IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 07-4080, 08-1030, 08-1072

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**United States District Court**
	)	**Northern District of Illinois**
	)	**Eastern Division,**
v.	)	
	)	
CONRAD M. BLACK,	)	**No. 05 CR 727**
PETER Y. ATKINSON, and	)	
JOHN A. BOULTBEE	)	
	)	**Judge Amy J. St. Eve**
Defendants-Appellants.	)	

ANSWER OF THE UNITED STATES TO PETITION FOR REHEARING AND REHEARING *EN BANC*

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STATEMENT

After a careful review of the three-month trial record, the unanimous panel in this case correctly concluded that the instructional error was harmless as to one of the fraud convictions against defendants Conrad Black, John Boultbee, and Peter Atkinson, and as to the obstruction conviction against Black. The panel asked the right legal question: was the honest-services instruction harmless beyond a reasonable doubt in light of the evidence, the parties' arguments, and the other jury instructions (including the perfectly valid money-fraud instruction). And the panel arrived at the right factual answer: there was no reasonable doubt that the jury would have found a money fraud absent the erroneous instruction, and indeed that this jury, beyond a reasonable doubt, did find the defendants guilty of money fraud for stealing a total of $600,000 using the guise of ludicrous non-compete covenants that no one wanted.

Far from overlooking or misapprehending any point of law or fact, Fed. R. App. 40(a)(2),[1] and far from creating any conflict with Supreme Court or Circuit law or otherwise presenting an exceptionally important question, Fed. R. App. 35(a)(1), (2), the panel in this case carefully considered the extensive trial-court record; the opening, response, and reply briefs filed during the initial appeal; the defendants' 45-page Circuit Rule 54 Statement, as well as the government's statement, on remand from the Supreme Court; and – beyond the requirement of Circuit Rule 54 – the panel ordered, on its own, cross-responses to the Rule 54 Statements, and held oral argument.

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[1]Defendant Peter Atkinson's rehearing petition is styled as both a panel and *en banc* petition (cited herein as "Atkinson Pet."); Black and Boultbee's joint petition requests only *en banc* review ("Joint Pet."). From the initial round of briefing, we will cite the government's appendix as "GA" and the defendants' separate appendix as "SA."

After that extensive deliberative process, the panel distinguished the two fraud convictions for which the error was not harmless (although just "barely," slip op. at 15)[2] from the fraud conviction and the obstruction conviction for which the error was harmless beyond a reasonable doubt. Because that conclusion was correct and consistent with precedent of the Supreme Court, this Circuit, and other Circuits, there is no basis for either panel rehearing or *en banc* review. Fed. R. App. 35(b)(1)(A), (B); Fed. R. App. 40. Indeed, *en banc* review is disfavored. Fed. R. App. 35(a). "Given the 'heavy burden' that en banc rehearings impose on an 'already overburdened court,' such proceedings are reserved for the truly exceptional cases." *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (*per curiam*) (internal quotation marks and citations omitted). This is not one of those "truly exceptional cases," and the petitions should be denied.

ARGUMENT

I. The Unanimous Panel Applied Governing Harmless-Error Review and Correctly Determined That the Instructional Error was Harmless Beyond a Reasonable Doubt as to One of the Fraud Convictions.

The defendants complain first that the panel misapplied harmless-error review on the fraud convictions, but the defendants' argument is based on a straw-man: that the panel sat as if it were a jury in the first instance. Joint Pet. at 2-3. The panel did no such thing. Instead, the panel identified the leading Supreme Court and Seventh Circuit precedent on harmless-error review of instructional errors, correctly stated the

[2]The panel's slip opinion is attached to this response in a case addendum.

applicable standard ("But if it is not open to reasonable doubt that a reasonable jury would have convicted them of pecuniary fraud, the convictions on the fraud counts will stand," slip op. at 3), and then painstakingly applied that standard to the fraud and obstruction convictions.

