No. 08-876

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND
MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

APPLICATION OF PETITIONER BLACK FOR BAIL PENDING APPEAL

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To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit:

Conrad M. Black applies under 18 U.S.C. § 3143(b) for bail pending appeal of his conviction, following this Court's grant of his petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The primary question presented is whether the mail fraud statute criminalizes an alleged scheme to deprive another of the intangible right of honest services where the defendant did *not* contemplate economic or other property harm to the private party to whom those honest services were owed. An instruction allowing the jury to convict without such a finding of contemplated harm was used on all counts of mail fraud, including the three of which Mr. Black was convicted.

Following the grant of certiorari, the government *consented* to bail for co-petitioner John A. Boultbee based on the *same* substantial question presented in the *same* petition. Ex. A, Defendant Boultbee's Motion on Consent for Release Pending Supreme Court Review and Proposed Order (May 26, 2009). The district court today granted bail based on the government's agreement to release Mr. Boultbee, a non-citizen, from the custody of both the Bureau of Prisons and immigration authorities. Mr. Boultbee will be placed on an appearance bond, signed by a relative, allowing him to return to Canada while the case is pending before this Court. But the government steadfastly refuses to consent to bail for Mr. Black.[1] The only difference between the two petitioners—Mr. Black's conviction of a single count of obstruction of justice—is no reason for a different

[1] Given the parties' firmly held positions on bond, there is no need to require Mr. Black to go through the extra time-consuming steps of burdening the district court and court of appeals (for a second time) only to end up back before this Court arguing that questions to be decided on the merits by *this* tribunal are substantial and likely to lead to a different outcome.

result. As Mr. Black argued in his petition, reversal of the fraud convictions would also require a new trial of the obstruction charge because of the significant prejudicial spill-over from highly inflammatory evidence used on the fraud counts, as well as the flawed "honest services" instruction on those counts which likely contributed significantly to the jury's conclusion that Mr. Black acted "corruptly." Although the government, in opposing certiorari, contended the instructional error had no prejudicial effect on the *mail fraud* verdicts, it never denied that the obstruction charge must be retried if the mail fraud counts are reversed. It is too late for the government to assert otherwise. *See, e.g.*, *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985) (requiring non-jurisdictional arguments against a grant of certiorari to be raised "*no later* than in respondent's brief in opposition to the petition for certiorari"); *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009) (noting that failure to dispute an assertion in the brief in opposition "alone is reason to accept this as fact for purposes of our decision in this case"); S. Ct. Rule 15.2. In any event, a sentence on the obstruction count, without more, likely would be only 15 months, and with statutory credit for "good time" Mr. Black has *already* served a sentence of nearly 18 months.[2] He is entitled to bail pending appeal.

STATEMENT

Mr. Black, who is now 64 years old, was convicted by a jury in July 2007 and has been incarcerated for the past 15 months—since March 3, 2008. He is serving a total sentence of 78 months. The length of that sentence was directly determined, under the Federal Sentencing Guidelines, by guilty verdicts on three mail fraud counts. The jury

[2] While Mr. Black's appeal was before the Seventh Circuit, that court denied him appeal bond based on the length of his sentence for obstruction. As explained below, neither the conviction nor the sentence for obstruction is reason to deny Mr. Black bond pending this Court's ruling.

was allowed to convict on those three counts under either of two theories—conventional fraud by the dishonest taking of another's money, or deprivation of another's right to the defendants' honest services. Ex. B, Petition for Writ of Certiorari, *Black v. United States*, No. 08-876 (Jan. 9, 2009), at 8-10 ("Pet."). Based on the evidence presented at trial, the arguments the government made to the jury, and Mr. Black's subsequent acquittals on several other counts that were grounded in fraud by theft of money, it is almost certain that the jury convicted him under the honest services fraud theory. *Id*. at 11, 22.

