant's release commence only "at the expiration of the likely reduced sentence." 18 U.S.C. 3143(b)(1). Thus, in granting bail, this Court would itself have to determine the precise length of applicant's likely sentence in order to determine when he should be released. Determining that date is not a task for this Court but for the sentencer.

timely raised in the proceedings before the remand), cert. denied, 533 U.S. 962 (2001); Gibson v. West, 201 F.3d 990, 992 (7th Cir. 2000) (same).

b. In any event, the argument lacks merit. Applicant contends that reversal of his obstruction conviction would be required because of "prejudicial spillover" from purportedly inflammatory evidence introduced on the mail fraud counts. Appl. 12 (citing United States v. Rooney, 37 F.3d 847, 856 (2d Cir. 1994)). The "prejudicial spillover" doctrine recognizes that, in certain cases where a defendant has been tried on multiple counts, and his conviction on one of those counts is reversed on a ground that requires dismissal of that count, retrial may be required on other counts because of "prejudicial spillover" from evidence introduced in support of the dismissed count. See, e.g., Rooney, 37 F.3d at 854-857. Reversal is not required, however, unless the purportedly prejudicial evidence "would not have been admitted but for the dismissed charges." United States v. Prosperi, 201 F.3d 1335, 1345 (11th Cir.), cert. denied, 531 U.S. 956 (2000); see United States v. Cross, 308 F.3d 308, 317 (3d Cir. 2002); United States v. Edwards, 303 F.3d 606, 640 (5th Cir. 2002). cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003); Rooney, 37 F.3d at 855-856. Here, virtually all of the evidence would have been admitted even if the government had not charged applicant with honest-services fraud.

As applicant acknowledged in his court of appeals' brief, "[t]he government's primary theory at trial" was that the fraudulent non-compete payments "were simple 'money grabs.'" Pet. C.A. Br. 32 (citation omitted) (reproduced in App., infra, Exh. F); see id. at 57 (same). The honest-services theory was an alternative to the government's principal contention that the defendants committed conventional money-or-property mail fraud. Applicant's certiorari petition did not challenge either the validity or the sufficiency of the evidence on the money-or-property theory. And virtually all of the evidence admitted on the fraud counts would have been admissible if the government had proceeded only on a money-or-property theory. Indeed, virtually all of the evidence would have been admissible even if the government had charged applicant 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). Thus, applicant cannot show any "prejudicial spillover" requiring reversal of his obstruction conviction.

Applicant is also incorrect in arguing that his obstruction conviction cannot stand because "a jury finding that [applicant] had not committed mail fraud would have been much more likely to conclude that * * * he acted with a clean conscience rather than a corrupt intent." Appl. 12. A holding by this Court that

the jury received incorrect instructions on the honest-services theory would not require the jury to find that applicant "had not committed mail fraud." And there is no reason to think that the jury would find that applicant did not commit mail fraud, even if the honest-services theory dropped from the case entirely. As noted above, the government's primary argument has always been that applicant committed money-or-property fraud. The courts below have repeatedly held that the government presented more than sufficient evidence to prove that applicant committed money-or-property fraud. Indeed, the court of appeals even concluded that the jury "would have acquitted" applicant if it had not concluded that he defrauded Hollinger of money. Pet. App. 10a.[6]

However this Court ultimately resolves applicant's challenge to the honest-services fraud instructions, the evidence

[6] Applicant argues (Appl. 10) that the jury's acquittals on other mail fraud charges against him show that the jury's verdict on the counts on which he was convicted could not have rested on a money-or-property theory. That argument ignores the significant differences between the two sets of charges. The charges on which he was acquitted all involved payments pursuant to actual non-competition agreements made in connection with actual sales by Hollinger of newspaper companies that it owned. App., infra, Exh. A at 8. In contrast, two of the charges on which he was convicted involved payments for a non-competition agreement with one of Hollinger's own subsidiaries that did not involve any newspaper sale. Ibid. The third charge involved payments that were labeled non-competition payments even though no non-competition agreements even existed. Id. at 14-15. Applicant himself stressed this distinction in his filings in the court of appeals. See, e.g., Pet. C.A. 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.") (reproduced in App., infra, Exh. G).

establishing his obstruction-of-justice remains the same: With full knowledge of an SEC investigation, grand-jury investigation, and criminal investigation closing in on him, applicant 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. Applicant's actions were captured on video camera and played to the jury. Both the district court and the court of appeals rejected applicant's arguments that the evidence was insufficient to prove his corrupt intent in removing the documents, App., infra, Exh. A at 25-27; Pet. App. 12a-13a, and this Court has not granted certiorari on that issue. Nothing about this Court's decision on the fraud counts will affect applicant's obstruction conviction.

c. Finally, applicant errs in contending (Appl. 2, 11) that the government waived any objection to his argument that reversal of his fraud convictions will require reversal of his obstruction conviction. Applicant notes (Appl. 10) that he raised that argument at the end of a footnote in the facts section of his petition for a writ of certiorari, and the government did not respond to the argument in its brief in opposition. Applicant therefore argues that, under Rule 15.2 of the Rules of this Court, the government has waived its right to contest the argument. That is incorrect.

Rule 15.2 provides that a non-jurisdictional "objection to consideration of a question presented" may be deemed waived if the respondent does not raise the objection in its brief in opposition. Sup. Ct. R. 15.2. The rule also provides that "the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Ibid. The rule thus requires the respondent to raise in its brief in opposition all objections to this Court's consideration of a question presented by the certiorari petition and any arguments about the scope of the questions presented. The government's argument that applicant is not entitled to bail because reversal of his fraud convictions will not require reversal of his obstruction conviction is neither an objection to consideration of any question presented by applicant's certiorari petition nor an argument about the scope of those questions. Indeed, the obstruction issue does not even bear on the proper resolution of the questions presented, which address only whether or not applicant's fraud convictions must be reversed. Accordingly, Rule 15.2 did not require the government to raise the argument in its brief in opposition.

Applicant apparently reads Rule 15.2 as if it requires the respondent to contest every misstatement of fact or law in the petition no matter how unrelated to the scope or resolution of the questions presented. That reading of the rule is not only contrary

to its text but makes no sense. Respondents would be forced to clutter their briefs in opposition with objections to statements in the petition that have little or no bearing on the issues that the Court has been asked to address. That point applies with full force here: applicant buried his comment about the obstruction count in a footnote in the fact statement, while acknowledging that "the questions presented do not directly address this count." Pet. 12 n.7. The government was not required to respond to applicant's assertion, which had nothing to do with the issues before the Court (either "directly" or indirectly).

None of the cases on which applicant relies (Appl. 2, 11) supports his reading of the rule. Instead, all three cases involve waiver of arguments directly addressing the scope or resolution of the issues on which the Court granted certiorari. See Carcieri v. Salazar, 129 S. Ct. 1058, 1068 (2009); Aetna Health Inc. v. Davila, 542 U.S. 200, 212 n.2 (2004); City of Okla. City v. Tuttle, 471 U.S. 808, 815-816 (1985). No case suggests that Rule 15.2 bars a respondent from raising an argument on an unrelated issue, such as bail, because the respondent declined to raise the argument in response to a footnote in the facts section of the petition for a writ of certiorari. Accordingly, the government did not waive its right to contest applicant's assertion that his obstruction conviction will have to be reversed if his fraud convictions are reversed.

CONCLUSION

The application for bail should be denied.

Respectfully submitted.

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