Indeed, it is the defendants' petition that conjures an unrecognizable harmless-error review standard, relegating the most important Supreme Court precedent, *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (*per curiam*), to a solitary end-of-string-cite-mention in the *en banc* petition, and then only cited for an undisputed proposition (that harmless-error review requires examination of the record as a whole). Joint Pet. at 1. Relying on *Hedgpeth*, the Supreme Court in *Skilling v. United States*, explained that harmless-error review does apply where a general verdict may be supported by an alternative, valid legal theory even though a jury has been also instructed on a legally invalid theory. *Skilling v. United States*, 130 S. Ct. 2896, 2934 (2010) (citing *Hedgpeth v. Pulido*, 129 S. Ct. at 532) (citing *Neder v. United States*, 527 U.S. 1, 19 (1999)). Just as instructional errors are subject to harmless-error review where an omission or misstatement of an element occurs, so too are errors in which one legally invalid theory is submitted to the jury along with a valid theory:

> And *Neder* makes clear that harmless-error analysis applies to instructional errors so long as the error at issue does not categorically vitiat[e] *all* the jury's findings. . . . An instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when one theory is submitted.

Hedgpeth, 129 S. Ct. at 532 (citations and quotations omitted; emphases in original).

The question for harmless-error review is whether, beyond a reasonable doubt, the reviewing court can conclude "that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 19.

The inquiry described by the Supreme Court in *Neder* and *Hedgpeth* contradicts the defendants' argument that harmless-error review requires proof that the jury "*in fact convicted on a proper basis*." Joint Pet. at 4 (all emphasis in original). And that contradiction is not surprising for two reasons. First, *Neder* itself did not ask whether the jury "in fact" convicted on a proper basis, because the jury there was not even correctly instructed on *one* correct theory of liability. The jury in *Neder* was "explicitly directed" not to consider what turned out to be an essential element of the offense (there, materiality in a tax offense), and thus did not "in fact" convict the defendant on a legally-proper theory of liability – yet the Supreme Court deemed the error harmless, because the error did not vitiate all of the jury's findings and non-structural errors are subject to harmless-error review. 527 U.S. at 16-17 & n.1.

The second reason why the defendants' description of harmless-error review is inconsistent with *Neder* is that *Neder* and *Hedgpeth* extensively discussed – and distinguished – the primary cases that the defendants rely on in their petition. Joint Pet. at 4-5 (relying on *Yates v. Evatt*, 500 U.S. 391, 406-07 (1991), and *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). In *Neder*, the Supreme Court explained that certain alternative-reasoning language in *Sullivan* "cannot be squared with our harmless-error cases," and that reliance on *Yates* was just another way of arguing that an instructional error is not subject to harmless error review. 527 U.S. at 11, 17.

Hedgpeth further put the nail in the defendants' description of harmless-error review, explaining that to require a showing that it was "absolutely certain that the jury relied on a valid ground" would really be a "finding that no violation had occurred at all, rather than that any error was harmless." 129 S. Ct. at 533 (quotation omitted). The panel applied the correct legal standard.

Furthermore, the panel painstakingly applied that standard to the extensive factual record, slip op. at 8-14, to correctly conclude that one of the fraud convictions (Count 7) must be affirmed because the instructional error was harmless beyond a reasonable doubt. Count 7 involved a total of $600,000 in stolen money arising from the sale of local community newspapers to companies called Forum and Paxton, and fraudulently labeled as non-compete payments to the defendants. Forum purchased the *Jamestown Sun* in North Dakota for $14 million, in September 2000. GA82. Paxton purchased Michigan newspapers for a total price of $59 million, in October 2000. Tr. 2408. As Forum's CEO – a disinterested witness – testified at trial, Forum did not care about non-compete agreements. GA83. Hollinger International was getting out of the community newspaper business, and there was no real risk the company or any individuals would come back to North Dakota to compete with the *Sun*. *Id.* Surprisingly to Forum, Hollinger International offered up a non-compete from International and from Hollinger, Inc. GA83-92. Because it cost Forum nothing, Forum was happy to sign the agreement as to International and Inc. GA93-99. But – significantly – not only did Forum not initiate the non-competes from the corporate

entities, Forum never requested or required non-competes from *individual* executives, and no such agreements were even signed as part of the deal. GA100, 590, 595.

