No.

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE,
AND PETER Y. ATKINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, N.Y. 10022
(212) 308-7900
Counsel for Petitioner Boultbee

MICHAEL S. SCHACHTER
IAN K. HOCHMAN
WILLKIE FARR &
GALLAGHER LLP
787 Seventh Avenue
New York, N.Y. 10019
(212) 728-8000
Counsel for Petitioner Atkinson

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com
Counsel for Petitioner Black

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QUESTION PRESENTED

In *Chapman* v. *California*, this Court held that a constitutional error requires reversal if there is "a reasonable possibility that the [error] complained of might have contributed to the conviction." 386 U.S. 18, 23-24 (1967). Constitutional error may be found harmless only if the prosecution establishes "beyond a reasonable doubt" that the error "did not contribute to the verdict obtained." *Id.* at 24. In *Sullivan* v. *Louisiana*, the Court held that this focus on the verdict "obtained" is required by the Sixth Amendment: A court must examine "the basis on which the jury *actually rested* its verdict," rather than the effect that the "error might generally be expected to have upon a reasonable jury." 508 U.S. 275, 279 (1993).

In the aftermath of *Neder* v. *United States*, 527 U.S. 1 (1999), however, several state and federal courts, including the Seventh Circuit in this case, have repudiated this traditional approach. Although this Court has already ruled that the instructions in this case authorized conviction for conduct that is not a crime, the Seventh Circuit held the error harmless after marshaling *only* the government's evidence on hotly disputed issues and pronouncing it "overwhelming" enough to persuade "a reasonable jury." Petitioners had been acquitted on numerous charges based on the same supposedly "overwhelming" evidence. The question presented is:

Whether the right to trial by a jury, and *Chapman* v. *California* and its progeny, permit a court to deem a constitutional error "harmless" solely because the government's evidence purportedly supports guilt, without crediting evidence that favors acquittal or assessing the impact of the error on the jury that actually heard the case.

PARTIES TO THE PROCEEDING

Petitioners were defendants in the district court. Mark S. Kipnis was a co-defendant in the district court and was a party to the decision below. F. David Radler and The Ravelston Corporation Limited—a privately held Canadian corporation—were defendants in the district court but entered into plea agreements with the government before trial. They were not parties in the Seventh Circuit and are not parties before this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Conrad M. Black, John A. Boultbee, and Peter Y. Atkinson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a-14a) is published at 625 F.3d 386. An earlier opinion of the Seventh Circuit (App., *infra*, 17a-33a), which this Court reviewed and vacated, *see* 130 S. Ct. 2963, is reported at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2010. A timely petition for rehearing was denied on December 17, 2010. App., *infra*, 15a-16a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, clause 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

The Due Process Clause of the Fifth Amendment provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

The provisions of 28 U.S.C. §§ 2106 and 2111 and of Federal Rule of Criminal Procedure 52 are set forth in the Appendix. App., *infra*, 34a-35a.

STATEMENT

The government tried petitioners on a 17-count information alleging they looted $60 million from the public company of which they were officers. After a four-month trial, however, the jury acquitted petitioners on nearly all counts, including the most serious. The jury convicted on just three counts of mail fraud and, as to Black alone, a single count of obstruction of justice based on instructions expressly referencing the criminal fraud investigation and trial. This Court granted certiorari and held that the jury charge permitted conviction for conduct that is not mail fraud.

On remand, the Seventh Circuit vacated two fraud counts but held that the error was harmless as to the third count, as well as the related obstruction conviction. With respect to both sets of rulings—vacatur and affirmance—the court marshaled the evidence in the light most favorable to the convictions. The court dismissed the defense evidence that had supported acquittal on the majority of the counts as "implausible," "decisively unbelievable," and "clowning." App., *infra*, 11a-12a. On the basis of this one-sided review, the court concluded that the government's case on the counts at issue here was "so compelling that no reasonable jury could have refused to convict." *Id.* at 14a.

A. Hollinger's Newspaper Sales

Petitioners were executives of Hollinger International, Inc. (Hollinger), a publicly held Delaware media company. Black was Hollinger's Chairman and

Chief Executive Officer. Boultbee was Hollinger's Executive Vice President and, for a time, its Chief Financial Officer. Atkinson was Hollinger's Vice President.[1] David Radler, Hollinger's President and Chief Operating Officer, became the government's star witness at trial in exchange for leniency.