The government accused Mr. Black and his co-petitioners of defrauding Hollinger International, Inc. ("Hollinger"), a public company, incorporated under Delaware law, that ran several large newspapers and hundreds of other smaller publications. The jury acquitted on all but three of the twelve fraud counts it considered, necessarily rejecting the government's sweeping theory that petitioners had engaged in a massive scheme to defraud Hollinger of over $60 million. *Id*. at 11. The government's fall-back theory was that petitioners violated their fiduciary duties to Hollinger through disloyalty and dishonesty. The evidence for this theory was that they entered into undisclosed transactions to obtain a lawful tax benefit in Canada, but the proofs also established that they did not do so at the expense of Hollinger. As the government's own star witness explained, petitioners recharacterized a management fee payment—already approved by the Hollinger board—as payment for legally enforceable non-competition agreements. Based on the evidence and the instructions, the jury would have convicted on an honest services theory despite the very strong evidence that petitioners had no intent to deprive Hollinger of money or cause it any economic or property harm.

The sole remaining count of conviction charged Mr. Black with obstructing investigations into his conduct—the same conduct that he has steadfastly maintained (and that a favorable ruling by this Court would help him prove) he had no reason to hide because under the law, as properly construed, he was innocent of all charges. Ex. C, Excerpt of Jury Instructions (June 27, 2007), at Tr 15176-78; Pet. 11-12 n.7.

Mr. Black remained free on a secured bond throughout pre-trial proceedings, trial and sentencing. Ex. D, Order Setting Conditions of Release, No. 05 CR 727 (Dec. 1, 2005); Ex. E, Transcript of Proceedings (Dec. 10, 2007), at 128:24-130:18. He appeared without fail at all proceedings and complied with all conditions of release.

Between verdict and sentencing, the district court denied the government's request to revoke Mr. Black's bail, expressly finding that he was neither a danger to society nor a flight risk. *See* Ex. F, Transcript of Proceedings (July 19, 2007), at 58:21-24 ("I find that under 18, United States Code, Section 3143, that with the conditions imposed by the Court, that there is clear and convincing evidence that Mr. Black is not going to flee."). The court made the same finding after it imposed sentence. Ex. E, Transcript of Proceedings (Dec. 10, 2007), at 128:24-129:4 ("I do find by clear and convincing evidence that Black is not likely to flee or pose a danger to the safety of any other person or the community if he is released under conditions, including the same bond conditions . . . that he has been under."); Ex. G, *United States v. Black*, No. 05 CR 727 (N.D. Ill. Jan. 31, 2008), at 2 ("The Court has previously held that Defendants are not a danger to the community and do not pose a flight risk given their respective bonds"). Indeed, the district court had expressly concluded that "run[ning] and hid[ing]" "would be inconsistent with

everything that I have seen about [Mr. Black's] character during the course of this trial." Ex. F, Transcript of Proceedings (July 19, 2007), at 46:3-5.

When the Seventh Circuit denied Mr. Black bail pending his appeal to that court, it did not take issue with any of these findings. *See* Ex. H, *United States v. Black*, No. 07-4080 (7th Cir. Mar. 3, 2008). Nor, for that matter, did the government. Ex. I, Government's Consolidated Response to Defendants' Motions for Release Pending Appeal (Jan. 29, 2008), at 4 n.1. The court of appeals instead concluded, mistakenly, that Mr. Black's 78-month sentence on the obstruction count would survive, even if the fraud counts were reversed, and that this sentence was "substantially longer than the normal course of an appeal." Ex. H, *United States v. Black*, No. 07-4080 (7th Cir. Mar. 3, 2008), at 2. Because only Mr. Black was convicted of obstruction, he was detained pending appeal while the other defendants (including Mr. Boultbee) were allowed to remain free pending their appeal to the Seventh Circuit.

The court of appeals ultimately affirmed Mr. Black's convictions and sentence. *See United States v. Black*, 530 F.3d 596 (7th Cir. 2008). This Court granted review on May 18, 2009. The Court has informed Mr. Black that his case is likely to be heard in the November or December 2009 argument session.

