Nos. 07-4080, 08-1030, 08-1072, 08-1106, consolidated

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTBEE, and MARK S. KIPNIS, *Defendants-Appellants*	Appeal from the District Court for the Northern District of Illinois, Eastern Division No. 05-CR-727 Judge Amy J. St. Eve

MOTION BY CONRAD M. BLACK AND JOHN A. BOULTBEE FOR PERMISSION TO FILE THE ENCLOSED REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR REHEARING *EN BANC*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 07-4080

Short Caption: United States v. Black

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[x] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Conrad Moffat Black

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP; Genson & Gillespie; Greenspan & White;
Marc W. Martin, Ltd.; Baker Hostetler LLP;
NEW: Gibson, Dunn & Crutcher LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: _____ Date: 12/06/2010

Attorney's Printed Name: David Debold

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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Defendants-Appellants Conrad M. Black and John A. Boultbee request permission pursuant to FRAP 27(a) to file a 6-page reply to the government's opposition to rehearing *en banc*. The proposed reply brief is attached to this motion. The government does not consent to this request.

In support, Appellants state:

1. On October 29, 2010 a panel of this Court issued its opinion, following remand from the United States Supreme Court, reversing Appellants' convictions on two counts of mail fraud and affirming their convictions on a third count of mail fraud as well as Mr. Black's conviction on a count of obstructing justice.

2. Appellants filed a timely petition for rehearing *en banc* on November 12, 2010. Co-Appellant Peter Y. Atkinson also filed a separate rehearing petition.

3. On December 3, 2010, at the Court's request, the government filed an answer to the petitions in which it opposed rehearing.

4. The petition raises the exceptionally important question whether an appellate court may deem an error harmless, based on the court's favorable assessment of the persuasive power of the government's case on an element that the defense strongly contested..

5. In opposing rehearing the government argues that the Supreme Court recently rejected the standard of harmless error review that Appellants urge. The proposed reply brief would assist the full Court in identifying why it is the panel (and the government) that have misconstrued the relevant Supreme Court precedents and why that error is of exceptional importance.

6. Appellants have prepared a short reply brief, attached to this motion, that would assist the Court in reaching a decision on those issues.

For the above-stated reasons, Appellants ask the Court to accept for filing the attached reply brief in support of their petition for rehearing *en banc* and circulate the reply brief to the full court.

Respectfully submitted,

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Dated: December 6, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 6, 2010 the following counsel was served with a copy of the foregoing **MOTION FOR PERMISSION TO FILE ATTACHED REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC*** by overnight carrier, postage prepaid:

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Dated: December 6, 2010

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EXHIBIT 1

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UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTBEE, and MARK S. KIPNIS, *Defendants-Appellants*	Appeal from the District Court for the Northern District of Illinois, Eastern Division No. 05-CR-727 Judge Amy J. St. Eve

REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING *EN BANC* OF CONRAD M. BLACK AND JOHN A. BOULTBEE

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The government insists that this case does not warrant further review because the panel "correctly stated the applicable standard" in a manner "consistent with precedent of the Supreme Court." Govt. Opp. ("Opp.") at 2-3. That this cannot be so is apparent even from the government's opposition, which contains not one citation to—much less discussion of—*Rose v. Clark*, 478 U.S. 570 (1986), *Pope v. Illinois*, 481 U.S. 197 (1987), or (incredibly) *Chapman v. California*, 386 U.S. 18 (1968). These landmark precedents are among the cases "that the defendants rely on in their petition" (Opp. at 4-5), but that, in the government's view, do not warrant discussion because they supposedly did not survive the Supreme Court's decision in *Neder v. United States*, 527 U.S. 1 (1999). That the government is compelled to defend the panel's decision on the theory that the world began in 1999 wholly impeaches the government's "move-along, nothing-to-see-here" approach to the petition. As the government should be well aware, only the Supreme Court can decide that High Court precedent has been superseded; the lower courts may *not* "conclude [that] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (*citing Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484 (1989)).

In fact, the government is completely off base in suggesting that *Neder* and *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (per curiam), foreclose the Sixth Amendment challenge presented by the petition. Both cases addressed whether particular errors may be *subject* to harmless-error analysis. But the issue here is not, as the government would have it, whether the type of error at issue here is "subject to harmless-error review." Opp. at 3. The question is *how* such review should be conducted. On *this* question, the legal standard used by the panel—both in conception *and* application—is incorrect. The panel (1) inquired whether the error "would have" affected a hypothetical "reasonable jury" rather than whether *this verdict* was affected by the error, (2) resolved all ambiguities in the government's favor, and thus placed the burden on the defense instead of the government, and (3) extolled the evidence marshaled by the government but ig-

nored or ridiculed the defense case. Apart from its submission that *Neder* changed the world, the government's opposition extensively parrots each of these themes without providing any reason to believe they are *correct*. Because the panel opinion subtly but radically alters this Circuit's basic approach to one of the most important and oft-used doctrines in criminal law, *en banc* review is warranted.