Although Hollinger ultimately became an international media empire with capitalization exceeding $2 billion, it had its roots in the 1969 acquisition of a single community newspaper by Black and Radler. Under their successful management, Hollinger acquired hundreds of community newspapers, as well as several renowned national publications such as the *Daily Telegraph* of London, the *Jerusalem Post*, *The Chicago Sun Times*, and the *National Post* of Canada. Tr. 8125, 8131, 8142, 8159-76.

The business was managed through Ravelston Corp. Ltd. (Ravelston), a Canadian company in which Black was majority shareholder; the combined holdings of defendants totaled nearly 80%. Ravelston, in turn, owned a controlling interest in Hollinger, Inc. (Inc.), a Canadian holding company that controlled Hollinger through a super-majority of voting shares. Hollinger typically did not pay petitioners or Radler directly; they were instead compen-

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[1] The jury convicted petitioners and Mark Kipnis, Hollinger's Corporate Counsel and Secretary, on the mail fraud charges in counts 1, 6, and 7, but the trial judge set aside Kipnis's count 7 conviction for insufficient evidence. On remand from this Court, the Seventh Circuit vacated only the convictions on counts 1 and 6 as to each defendant. Therefore, each petitioner now stands convicted of count 7, and Black also remains convicted of count 13 (obstruction of justice).

sated by Ravelston based on substantial management fees from Hollinger.

In the 1990s, Black correctly foresaw the Internet's adverse consequences for Hollinger's media properties. Under his leadership, Hollinger's board of directors voted to divest the company of its smaller newspapers. The sales were consummated in a series of transactions with various purchasers. A common feature of these deals was that the seller (Hollinger), its Canadian holding company (Inc.), and, at times, Hollinger's corporate officers (including petitioners and Radler) would execute agreements not to compete with the purchaser and would receive part of the sales proceeds as consideration for such covenants.

B. Criminal Charges

The government charged that the covenants and related payments to Inc. and the individuals were *both* means to "steal" sales proceeds that should have gone solely to Hollinger *and* violations of fiduciary duties imposed by Delaware law and thus a deprivation of petitioners' "honest services" owed to Hollinger. The indictment (later superseded by an information) alleged that defendants developed a "template" for violating their duties and diverting sales proceeds to Inc. and, later, directly to themselves. This "template" began with a sale of community newspapers to Community Newspaper Holdings, Inc. (CNHI) and continued through sales to Forum Communications and Paxton Media Group. App., *infra*, 53a-59a. Count 7, the sole remaining fraud conviction, stemmed from these Forum/Paxton sales.

The government's theory of theft was that neither Inc. nor the individuals were credible competitors of anyone, but that the defendants benefited

from pushing payments "upstream" in the corporate structure, because (through Ravelston) they owned more equity in Inc. than they did in Hollinger. Gov't C.A. Br. 3-6 (2008).

The government's theory of honest services was that the covenants and their implementation involved fiduciary breaches, including undisclosed "related-party transactions." Gov't C.A. Br. 3-6 (2008). With nearly identical language in each relevant fraud count, the information charged that the defendants "failed to disclose these related party transactions to [Hollinger's] Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving [Hollinger] of honest services, and concealing the scheme." App., *infra*, 57a-59a ¶¶ 18, 21 (Forum/Paxton—counts 2, 3, and 7); *id.* at 63a-64a ¶ 30 (American Publishing Company (APC)—counts 1 and 6).

The government alleged in other counts the abuse of corporate "perquisites" to fund Black's lavish style, and it charged racketeering (including interstate transportation of "stolen" property predicates), tax violations (alleging that petitioners' "thefts" caused Hollinger to understate its tax liability), and money laundering. The final count charged Black alone with obstruction of justice, in violation of 18 U.S.C. § 1512, for purportedly endeavoring to impede his criminal fraud investigation and prosecution by moving his personal effects from his Toronto office to his nearby house when evicted from his office.

