No. 10-695

In The
Supreme Court of the United States

MARK D. LAY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF DR. BARRON H. HARVEY, DEAN OF THE HOWARD UNIVERSITY SCHOOL OF BUSINESS AND CHARLES R. ZAPPALA, ESQ.

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January, 2011

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IN THE SUPREME COURT OF THE UNITED STATES

MARK D. LAY,
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V.

UNITED STATES OF AMERICA,
RESPONDENT.

MOTION OF DR. BARRON H. HARVEY, DEAN OF THE HOWARD UNIVERSITY SCHOOL OF BUSINESS AND CHARLES R. ZAPPALLA, ESQ. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Dr. Barron H. Harvey, Dean of the Howard University School of Business and Charles R. Zappalla, Esq., respectfully request leave to file their brief amicus curiae in this action. The brief was tendered on January 28, 2011, but has not been filed. It was believed that the brief was due on January 28, 2011, the date of the filing of opposition by the United States. It has now been clarified that the

amicus brief was due when the original Petition for Certiorari was filed. It is respectfully requested that the amicus brief tendered on January 28, 2011 be filed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via US. Postal Service upon opposing counsel, on February 15, 2011.

The Honorable Neal Kumar Katyal, Acting Solicitor General
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BRIEF *AMICUS CURIAE* OF DR. BARRON H. HARVEY, DEAN OF THE HOWARD UNIVERSITY SCHOOL OF BUSINESS AND CHARLES R. ZAPPALA, ESQ.

STATEMENT OF INTEREST OF AMICUS [1]

Dr. Barron H. Harvey is the Dean and Frank Ross/KPMG Endowed Professor in accounting at the Howard University School of Business. Dr. Harvey is a lifelong friend of Mr. Lay and a native of

[1]In accordance with the provisions of Supreme Court Rule 37.6, it is hereby disclosed that counsel for Petitioner provided input to this brief of *amicus curiae* and also made a monetary contribution to the cost of printing. Other than counsel for Petitioner,no person other than the *amicus curiae* or their counsel contributed to preparation or submission of the brief. Pursuant to Rule 37.2(a), counsel of record for both parties received timely notice of amici's intent to file this brief. Letters from the parties consenting to the filing of this brief are on file with the Court.

Aliquippa, Pennsylvania. Dr. Harvey was a character witness at Mr. Lay's trial.

Under the distinguished leadership of Dr. Harvey, the Howard University School of Business has made strides in its ongoing quest to maintain excellence in its academic programs. The School's Undergraduate Program is ranked among the Top 75 US programs in Business Week's 2008 "Best Undergraduate B-Schools". It was among the top 20 schools in the Mid-Atlantic Region of the United States, 1 of 4 in the Washington DC Metro-Area and the only Historically Black University to be included in the ranking.

In the September 2007 *Wall Street Journal/Harris Interactive Survey* of corporate recruiters on business schools, the School's MBA program maintained its ranking as one of the top three national institutions for hiring minority graduates. Additionally, the 2007 Princeton Review, again ranked the MBA Program among the top business schools in the nation, *#1 ranking for the Greatest Opportunity for Minority Students and #5 ranking for Most Competitive Students*. The School is also ranked as one of the top 70 undergraduate business programs in the nation by *Businessweek* magazine.

In addition to the prestigious position as Dean of the School of Business, Dr. Harvey is a tenured member of the faculty and has served as a full professor in the Department of Accounting for over 18 years. In fall 2007, Dr. Harvey became the first endowed professor in the School of Business when he was named Frank Ross/KPMG Endowed Professor in Accounting. He has twice been named "Educator of the Year" by the National Association of Black Accountants Inc. (NABA).

By reason of his lifelong association with and his particular concern for fair treatment of African American professionals in the financial services sector, Dr. Harvey desires to bring to the attention of the Court the unprecedented and highly questionable nature of the theory underlying Mr. Lay's prosecution including the unjustified reliance on trade confirmation slips as the basis for prosecution under 18 U.S.C. §1341.

Charles R. Zappala is an investor/ businessman who has founded, acquired, developed and exited companies and projects ranging from plastics manufacturing to financial services. He was one of the founding principals of Russell, Rea, Zappala & Gomulka Holdings, Inc. ("RRZ&G"), the Pittsburgh-based investment

banking holding company. To date, the enterprise value of projects and companies developed and sold exceeds $500 million.

He is currently a Shareholder and a Director of several privately-held Companies, including CLT Efficient Technologies Group, an energy efficiency company; and OnQ Technologies, Inc., a residential structured wiring company.

He has served on various charitable boards, including Pittsburgh Youth Symphony, Pittsburgh City Theater, NCCJ and NEED. Mr. Zappala is a magna cum laude graduate of the University of Notre Dame with a Bachelor of Arts in Government, and an L.L.B. from Georgetown University Law Center.

Mr. Zappala is personally familiar with Petitioner and his work in the financial services industry.