1. In light of the importance the government attaches to *Neder*, it is essential to understand what was (and was not) at issue in that case. The trial court in that case reserved for itself (and thus did not submit to the jury) a single offense element that the defendant chose not to contest. The issue before the Supreme Court was whether such an error could *ever* be harmless, or whether it instead categorically vitiates a jury's verdict *in every case*. The Court split 5 to 4 on the majority's conclusion that failure to instruct on a single element could be harmless where the evidence on an element is overwhelming *and* the defendant fails to *dispute* that element. The jury-trial right guaranteed by Article III and the Sixth Amendment was at the center of the disagreement between the majority and the dissenters. The latter contended that the utter absence of a jury finding even on a single undisputed element was fatal because a jury never actually found the crime. 527 U.S. at 25-40 (four justices rejecting the majority's test as unconstitutionally broad) & 30 (Scalia, J., dissenting) (even where the evidence is uncontested, "*the Constitution does not trust judges to make determinations of criminal guilt*"). The majority homed in on the fact that *Chapman* required a focus on the "verdict obtained," and noted that a fact that the defendant never disputed could not possibly have affected the verdict that the jury actually returned. *See* 527 U.S. at 15, 19. There was not a single member of the Court who believed that review should focus on anything other than the jury that actually heard the case. Indeed, the majority could not have been more clear on the rule that applies here (*id.* at 19 (emphasis added)):

> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—*for example, where the defendant*

contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.

Neder is miles away from a holding that allows a court to take from the jury hotly *disputed* issues—including, here, intent to commit pecuniary fraud.

Neder concluded that *Sullivan v. Louisiana*, 508 U.S. 275 (1993), had spoken too broadly in suggesting that the absence of a jury verdict on every element of an offense can *never* be harmless. The government evidently takes this part of *Neder* to suggest that the Supreme Court broke with decades of precedent—all those pesky cases "that the defendants rely on" and the government cannot be troubled to discuss (Opp. at 4)—but the strand of *Sullivan* that the Court superseded has nothing to do with the issues in this case.[1] The problem here is not that the trial court missed one element of mail fraud, but that its instructions (and the government's arguments) permitted the jury to dispense *with all of them*. The jury in this case could return a guilty verdict (and very likely did so) on the basis of a fake crime, without even considering whether the defendants committed actual mail fraud. *Neder* did not suggest that it is permissible to "cure" this due process violation by violating the Sixth Amendment: *i.e.*, with nothing more than an appellate assurance that, were an actual "reasonable" jury ever to consider and decide the elements of the offense, it surely would agree with the government's "compelling" evidence. See 527 U.S. at 10-11, 17 & n.2 (majority opinion) (reaffirming *Rose* v. *Clark*'s rule that a court may not find the defendant guilty); *see also id.* at 33 (Scalia, J. dissenting). And one would think that a case in which the jury overwhelmingly *rejected* the government's proofs, including the very evidence on which the panel relied, would be a particularly poor candidate in which to announce such a rule.

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[1] In particular, nothing in *Neder* calls into doubt Sullivan's statement of the government's burden: the government must establish that "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *cf. Neder*, 527 U.S. at 11 (distinguishing *Sullivan* on the question whether instructional error on an offense element is *amenable to* harmless-error review in the first place). In fact, the result in *Neder* is fully consistent with that rule, since a fact the defendant did not put in issue could not possibly have affected the verdict. Apart from *Sullivan*, the only case that the government even deigns to mention is *Yates v. Evatt*, 500 U.S. 391 (1991). But *Neder* distinguished *Yates* on precisely the point that requires reversal *here*: while Neder (understandably) made no effort to contest the materiality to a tax return of $5 million in income, the element affected by the instruction error in *Yates* "was the crux of the case—the defendant's intent." 527 U.S. at 17.

The government also badly misses the mark when it touts *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008), as "the most important Supreme Court precedent" (Opp. at 3) on how to conduct harmless-error review. There is nothing new in *Hedgpeth* on *that* question (and certainly nothing validating the panel's novel approach). *Hedgpeth* merely addressed *when* harmless-error review is permitted, 129 S. Ct. at 531, a point the Supreme Court answered in this case by remanding for harmless-error review. *Black v. United States*, 130 S. Ct. 2963, 2970 (2010). When *Hedgpeth* did advert to the *manner* of review, it reaffirmed what the panel here ignored: that reversal is required where it is "impossible to say under which clause of the [instruction] the conviction was obtained." 129 S. Ct. at 531 (alteration in opinion; quoting *Stromberg v. California*, 283 U.S. 359, 368 (1931)).