C. The Trial and Appeal

1. As the government has conceded, the defendants "hotly contested" each of the charges at trial; "[d]efendants vigorously cross-examined the govern-

ment's witnesses, and each defendant called witnesses in his own case." Gov't C.A. Br. 29-30 (2008). The defense contended that would-be purchasers of Hollinger's newspapers wanted the noncompetition covenants because they feared competition from the executive team that had successfully built Hollinger into an international media empire from a single community newspaper.

a. Whether the purchasers had requested covenants was a key issue with respect to the supposed fraud on the Forum/Paxton sales, which was charged in three counts. Counts 2 and 3 attacked payments made to Inc.; count 7 challenged a $600,000 payment made to petitioners and Radler. The government elicited testimony from the purchasers that neither had requested or desired non-compete agreements from Inc. or the individual officers. App., *infra*, 145a-154a.

According to a contemporary memorandum by Radler, however, the Forum/Paxton purchasers had requested non-competition agreements with individual officers. App., *infra*, 319a-320a. The same memorandum reported an identical request from another purchaser of other properties (CNHI), which the government later charged as fraud in count 5 (on which the jury acquitted). Radler's memorandum quipped that these covenants would soon require petitioners to confine their business to an office in Casper, Wyoming. *Id.* at 320a.[2]

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[2] Similarly, a contemporary memorandum from Kipnis to the Audit Committee explained that another purchaser (CanWest) had requested non-competition covenants from individual officers, and it adverted to the fact that similar covenants would be

[Footnote continued on next page]

The evidence also showed that each member of Hollinger's Audit Committee signed SEC filings representing that covenants had been requested by various purchasers (including Forum and Paxton) and duly approved by that committee. Their testimony denying those approvals, elicited by the government, was heavily impeached. Indeed, former Illinois Governor James Thompson—the chairman of the Audit Committee and leader of one of the world's largest law firms—repeatedly claimed at trial that he missed these statements in multiple drafts of the filings, which he signed under penalty of perjury, because he didn't pay much attention to what they said. App., *infra*, 177a; *see also id.* at 163a (Burt) (independent director claimed he read only what management suggested); *id.* at 169a (Kravis) ("I must have missed it").

Hollinger's board (including each Audit Committee member) had approved the Forum/Paxton sales, and had authorized non-compete agreements between the purchasers and Hollinger's "executive officers." App., *infra*, 323a-341a. But the government contended that the approvals violated Delaware law, because these were "related party transactions" that should have been presented initially to the Audit Committee, rather than the Executive Committee, as had occurred. *Id.* at 58a-59a.

As it turned out, the officers did not sign agreements with Forum/Paxton. Although the government claimed the money was therefore stolen, Radler

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included in the pending Forum/Paxton and CNHI deals. App., *infra*, 321a-322a.

testified that Kipnis simply forgot to draft agreements for inclusion with the closing documents. App., *infra*, at 188a-189a. Radler called Kipnis shortly after the Forum/Paxton sales closed and asked about money for individual non-competition covenants. Kipnis responded that money had not been specifically reserved for that purpose, but that unallocated funds were available in the reserve account. *Id.* at 185a-186a. When Radler directed individual noncompetition payments from that reserve, he believed that the agreements themselves had been executed, consistent with the earlier board approval. Not until two years later, during a special board committee investigation, did Radler learn that Kipnis had never prepared the agreements. *Id.* at 188a-189a. Because there was no intent to steal, petitioners contended, payments accepted under the mistaken belief that agreements had been executed were not theft.

b. The government's evidence on obstruction was even thinner. It was undisputed (indeed, there was film) that Black moved 13 boxes of personal possessions from his office with the help of his assistant and chauffeur. The question was *why* he did so. The government contended it was because the SEC had advised one of Black's lawyers, just the day before, that a subpoena was forthcoming. The SEC investigation had been ongoing for over a year, however, and this would be the government's *sixth* request for documents. The government stipulated that Black had produced 112,000 pages in compliance with all earlier requests. App., *infra*, 356a. Since this conduct did not bespeak a burning compulsion to impede the long-pending investigations (by the SEC and a grand jury), the government repeatedly suggested that Black's real fear was a future criminal prosecu-

tion.[3] In the government's telling, Black somehow learned of the latest document request and, fearing imminent criminal prosecution, decided to make off with the boxes after hours while, unbeknownst to him, a "new" system of security cameras captured his every move. *Id.* at 286a-287a.