As part of the Paxton transaction, Paxton wanted an agreement from *International* not to re-enter the market and compete with Paxton, GA101, but Paxton (again represented at trial by disinterested witnesses) did not require non-competes from any other person or entity, GA102. Specifically, Paxton did not request or require non-compete agreements from any individuals, including Black, David Radler, Boultbee, or Atkinson. GA103-07. There were no individual non-compete agreements signed, and the contracts did not provide for any money to go to the executives. GA604, 609. In deals with newspaper-buyers Forum and Paxton, there was $600,000 from the sales left in the company's reserves, so defendant Black and Radler agreed they would take it and distribute it among Black, Radler, Boultbee, and Atkinson. GA249, 250-56. Thus, in dividing up the $600,000, Black and Radler were not following any allocation that had been provided for in the transaction documents, for the simple reason that there were *no* individual non-compete agreements mentioned anywhere in the transaction documents. Rather, as the district court recognized, they simply decided how to divide up Hollinger International's money "according to the same formula they had used in the past for non-compete payments." SA198. In concluding that the instructional error was harmless, the panel summarized the "compelling" evidence of money fraud: "the absence of a written record of a $600,000 transaction, the disinterested testimony by the newspapers' buyers that they did not request covenants not to compete, Radler's implicit boast that the covenants were fabrications, and the

absence of an economic reason for them (because the defendants had no conceivable interest in becoming individual publishers of small community newspapers)." Slip op. at 14.

The defendants register various complaints about the panel's assessment of the trial record. They rely on the "large number of acquittals," including the acquittals on two other fraud counts involving the supplemental payments where the money was paid, supposedly, for a non-compete covenant from Hollinger, Inc., which was the holding company for Hollinger International. Joint Pet. at 8-9. But aside from the general difficulty in accurately divining meaning from acquittals, *see United States v. Powell*, 469 U.S. 57, 68 (1984) (warning that there is no self-evident interpretation of verdicts of acquittal), even the defendants have recognized that the acquitted charges all involved payments pursuant to purported non-competition agreements that were, for cover story purposes, at least reduced to writing and made, supposedly, in connection with actual sales by Hollinger of newspaper companies that it owned. *See* Defs.' 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."). In contrast, the counts of conviction (including the one affirmed by the panel, Count 7) were such brazen money frauds that either no newspaper sale was connected to the payments or the non-compete cover story was not even reduced to writing. If anything, the jury applied a super-reasonable-doubt standard in splitting its verdicts, and thus, as the panel explained, slip op. at 13-14, the jury simply convicted where the non-compete story was

completely implausible, including where Forum and Paxton cared not at all about non-competes from individual executives.

The defendants also insist that the panel misconstrued Radler's August 2000 "contemporary documentation" of the bogus non-compete agreements that the buyers had purportedly demanded. Joint Pet. at 9-11. To the contrary, Radler sent the memo to Black, Boultbee, Atkinson, and Mark Kipnis joking that the buyers "[u]nfortunately" wanted such broad non-competes that the defendants would only be allowed to work in "Alaska, Wyoming, and Louisiana," and therefore the executives would have to find "suitable accommodations four [sic] our new headquarters in Casper, Wyoming." GA454. To compensate for this supposed burden, Radler wrote that he had "allocated 42.6% of the purchase price," to pay for the individual non-competes–which in Paxton would have meant $25 million. The "42.6%" figure bore no true relation to the deals, and was Radler's tongue-in-cheek way of congratulating himself and his co-schemers on how they had succeeded in using the company's newspaper sales as a way to enrich themselves. GA240-41. No reasonable jury could interpret that incriminating evidence as "contemporary documentation" of real non-compete agreements, as the defendants propose.

Even more remarkable is the defendants' dressing-up of the contention that Radler "honestly believed that the payments for the Forum/Paxton non-competes had been authorized and properly documented." Joint Pet. at 10. Not so. Radler mistakenly believed that Kipnis had carried out the bogus cover story by reducing the fraudulent non-competes to writing, Tr. 7935, and Radler additionally testified that he

did not seek approval from the Board or the Audit Committee, Tr. 7935, precisely because "first of all, the buyers hadn't really requested the non-compete payment; and, secondly, I knew that the non-compete – the process of creating this non-compete – payment was wrong," Tr. 7936.

Defendant Atkinson also complains that, aside from the $15,000 non-compete payment itself, there was "no other evidence" as to his fraudulent intent. Atkinson Pet. at 3. But there was. To start, Atkinson did not even live or work in the United States, so not only was it a fact that Forum and Paxton did not seek an individual non-compete from him, it was completely implausible that those United States community newspaper buyers would pay him for one. Furthermore, Atkinson received the August 2000 memo from Radler in which Radler joked about the bogus non-competes. *See supra* at 8. There is also the strong inference, based on the evidence, that if Radler were doing all of this on his own, he would not have shared the fraud proceeds of every non-compete payment with Black, Boultbee, and, of course, Atkinson. Every single non-compete payment received by Radler was matched with an equal payment to Black. GA627. And every time Black and Radler received individual non-compete payments, Atkinson (and Boultbee) received non-compete payments as well. *Id*.