2. Any proper assessment of whether the government disproved prejudice beyond a reasonable doubt in this case cannot fairly ignore—as the panel did—the significance of the jury instructions or the jury's massive rejection of the government's case at trial. The government never addresses the fact that the jury charge permitted conviction without *any* consideration of the money-fraud theory. Nor does the government address *at all* the unanimity instructions in this case, which require the government to establish that not a single juror relied on the flawed instructions. *See* Pet. at 8. The only unanimity the government is interested in discussing (and with ingratiating repetition) is that of the panel. Although the government presumably means only to suggest that the absence of a dissent lessens the likelihood of error, the fact is that appellate remedies are provided on the theory that "[c]ourts do make mistakes." *Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992). The same unanimous panel previously ruled against the defendants on two independent grounds, neither of which garnered a single vote in the United States Supreme Court. One of those two grounds (procedural default) would have been totally unnecessary if the government could establish harmlessness under conventional standards, as it now contends. The government surely could have spared one of its encomiums to the panel in order

to take the time to explain why it fought all the way to the Supreme Court to defend a forfeiture rule that could only possibly have bite where the government cannot meet the *Chapman* standard.

The acquittals encompassed the most serious charges—and the great bulk of the case. Both the panel and the government ignore the point that, if anything can be said with confidence about the verdict, it is that the jury repeatedly and decisively rejected the government's evidence on the hotly disputed element whether defendants intended to commit real fraud. The government, after setting out to prove a multi-year scheme to "loot" over $50 million, ended up with just a single mail fraud conviction involving 1% of that amount to show for all its efforts. It is poorly positioned to insist that it "overwhelmed" the jury with proof of pecuniary fraud. Only by treating harmless-error review as an assessment of the *sufficiency* of the government's proofs could the panel have concluded otherwise, especially where the acquittals depended on similar and, in some instances, *the same* testimony from the six government witnesses who were essential to the proofs on count 7—co-defendant Radler, Case (from Forum), Paxton, and all three audit committee members. Indeed, for every example the government offers up of "compelling" proof of money fraud—the two "disinterested witnesses" who testified they "did not require non-competes from any other person or entity" (Opp. at 6); Radler's "clowning memo" (*id.* at 6 & 8); the assertion that "the defendants had no conceivable interest in becoming individual publishers of small community newspapers" (*id.* at 7 (quoting slip op. at 14))—the jury acquitted of counts where the government relied on *the same evidence and argument*. *See* Pet. at 9 (count 2 and 3; Hollinger, Inc.—a Canadian holding company—also received non-compete payments from Forum and Paxton); 11 (count 5; involving other non-competes in Radler's "tongue in cheek" memo); 7th Cir. Govt. Br. at 8 (listing individuals and entities receiving payments for other charged and acquitted non-compete deals).[2] All that remained *un*contested was "the absence of a

[2] Any "general difficulty" in "accurately divining meaning from acquittals" (*see* Opp. at 7) would be reason to *reverse* (not affirm) because unlike with sufficiency-of-evidence review, *the government* bears

written record" of the transaction (Opp. at 6)—Kipnis's inadvertent failure to draft agreements—which the government concedes prompted the parties to "argue[] over" whether "the defendants had stolen money from the company." Opp. at 11; *see also* Pet. at 9-12. A jury argument in which the parties dispute an element is the antithesis of harmlessness beyond a reasonable doubt.

3. The Opposition's defense of the panel's ruling on the obstruction conviction is flawed for all the same reasons—and then some. The government, in fact, confirms what the panel denied. While the panel contended there was no relation between the fraud and obstruction convictions (wholly ignoring the instructions that identified the flawed criminal prosecution as a predicate for obstruction), the government's theory is that the honest-services catechism was so widespread at the time of the investigation that Black was highly motivated to evade the grasp of this amorphous law. This is just another way of saying that the jury was more likely to convict Black if it believed, however wrongly, that he was guilty of honest services fraud. Precisely what we have contended all along.

For the reasons stated above and in the petition, this Court should grant *en banc* review.

Respectfully submitted,

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the burden of proving beyond a reasonable doubt that constitutional error had no effect on a conviction. For good measure, the government overstates *United States v. Powell*, 469 U.S. 57 (1984), which held only that inconsistency in verdicts is not *itself* reversible error. The Supreme Court has already rejected the view that acquittals are necessarily too ambiguous to form the basis for dismissal of other counts—even in situations (unlike here) where *defendants* bear the burden. *See Yeager v. United States*, 129 S. Ct. 2360 (2009) (applying *Ashe v. Swenson*, 397 U.S. 436 (1970), to allow estoppel effect for acquittals).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 6, 2010 the following counsel was served with a copy of the foregoing **REPLY BRIEF IN SUPPORT OF PETITION FOR RE-HEARING *EN BANC* OF CONRAD M. BLACK AND JOHN A. BOULTBEE** by overnight carrier, postage prepaid:

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