Black's detailed cross-examination of the government's witnesses established, however, that the events occurred in broad daylight, in a building full of people; that the purportedly "new" security consisted of updating the recording and playback capabilities of pre-existing surveillance systems, installed while Black was in charge, that continued to film the very same areas; and that anyone of a mind to remove documents from the building could have placed them in a briefcase and walked out without fear of hindrance or detection. App., *infra*, 207a-219a.

Black also put on an extensive defense case demonstrating good reason for moving his effects: He had received his eviction notice six weeks earlier. With the deadline for removing 27 years' worth of accumulated possessions expiring six business days later, his assistant had already spent several weeks packing. App., *infra*, 236a-239a, 351a-353a.

Black had already given his attorneys the run of his office and houses to look for and produce materials responsive to earlier requests; indeed, every document in the Toronto office had been reviewed and

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[3] In examining defense witnesses, the government emphasized that SEC and grand jury inquiries are just a warm-up for a criminal prosecution, and made a point of asking repeatedly if Black had hired criminal defense attorneys. App., *infra*, 224a-226a, 231a-235a, 252a-254a, 259a-262a.

copied by his lawyers at Sullivan & Cromwell. App., *infra*, 240a-241a, 264a-266a. Testimony from several witnesses demonstrated that Black was not told of the new SEC request until the following week. *Id.* at 220a-222a, 228a-230a. Even so, the only item from the entire 13 boxes that the government has ever identified as relevant—a copy of the APC agreement—was the *first* document produced by Black, over a year earlier; it bears a Bates number "CMB 00001." *Id.* at 224a. The other boxes contained personal effects, such as the estate papers for Black's deceased brother. *Id.* at 257a-258a.

2. In keeping with the charges they brought, the prosecution consistently made clear during trial, in framing the jury instructions, and in summations, that the "honest services" charge was an independent (and easier) basis for conviction. Indeed, before jury selection, defense counsel asked that the "honest services" allegations be stricken if merely an alternative label for theft. The prosecutor objected, arguing that the case was "about more than money" because "what these men did was violate the trust that was put in them. So, the government will argue both theories, and the government believes that both theories are equally important." App., *infra*, 134a; *see also id.* at 156a, 303a.

a. The court charged the jury that the honest-services and theft theories of fraud were "different." App., *infra*, 306a. The court extensively defined the former charge solely by reference to the "duty of loyalty" that petitioners owed Hollinger under Delaware law. *Id.* at 307a-308a. Petitioners were guilty of "honest services fraud" if they obtained any "private gain" while failing to act in Hollinger's "best interests." *Id.* at 306a-307a. The jury was told, in that

regard, to consider whether the circumstances surrounding each transaction were "entirely fair," and "whether or how the transaction was disclosed to the directors; and whether or how the approvals of the directors were obtained." *Id.* at 308a.

Petitioners unsuccessfully requested an instruction precluding conviction on the honest-services theory if petitioners had intended no pecuniary harm to Hollinger. App., *infra*, 135a-136a. The jury was told instead that the "intent to defraud" necessary for this theory was that petitioners intended "to deprive" Hollinger of "honest services." *Id.* at 309a. This meant that petitioners "intended to defraud" if they "knew" they were not disclosing what the government asserted should have been disclosed. *Id.* at 307a-309a.

Importantly, the jury also received count-specific instructions on unanimity. For the obstruction charge, the jury needed to "unanimously agree on which" of three "official proceedings, if any, Black intended to obstruct": (1) an SEC investigation into the non-competes, (2) a grand jury investigation of the same, or (3) the criminal fraud case. App., *infra*, 315a.

With respect to mail fraud, however, unanimity was required only on *whether* a "scheme to defraud" existed, not on *which theory* ("honest services" or "theft") supported that element. A guilty verdict was therefore possible even if no juror even considered the "theft" theory, or if different jurors were persuaded by different theories. App., *infra*, 270a-272a, 305a-309a.

b. The prosecution took full advantage of the roadmap provided by the instructions and information (both of which the jury had during deliberations)

to remind the jurors at every turn that petitioners' "duty of loyalty" to Hollinger was an independent, and sufficient, basis for conviction under the "honest services" rubric. App., *infra*, 274a, 276a-277a, 280a-282a; *see also id.* at 297a ("[Y]ou won't see 'lie' defined in the jury instructions . . . . You'll see 'honest services.'"). Indeed, the government had one key point to make in its final words to the jury: "[W]hen you go back into the jury room, ladies and gentlemen, I have one request . . . . [T]hink of those two words. Think of 'honest services.' And ask yourself, when you consider each transaction, whether that is what the shareholders received." *Id.* at 300a.