There also was plentiful evidence of Atkinson's concealment and affirmative misrepresentations concerning the payment. Atkinson did not obtain the requisite Audit Committee approval for the related-party payment, GA193-95, and when he finally disclosed the payments to shareholders in 2002 (more than a year too late), the disclosures were false. Shareholders were told:

> In connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, the Company, Lord Black and three senior executives [including Atkinson] entered into non-competition agreements with the purchasers . . . for aggregate consideration paid in 2001 of $600,000. . . . Such amounts were paid to Lord Black and the three senior executives. The Company's independent directors have approved the terms of these payments.

GA577. The $600,000 paid in 2001 constituted the supplemental payments from the Forum and Paxton deals. Atkinson, along with Boultbee and Kipnis, was sent draft SEC disclosures containing these false statements for their review, and he approved them without correcting them. GA110-12. The false SEC disclosures also came after 2001, when Atkinson had been warned by lawyers from Cravath, Swaine & Moore in direct and clear terms that Atkinson must disclose non-compete payments, that the need to disclose was not a close call, and that failure to do so exposed the company to substantial shareholder liability. GA134-40; GA435.

There was even more proof of Atkinson's consciousness of guilt: by 2003, inquiries into the purported non-compete payments were advancing, including a Special Committee of the Board, and Atkinson sought to ensure that the executives continued to control the Board until the inquiry was complete. Specifically, in May 8 and May 21, 2003 e-mails to Black, Atkinson emphasized that the executives needed to control the Board, going so far as saying that they should add new, independent Board members only "after the non compete review phase is completed." Exh. Shareholder-51. All of this evidence refutes Atkinson's claim that there was "no other evidence" of his intent aside from the $15,000 check itself.

Finally, the other type of argument that the defendants make is that the mere undisclosed conflict-of-interest theory so permeated the case that the jurors had no reason to even consider the money-fraud theory, and thus the undisclosed conflict-of-interest theory was the basis for the Forum/Paxton fraud conviction. Joint Pet. at 6-8. But the panel correctly concluded that the "failure to disclose is mentioned in passing in the information," and that "the evidence at trial, and the closing arguments, focused on whether the absence of a written covenant was merely an oversight or instead proof of pecuniary fraud." Slip op. at 13. For example, in closing arguments, the government repeatedly and predominantly argued that the defendants stole money, and that the theft was the basis for the honest-services fraud:

> The crime in this case is not about the fact that defendants got money. It's not that by itself. The crime in this case is that the defendants hid and lied about the true reasons why they got money.

Tr. 13728. The crime was "not" that defendants got some undisclosed payment "by itself." *Id.* It was that the defendants "hid and lied about the true reasons why they got money." *Id.* That is money fraud: false representations and concealment to obtain money. Throughout the closing arguments, the parties argued over whether non-disclosure was a mere innocent mistake or *evidence* of money fraud, and over whether the defendants had stolen money from the company, *e.g.*, Tr. 13631-32, 13633,[3] 13639-

[3]"Now, there are a lot of legal terms that define these men's crimes, but what it boils down to is really quite simple: Conrad Black, David Radler, Jack Boultbee and Peter Atkinson decided on their own to take a slice of the company's profits . . . and, with Mark Kipnis' help, they created a phoney paper trail to make their actions appear legitimate." Tr. 13633.

40, 13699, 13829-30, 13880-81, 14947, 15019, 15071,[4] but there was no equating non-disclosure to honest-services liability.

Nor did the mere undisclosed conflict-of-interest theory permeate the superseding information; rather, the charges alleged that the defendants had a duty not to fraudulently benefit themselves *at the expense* of the company, which is not a mere failure to disclose. Specifically, the superseding information alleged that defendants each had a "duty of undivided loyalty to International," R407 ¶1(d)-(h), and "repeatedly abused their authority and fiduciary obligations as managers of International in order to fraudulently benefit themselves *at the expense of International and its public shareholders*." *Id.* at ¶3 (emphasis added).