ARGUMENT

Mr. Black Meets The Statutory Requirements Specified In 18 U.S.C. § 3143(B) For Release Pending This Court's Review Of The Judgment Of The Court Of Appeals.

The primary question on which this Court has granted certiorari is whether the jury's instructions for honest services fraud omitted a qualification that was essential to finding Mr. Black guilty of criminal fraud. Five circuits have explicitly held that a defendant may not be convicted under the honest services provision of the mail fraud statute

for private-sector conduct unless the jury finds that he sought private gain while contemplating economic or property harm to the person to whom his honest services were owed. *See* Pet. 19-21. Under the Seventh Circuit's view (shared by two other circuits), the jury was allowed to convict even though the government's own cooperating witness testified consistently in the grand jury and at trial that the defendants did not intend to take money that was not theirs; rather, they recharacterized the previously approved payments in order to take advantage—in an entirely *lawful* manner—of a Canadian judicial ruling that would lower their tax burden in Canada. *Id.* at 7-10. If this Court ultimately agrees with the majority view, Mr. Black will have served more than two years in prison for conduct that is not a federal crime. Bail pending appeal is needed to avoid that unjust result.

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

There was no dispute in the district court or the court of appeals that Mr. Black is unlikely to flee, that he poses no danger to the safety of any other person or the community if released on conditions, and that he pursues his appeal for a legitimate reason and not for purposes of delay. The district court found in Mr. Black's favor on each point, by

clear and convincing evidence, and the government did not contest those issues in the court of appeals. Accordingly, the sole issue is whether Mr. Black has "raise[d] a substantial question of law or fact" likely to result in at least a new trial should he prevail on that question. *Cf.* Ex. G, *United States v. Black*, No. 05 CR 727 (N.D. Ill. Jan. 31, 2008) (noting that only this point was at issue on Mr. Black's motion for bail pending appeal); Ex. I, Government's Consolidated Response to Defendants' Motions for Release Pending Appeal (Jan. 29, 2008), at 4 n.1.

2. The question presented here is "substantial." Most circuits define a "substantial" question within the meaning of Section 3143(b) as a "close" one—one that could very well be decided the other way. *E.g.*, *United States v. Molt*, 758 F.2d 1198, 1200 (7th Cir. 1985); *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (a substantial question is "a 'close' question or one that very well could be decided the other way"); *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985) (adopting the *Giancola* test); *United States v. Randell*, 761 F.2d 122, 125 (2nd Cir. 1985) ("We do not believe that these definitions of 'substantial' differ significantly from each other, but if we were to adopt only one, it would be the language of *Giancola*."); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985) (following *Giancola*); *United States v. Powell*, 761 F.2d 1227, 1231-32 (8th Cir. 1985) (same); *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (same); *United States v. Perholtz*, 836 F.2d 554, 555-56 (D.C. Cir. 1988) (same). "[O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to

proceed further.'" *United States v. Smith*, 793 F.2d 85, 89-90 (3rd Cir. 1986) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Given the importance of the question presented, the sharp split in the circuits, and this Court's decision to grant review, it is now clear that the question presented is substantial. At least four Members of this Court have implicitly concluded that there are "compelling reasons" for review, such as a conflict between courts of appeals on an important question of federal law. *See* S. Ct. Rule 10. In *Costello v. United States*, a case where—unlike here—the substantiality of the question was established only indirectly, Justice Jackson granted bail pending appeal. *See* 74 S. Ct. 847 (1954) (Jackson, J.) (mem.). Costello had not been granted review in *his* case; rather, the Court granted certiorari in other cases raising the same issue of law. Justice Jackson followed a "necessary inference for purposes of this application . . . that the Court deems a substantial question of general application to exist" in cases raising the issue on which the Court had granted review. *Id.*

Lower courts and Members of this Court have reached the same conclusion under circumstances such as those present here. "It cannot be disputed that defendant is raising a 'substantial' question of law—*i.e.*, one that is 'close' or that 'very well could be decided the other way,' *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985)—now that the Supreme Court has agreed to address this very issue." *United States v. McCabe*, 1991 U.S. App. LEXIS 20448, at *4-5 (1st Cir. May 8, 1991). Justice Douglas emphasized why it is not dispositive that the judicial officer considering the application might be disinclined to rule in favor of the applicant on the merits of his appeal.