ARGUMENT

As was point ed out in the dissent in the appellate court opinion in this action, in order to sustain a mail fraud conviction against Mr. Lay, the government was required to show proof of interstate mailing "in furtherance of the [alleged] scheme to defraud[.]" United States v. Prince, 214 F. 3d 740, 748 (6th Cir. 2000); see also, 18 U.S.C. §1341 (a mailing must be "for the purpose of executing such scheme or artifice" to defraud).

Here the charged mailings are "trade confirmation slips." The government did not contend and the evidence did not show that the slips themselves contained any misrepresentations or that they played any role whatever in parting the Ohio Bureau of Workers Compensation (OBWC) from its money. Instead, the slips simply confirmed trades that Mr. Lay made on the open market.

The dissent correctly points out that the governments' explanation of this point is amorphous at best. Post-fraud mailings, such as trade confirmations, can further a scheme if designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension

of the defendants less likely than if no mailings had taken place. United States v. Lane, 474 U.S. 438, 451 (1986). Here, there was no proof to support such a theory. In Mr. Lay's case, all of the trades were done correctly, which the government did not contest. The government alleged that the trade confirmations were used in a scheme to over leverage the Active Duration Hedge Fund (ADF). The evidence at trial however did not show how any of the trades accomplished over leveraging. The fact is many trades reduced leverage, and many trades were profitable. The government never distinguished this fact. The evidence did not address individual trades or the dates of the trades. Without showing the daily position of the fund and any losses generated by the trades, the confirmation slips in and of themselves did not advance the government's case.

The trade confirmation statements did not contain false information. In cases where mailing trade confirmation statements constituted a violation of 18 U.S.C. §1341, the statements were transmitted for the purposes of executing the artifice of scheme. See, United States v. Marando, 504 F.2d 126(2d Cir. 1974) where trade confirmation slips were mailed and determined to be an integral

part of a scheme to obtain property; also see, United States v. Grossman, 843 F. 2d 78 (2d Cir. 1988) where it was determined that:

> The mailings of the confirmation slips did further the purpose of executing the scheme. The confirmation slips (1) notified the relatives that the purchase or sale actually had been completed; (2) provided an on-going tally of purchases, allowing the relatives to cover each other's positions; (3) concealed the fraud by maintaining an appearance of normality, see, United States v. Cohen, 518 F.2d 727, 737 (2 Cir), cert denied, 423 U.S. 926, 46 L. Ed. 2d 252 (1975): and (4) allowed the relatives to demonstrate ownership after the recapitalization announcement. Pereira v. United States, 346 U.S. 1, 98 L. Ed. 435, 74 S. Ct. 358 (1954). [**27].

To establish a violation of the mail fraud statute, "the mailing must be for the purposes of executing the scheme." United States v. Maze, 414 U.S. 395 (1974). To state an offense under 18 U.S.C. §1341 this Court determined in Cleveland v. United States, 531 U.S. 12 (2000) that the evidence must

show that the defendant not only devised scheme or artifice, but also used that scheme or artifice to obtain money or property. See, United States v. Males, 459 F. 3d 154 (2d Cir. 2006) (Emphasis added). Here the evidence showed ADF received its first $100,000,000.00 before Mr. Lay ever executed a trade. There was no evidence that the mail was used to obtain money or property. There was no evidence that property or money was obtained through a scheme that involved the use of the mail. The trade confirmation slips here unlike those in Grossman or Mirando did not contain false information, did not document illegal insider trades, and were not transmitted to obtain money or property. The alleged nondisclosures and misrepresentations concerning leverage alleged by the government were not related to the mailing of confirmation slips. The trades reflected on the listed slips were lawful trades for a hedge fund. It does not matter that OBWC did not authorize them, the relevant private placement memorandum gave ADF's board sole discretion to deviate from the fund's leverage guideline, not OBWC. The trade confirmation statements report the purchases of securities on a certain date, from a certain broker, at a certain price. All of that

information was true, in every instance. On these facts a violation of 18 U.S.C. §1341 was not established.

Here OBWC invested funds in ADF on three discrete dates, August 20, 2003, May 21, 2004 and September 23, 2004. These are the only times OBWC "parted" with property.

> The mail fraud statute prohibits the use of the mails by any person "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises..." 18 U.S.C. §1341. "Mail fraud consists of (1) a scheme or artifice to defraud; (2) use of mails in furtherance of the scheme; and (3) intent to deprive the victim of money or property." United States v. Turner, 465 F.3d 667, 680 (6th Cir. 2006). Materiality of falsehood is a requisite element of mail fraud. Neder v. United States, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The misrepresentation "must have the purpose of inducing [*7] the victim of fraud to part with the property or undertake some action that he would

> not otherwise do absent the misrepresentation or omission." United States v. Daniel, 329, F.3d 480, 487 (6th Cir. 2003). A misrepresentation "is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." Neder, 527 U.S. at 16 (internal citation and quotation marks omitted).

McCauliff, supra.

There was no proof here that OBWC parted with property by reason of a material misrepresentation in a trade confirmation slip.