3. The jury acquitted on the bulk of the charges, including the majority dealing with non-competes, each alleged abuse of "perks," the charge that Hollinger understated its tax liability by not including as part of its income the money that petitioners "stole," and the fraud-based RICO charge against Black. (The government had dismissed the money laundering count at the close of its case.) The jury returned guilty verdicts on just four counts: two counts charging fraud on the basis of non-compete agreements with Hollinger subsidiary APC (counts 1 and 6); one of the three Forum/Paxton fraud counts (count 7); and Black's obstruction charge.

4. On appeal, the government invoked the doctrine of "inconsistent verdicts," urging the court to disregard the acquittals and assess only the evidence favoring conviction in its most favorable light. Gov't C.A. Br. 32-33 (2008). The Seventh Circuit acknowledged that the evidence was conflicting and inconsistent, but accepted that the jury could legally have rested its verdict on the government's version of events. App., *infra*, 19a ("Or so the jury was entitled

to find; the evidence was conflicting"). The court also rejected petitioners' objections to the jury charge on honest services but held, in the alternative, that petitioners forfeited their objections by opposing special verdicts. *Id.* at 26a-27a.

D. This Court's Decision and the Seventh Circuit's Ruling on Remand

This Court unanimously reversed the Seventh Circuit's honest-services and forfeiture rulings.

1. The Court held that petitioners' objections to the honest-services instructions complied with the federal rules, which left no room for additional forfeiture rules based on petitioners' rejection of a special verdict. The Court also concluded that the instructions on honest services "were indeed incorrect," because honest-services fraud is limited to bribe or kickback schemes, and "[t]he scheme to defraud alleged here did not involve any bribes or kickbacks." *Black* v. *United States*, 130 S. Ct. 2963, 2968 n.7, 2970 (2010). The Court remanded for consideration of the government's claim that "the error was ultimately harmless," expressing "no opinion on the question." *Id.* at 2970 & n.14.

2. On remand, the government contended that the error was harmless because there was "overwhelming evidence" of theft and obstruction. It again relied on the inconsistent verdicts caselaw to urge the irrelevance of the acquittals, embracing a sufficiency-of-the-evidence approach that touted only the evidence supporting its theories. Gov't Remand Br. 4-10; Gov't En Banc Opp'n 7. Petitioners urged that *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny required the court to focus on the effect of the erroneous instruction on the jury that actually heard the case, and to vacate the convictions if there

was any reasonable possibility that the error might have contributed to the verdict. In light of the general verdict, the defense evidence, and the sweeping acquittals, petitioners contended, the government could not prevail.

The Seventh Circuit accepted the government's methodology, but not its every conclusion. Writing for the court, Judge Posner noted that the general verdict meant "we cannot be absolutely certain that [the jury] found the defendants guilty of pecuniary fraud as well as, or instead of, honest services fraud." App., *infra*, 2a. "But," he added, "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." *Id.* at 3a (citing, *inter alia*, *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam), and *Neder* v. *United States*, 527 U.S. 1 (1999)).

The court "barely" vacated the APC counts (1 and 6) after rehearsing at length the prosecution's evidence of "theft," but without adverting to any contrary arguments or evidence—not even the fact that Radler, *testifying for the government*, consistently swore the money was not stolen. App., *infra*, 14a. Instead, the court vacated those counts because "all that the jury had to find" to convict of honest-services fraud was petitioners' "failure to level with the board and the audit committee, which was irrefutable." *Id.* at 10a.

Although identical instructions, and the parallel language of the information, also permitted the jury to find guilt on Forum/Paxton (count 7) solely for petitioners' "failure to level" with the Audit Committee, the court reached a different conclusion as to count 7. The court asserted that the failure-to-disclose theory

was mentioned only "in passing in the information" and emphasized the government's evidence and arguments on pecuniary fraud—again, without adverting to contrary evidence or arguments.