> [T]he first consideration is the soundness of the errors alleged. Are they, or any of them, likely to command the respect of the appellate judges? It

> is not enough that I am unimpressed. . . . A question may nevertheless be "substantial" . . . if it is novel, or if there is a contrariety of views concerning it in the several circuits, or if the appellate court should give directions to its district judges on the question, or if in the interests of the administration of justice some clarification of an existing rule should be made.

Herzog v. United States, 75 S. Ct. 349, 351 (1955) (Douglas, Circuit Justice).

This case plainly meets those standards. In at least five circuits, a jury must make an essential finding—a finding that was absent here—in order to convict under the honest services fraud theory. It is at least a close question—one on which reasonable-minded jurists could disagree—whether a rule embraced by only three circuits, and rejected by five others due to its impermissibly broad and unpredictable reach, is the right result.

3. Having raised a substantial question, Mr. Black need only show that the likely result of a ruling in his favor is reversal or a new trial. In other words, is the issue sufficiently important to his case that *if he prevails on the merits*, the error would undermine the verdict? *United States v. Bilanzich*, 771 F.2d 292, 299 (7th Cir. 1985) ("In deciding whether this part of the burden has been satisfied, the court or judge to whom application for bail is made must assume that the substantial question presented will go the other way on appeal and then assess the impact of such assumed error on the conviction."). For the reasons explained in more depth in Mr. Black's petition for writ of certiorari, the interpretation of the honest services provision employed here was critical to Mr. Black's conviction, and he would likely have been acquitted on *all* counts if the majority view had been applied. Pet. 22-23; Ex. K, Reply Brief for Petitioners, *Black v. United States*, No. 08-876 (April 27, 2009), at 7-10 ("Pet. Reply").

The government, in opposing certiorari, argued that the jury would not have convicted on an honest services theory alone, and—so its argument went—any error in the

instructions was therefore harmless. Ex. J, Brief for the United States in Opposition, *Black v. United States*, No. 08-876 (April 13, 2009), at 15-16. Mr. Black explained in his petition and reply brief why the only fair inference is just the opposite. In other words, the jury very likely rejected fraud by theft and convicted for deprivation of honest services even though the defendants contemplated no economic or other property harm to Hollinger or its shareholders. Pet. 22; Pet. Reply 8. Having considered these competing arguments, this Court granted the petition. And for good reason. The jury's acquittals on the bulk of the fraud counts was a stinging rebuke to the government on its fraud-by-theft theory. On the small portion of the government's case where the jury convicted, the evidence refuting the theft theory was even weightier. The *government* proved through its own cooperating witness that Hollinger's board had approved the payments. The issue on which a real dispute existed was whether Hollinger was deprived of its right to the defendants' honest services. Pet. Reply 8. And that dispute was largely a legal one. The district court resolved that dispute in favor of the government based on the prevailing law of the circuit. The harm from the erroneous instructions is more than serious enough to meet the test for likelihood of reversal or a new trial.

4. The sole remaining question is whether Mr. Black's conviction for obstruction—count 13—requires a different outcome. It does not. As the petition demonstrated, there was serious spillover prejudice from the challenged fraud counts. Pet. 11-12 n.7. The petition further explained why a jury that had been properly instructed on honest services fraud likely would have acquitted on the obstruction count too. *Id.* The government, by not contesting or even mentioning either point, has waived a claim that the obstruction count can be affirmed if the fraud counts are reversed.