> The mail fraud statute "does not purport to reach all frauds, but only those limited instance in which the use of the mails is part of the execution of the fraud." Kann v. United States, 323 U.S. 88, 95, 89 L. Ed. 88, 65 S. Ct. 148 (1944). Accordingly, the government must show beyond a reasonable doubt that [defendant] caused the mailings listed in the indictment to be sent and th at the mailings were in furtherance of the fraud.

United States v. Pimental, 236 F. Supp. 2d 99 (D.C. Mass 2002).

Here there was no proof of any mailings in further of a scheme to exceed leverage or that the OBWC parted with money due to mailing trade confirmation slips.

On June 24, 2010, the United States Supreme Court in Skilling v. United States, 561 U.S. _____ (2010), 130 S. ct. 2896 2010 U.S. LEXIS 5259 (June 24, 2010) announced a seismic shift in mail fraud prosecutions. The appellate court totally ignored the Skilling opinion. The Skilling opinion highlights what the government's burden of proof is in a prosecution under 28 U.S.C. §1341for mail fraud. Skilling makes is clear that an essential element is a mail fraud prosecution is evidence of some form of gain or enrichment to the defendant. Skilling states:

> Enacted in 1872, the original mail-fraud provision, the predecessor of the modern-day mail and wire fraud laws, proscribed, without further elaboration, use of the mails to advance 'any scheme or artifice to defraud.' See, McNally v. United States, 483 U.S. 350, 356 (1987). In

> 1909, Congress amended the statute to prohibit, as it does today, 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' §1341 (emphasis added); see id. at 357-358. Emphasizing Congress disjunctive phrasing the Courts of Appeals, one after the other, interpreted the term "scheme or artifice to defraud" to include deprivations not only of money or property but also of intangible rights.

Id. at *80-81 (emphasis added).

Skilling goes on to discuss the elements of an honest service fraud claim versus other frauds. In Skilling the Court pointed out the requirement for symmetry in a standard mail fraud case, that is the victim's loss of money or property supplied the defendant's gain with one the mirror image of the other. Id. at *82.

In this case it is undisputed that Mr. Lay did not realize any gain as a result of an al leged misuse of the mails. The OBWC's losses were due to unsuccessful attempts by Mr. Lay to recoup losses through increased use of leverage. In some instances gains resulted from the use of increased

leverage. In other instances losses occurred from its use. In no instance, however, did Mr. Lay realize any money or property from the use of allegedly excessive leverage.

Likewise, Mr. Lay has received no compensation from OBWC by reason of trading activity or volume. All of Mr. Lay's fees were paid by the ADF, not the OBWC. Mr. Lay received no compensation from OBWC for ADF trades. The absence of any gain of any nature by the Defendant is also fatal to a mail fraud prosecution. Skilling emphasizes this point.

The use of the excessive leverage was not a scheme to defraud. It was an investment strategy that failed. The purpose and intent of the strategy was not of a nature that could support a mail fraud prosecution. See, Skilling, (citing United States v. Bloom, 149 F. 3d 649, 655 (7th Cir. 1988) and United States v. Panarella, 227 F.3d 678, 692 (3rd Cir. 2002) (requires that a defendant act in pursuit of private gain)).

Skilling determined that a 28 U.S.C. §1346 prosecution requires as "offense conduct" evidence of either bribery or kickbacks and that the "ambit of criminal statutes should be resolved in favor of lenity." Id. at 100 (quoting Rewis v.

United States, 401 U.S. 808, 812 (1971)). The "offense conduct" in Mr. Lay's case which was a 28 U.S.C. §1341 prosecution according to Skilling, must include an element of gain at the expense of a victim, here OBWC.

In this case the gain element is totally lacking. The District Court stated in of Mr. Lay's sentencing memorandum:

> Looking back in hindsight, as the Court can do, it seems obvious that he should have stopped following the investment strategy he had in place. But at the time, no one had ever seen an instance in which rising bond process would not lead to a devaluation of existing bonds. But that is precisely what happened in this time frame. It was the first time in economic history of the United States that that occurred, and his strategy failed and because of the leverage, failed dramatically.
>
> ***
>
> It seems apparent that the defendant had not lost any monies for any clients in the management of the MDL investments until the defendant began excessive over-leveraging with

> the ADF. It appears from his past experiences with Mellon Bank and PNC the it was not the first time defendant took great risks in the belief that he could recoup his losses. The Court notes that the defendant, born in 1963, actively pursued a good education and did not demonstrate criminal tendencies. The defendant has no criminal record. The defendant appears to have been a responsible father. It does not appear to the Court that the defendant was motivated to gain more income by his management of the ADF.

(Trial Court Doc. #181 p. 23) (emphasis added).

As the District Court indicated, there was no evidence whatsoever that the mails were used by Mr. Lay in any scheme to defraud another or to generate gain for Mr. Lay. Skilling makes it clear the absence of this element is fatal to a mail fraud prosecution. The mailing of trade confirmation slips by third parties that document specific transactions did not result in any gain or benefit to Mr. Lay.

It is respectfully requested that the Court consider this information when reviewing Mr. Lay's Petition.

CONCLUSION

The amicus curiae here respectfully request that the Court grant certiorari.

January 28, 2011.

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