The same lack of reliance on the mere non-disclosure theory applies to the jury instructions. For example, the jury instructions required that the government prove that a defendant "misused his position for private gain for himself and/or a co-schemer." R. 771 at 22. The instructions thus required a "misuse" of position for private gain, and did not equate "misuse" with a simple non-disclosure or breach of fiduciary duty, which a rational jury would have expected the instructions to say if they in fact were equivalent. And, as the panel pointed out, the mere non-disclosure could not be the basis for the Forum/Paxton fraud conviction because, if it had been, then the jury would have also convicted on Counts 2 and 3 (the other Forum/Paxton counts) in

[4]"And you'll see what that means is to *take money from the shareholders or the company, or to gain money from the shareholders of the company*, by means of fraud and deception. Okay? You will see that in the jury instructions." Tr. 15071 (emphasis added).

light of the failure to disclose those payments as well. None of the defendants' myriad complaints about the panel's exhaustive harmless-error review of the fraud convictions warrants panel rehearing or *en banc* rehearing.

II. The Unanimous Panel Correctly Held that the Honest-Services Instructional Error has no Effect on Black's Obstruction Conviction.

Defendant Black also contends, Joint Pet. at 12-15, that this Court should review *en banc* the panel's detailed assessment of his obstruction conviction, slip op. at 4-8. But the honest-services instructional error had no impact on what evidence was introduced on the fraud counts, let alone the obstruction count. That means, as the panel correctly identified under this Circuit's law, that the erroneous instruction "would ordinarily be irrelevant" to conviction on error-free counts. Slip op. at 6 (citing *United States v. Holzer*, 840 F.2d 1343, 1349 (7th Cir. 1998)). In any event, the panel understood that if, somehow, "a count is submitted to the jury under an instruction apt to poison the jury's consideration of other counts as well, the defendant may be entitled to a new trial." Slip op. at 6. But that rare exception did not apply to Black's obstruction conviction. *Id.* at 7-8.

Yet Black maintains that the legal error in describing honest-services fraud somehow affected the jury's consideration of Black's corrupt intent to obstruct. There is no support, either in the evidence or the arguments to the jury (or in common sense), for the idea that a rational jury would consider the scope of 18 U.S.C. § 1346 as determinative of Black's state of mind in sneaking out the boxes of documents that were relevant to the SEC, criminal, and grand-jury investigations. Indeed, if it was

widely believed at the time of Black's obstructive conduct that § 1346 did have a broad scope, then that belief would only serve as more motivation, not less, for targets of fraud investigations to corruptly engage in obstruction.

In any event, even if the honest-services instruction had not been part of the trial, the perfectly-valid money fraud counts and instructions, and the extensive evidence of the investigations closing in on Black, render the error harmless as to the obstruction conviction. With full knowledge of an SEC investigation, federal grand-jury investigation, and federal criminal investigation closing in on him – the government directly informed the defendant of the criminal investigation just 2 months before the obstruction, SA151-52 – Black 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. Specifically, Black's assistant, Joan Maida, was prevented from removing the boxes by a Canadian court order prohibiting documents' removal, and by a corresponding office policy. Tr10666-68,10823; GA310-11. She was told by court-appointed inspectors that the boxes could not leave the building until a protocol was established for reviewing any documents that were to be removed. Maida then called Black to inform him that she was not being allowed to leave with the boxes. Tr. 11443,11500. Yet Black then went to great lengths to remove them. That itself is powerful evidence of corrupt intent.

In the Joint Petition, Black attempts to drape innocent explanations on his conduct, but he removed files containing documents relevant to the investigations, and left behind numerous personal effects. GA277-78. Indeed, the jury saw Black's actions

on video-tape – a building-security video camera had been installed in a position that the defendant did not know about. Everything the defendant did in sneaking out the boxes was evidence of corrupt intent: waiting until after the building was closed and the guards had changed shifts; and carrying the boxes out himself rather than asking the security guard to help (as his assistant had done earlier in the day).[5]

CONCLUSION

The government respectfully asks that the Court deny the petitions.

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[5]Black continues to rely on the assertion that he knew that security cameras were recording him, but the camera that Black pointed at was focused on the stairwell that he, his assistant, and his chauffeur descended on their way to a separate hallway where the boxes were stored. Black pointed at another area in the stairwell near the ceiling where there was something that looked like a camera but was not. GA276, 654.