The obstruction count was based on the removal of personal papers and effects from Mr. Black's office for safekeeping, during regular business hours, on the eve of his eviction by new management. These materials included copies of documents that were of potential interest to others and had *already* been reviewed extensively by the company's outside investigators. The key issue was whether Mr. Black merely proceeded as any tenant would at the end of his tenancy or, instead, acted "corruptly"—with the improper purpose of "subvert[ing] or undermin[ing] the fact-finding ability of an official proceeding." Ex. C, Excerpt of Jury Instructions (June 27, 2007), at Tr 15176-78.

As explained in the petition, and summarized further *infra*, a ruling for Mr. Black on the questions presented would also require that the obstruction conviction be reversed. The government has waived any claim to the contrary. Although its brief in opposition asserted multiple reasons why instructional error would not require reversal of the *mail fraud* convictions—including arguments that the claim of error was not preserved—the government chose not to dispute that the obstruction count must fall if the mail fraud counts fall. By not contesting that point, the government waived it. *See* S. Ct. Rule 15.2 (any non-jurisdictional objection to consideration of a question presented based on what occurred in the proceedings below "may be deemed waived unless called to the Court's attention in the brief in opposition"); *Tuttle*, 471 U.S. at 815-16; *Carcieri*, 129 S. Ct. at 1068; *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004) (rejecting, under Rule 15.2, consideration of respondents' argument because respondents failed to identify it in their brief in opposition to certiorari).

Quite apart from the government's waiver, there is at least a substantial question whether the obstruction count must be retried if the fraud counts are reversed, and that is

enough under the bail statute. As the petition explained, a jury finding that Mr. Black had *not* committed mail fraud would have been much more likely to conclude that he *honestly* believed he had nothing to hide—that is, he acted with a clean conscience rather than a corrupt intent. Moreover, the petition documented the serious risk of prejudicial spillover from the mountains of highly inflammatory evidence introduced on the fraud counts. *See, e.g.*, *United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994) (reversing false statements convictions due to risk of prejudicial spillover from evidence that the government introduced on another count for which its theory of guilt was legally flawed).

Even assuming the *absence* of a substantial question as to the fate of count 13, however, Mr. Black is still entitled to bail pending appeal. The statute also provides for release if the likely result of prevailing on appeal is "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b). Mr. Black will have served the likely sentence for the obstruction count alone before the appellate process has run its course.

The court of appeals, in denying Mr. Black bail pending appeal, noted that he received a sentence of 78 months on count 13 alone. *See* Ex. H, *United States v. Black*, No. 07-4080 (7th Cir. Mar. 3, 2008), at 2. But the court of appeals overlooked the fact that, under the required Sentencing Guidelines analysis, the 78-month sentence imposed on that single count was driven almost entirely by Mr. Black's conviction on the fraud counts, not obstruction simpliciter.

The district court calculated the offense level for the fraud counts and separately calculated an offense level for the obstruction count. Because the fraud counts yielded a higher offense level, the obstruction count calculation did not determine the sentence for

that or any other count. Ex. E, Transcript of Proceedings (Dec. 10, 2007), at 40:3-25 (finding a total offense level for the three fraud counts of 28; finding a total offense level for the obstruction count (count 13) of 24; and applying the fraud offense level of 28 because count 13 "is grouped" with the fraud counts).[3] The only effect from the obstruction conviction was indirect and relatively minor. The court imposed a 2-level obstruction enhancement under the calculation of the Guidelines for the fraud counts, *see* USSG § 3C1.1, raising Mr. Black's guideline range minimum from 63 months to 78 months—a difference of just 15 months. Mr. Black has *already* served 15 months. The reason the district court imposed a sentence of 78 months on count 13 is that the Guidelines instruct courts to impose the *total* sentence on each count, with all sentences to run concurrently. USSG §§ 5G1.2(b) (the sentence imposed on *each* count "shall be the total punishment as determined in accordance with" the Guidelines); 5G1.2(c) ("If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently[.]").

The determination of a sentence for count 13, without any underlying fraud offense, would start with an offense level of 14, which yields a guideline range of 15 - 21

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[3] The grouping took place because the fraud calculation included a two-level enhancement, under USSG § 3C1.1, for obstructing the investigation and prosecution of the fraud offense (*i.e.*, the two-level enhancement was based on the conduct that formed the basis for count 13), and also because the Guidelines directed calculation of the *obstruction* offense level based on the seriousness of the underlying *fraud* offenses, whose investigation and prosecution Mr. Black purportedly obstructed. USSG § 2J1.2(c)(1) (directing use of a "cross reference" to a Guideline for another criminal offense if the obstruction "involved obstructing the investigation or prosecution of a criminal offense"). Under the Guidelines, counts are grouped if, as here, one count "embodies conduct that is treated as . . . [an] adjustment to[] the guideline applicable to" other counts. USSG § 3D1.2(c). When counts are grouped under § 3D1.2(c), the offense level applicable to the group is the highest one calculated for the different counts in the group. USSG § 3D1.3(a). As noted, the fraud counts produced the higher offense level.

months. (As noted above, the district court's calculation of level 24 for the obstruction count was premised on Mr. Black having obstructed the investigation and prosecution of fraud offenses.) By the end of the October 2009 Term, Mr. Black will have spent nearly 28 months in federal prison—which equates, with good time credit, to a sentence of 32 months.[4] Even if Mr. Black were to receive a role in the offense enhancement for an obstruction conviction alone, he still will have served the minimum of that range (21 months) well before a decision by this Court reasonably could be expected. And that takes no account of the distinct possibility of a below-Guidelines sentence on the ground that Mr. Black would stand convicted of obstructing an investigation into *lawful* conduct.[5] The obstruction conviction provides no valid basis for denying Mr. Black his freedom while this Court decides whether his convictions must be reversed.

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[4] With credit under the statute for good behavior (54 days per year, *see* 18 U.S.C. § 3624(b)(1)), the Bureau of Prisons projects that Mr. Black will complete his 78-month term of imprisonment and be placed on supervised release on October 30, 2013. (The release date for any federal prisoner is publicly available at www.bop.gov under "inmate locator.") This means, even ignoring the possibility that up to 10 percent of the end of Mr. Black's term of imprisonment could be spent in community confinement or home detention, he likely would serve close to half of the custodial portion of his sentence before this Court ever rules on the merits.

[5] When the Seventh Circuit denied Mr. Black bail pending its consideration of his direct appeal, the court also noted that Mr. Black received a sentence of 60 months on count 7, a mail fraud count that involved a $600,000 payment. Ex. H, *United States v. Black*, No. 07-4080 (7th Cir. Mar. 3, 2008), at 2. But now that this Court has granted certiorari, a ruling on the merits would require count 7 to be reversed along with the other two fraud counts. The honest services fraud instruction applied to count 7 too. As with the obstruction count—and with the same waiver consequence—the government did not claim in opposition to certiorari that the fraud counts are different for purposes of the legal issue presented.

CONCLUSION

By the time this Court decides his appeal, Mr. Black will be nearly 66 years old and—without the appeal bail that he requests—will have been imprisoned for more than two years. He understands that if he is released on bail and does *not* prevail in his appeal, the completion of his sentence will have been delayed by several months. He is willing to take the chance of prolonging his punishment, though, because if he *does* prevail then the time he will have spent in prison between now and such a ruling can never be returned to him. On the other hand, and as the government has no doubt recognized with respect to Mr. Boultbee, if appeal bail is granted to Mr. Black and the *government* prevails on appeal, society's interest in seeing Mr. Black punished will not be frustrated in the least. Mr. Black therefore asks the Court to enter an order that allows him to enjoy the freedom afforded to his co-petitioner while this Court determines whether their convictions must be reversed. In order to effectuate the release order, the matter should be referred to the district court for the sole purpose of setting the appropriate amount of security for his bond, in light of the government's agreement as to co-petitioner Boultbee, within 7 days of this Court's order.

Respectfully submitted.

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