The court found the defense on count 7—that covenants were approved but undocumented due to an innocent oversight by Kipnis—"decisively unbelievable," because (1) petitioners "could have no interest in going into competition" with such "small newspapers," (2) Forum/Paxton witnesses offered "disinterested" testimony that they did not request covenants, and (3) Radler's contemporary memorandum reflecting that the owners did request them was "clowning" and an "implicit boast that the covenants were fabrications." App., *infra*, 11a-13a. The court concluded that "the evidence of pecuniary fraud is so compelling that no reasonable jury could have refused to convict." *Id.* at 13a-14a.

The court also affirmed Black's obstruction conviction. The court conceded that "copies of the documents" in Black's office were already "available to the government," but (disregarding that this was so because Black himself had produced them) speculated that Black might have tried to deny he had copies. App., *infra*, 4a. The court found "compelling evidence" that Black knew he was being investigated "by a grand jury and by the SEC." *Ibid.* According to the court, "[t]he evidence that the boxes were removed in order to conceal documents from the government investigators was compelling, even though Black's secretary loyally testified that Black intended to remove the documents to a temporary office . . . because he had to vacate his office at Hollinger within ten days." *Id.* at 5a. Finally, the court denied that the honest-services instruction was "apt

to poison the jury's consideration of" the obstruction charge, because the evidence on honest services was "esoteric" and "[n]o reasonable jury could have acquitted Black of obstruction if only it had not been instructed on honest services fraud." *Id.* at 6a.

The court also suggested forgoing retrial on the vacated APC counts and instead seeking, on the affirmed counts, the sentences already imposed before this Court vacated the judgment below. App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

The opinion below deepens two substantial splits in the lower courts over the application of harmless-error review in the wake of *Neder* v. *United States*, 527 U.S. 1 (1999).

First, the circuits are divided on how such review should be conducted when jury instructions allow conviction for both unlawful and lawful conduct. The Seventh Circuit's approach—also followed by the Eighth Circuit—deems such an error harmless if a hypothetical rational jury "would have" credited the prosecution's "overwhelming" evidence on the legally *valid* theory. By contrast, the Tenth and Eleventh Circuits require the government to establish that the legally *invalid* theory did not affect the jury's verdict; they reject reliance on purportedly "overwhelming" evidence on the valid theory as inconsistent with *Stromberg* v. *California*, 283 U.S. 359 (1931), and *Yates* v. *United States*, 354 U.S. 298 (1957).

Second, the lower courts are divided on whether, even outside the alternative-theory context, *Neder* fundamentally revamped harmless-error review by rejecting this Court's traditional focus on the verdict "obtained" and the error's effect "upon the guilty ver-

dict in the case at hand," *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993), in favor of an abstract inquiry into whether "overwhelming evidence" supports the result. *Compare State* v. *Alvarez-Lopez*, 98 P.3d 699, 708-10 (N.M. 2004) (rejecting "overwhelming evidence" test), *and Cooper* v. *State*, 43 So. 3d 42, 43 (Fla. 2010) (same), *with People* v. *Nitz*, 848 N.E.2d 982, 991 (Ill. 2006) (*Neder* requires inquiry into "what a rational jury would have found," not "specula[tion] as to the motivations of the 12 men and women empaneled to decide defendant's case").

The Seventh Circuit's decision starkly illustrates the confusion in the lower courts following *Neder*. Although there is more than a reasonable likelihood that the jury convicted petitioners for conduct that is not a crime, the Seventh Circuit purported to "cure" this due process violation by violating the Sixth Amendment: The judgment was affirmed because, in the estimation of three judges, the evidence supporting the defense was incredible, and a "reasonable jury" faced with the prosecution's "overwhelming" evidence surely would have convicted on the Forum/Paxton and obstruction charges—indeed, a jury "could not refuse" to do so.

This radical application of the "overwhelming evidence" approach lays bare its constitutional weakness, because *this jury* was unpersuaded by much of the same prosecution evidence. It has long been settled that appellate courts may not make credibility judgments under the guise of harmless-error review, *Weiler* v. *United States*, 323 U.S. 606, 611 (1945), that the government bears the burden of establishing harmlessness beyond a reasonable doubt, *e.g.*, *Gamache* v. *California*, 131 S. Ct. 591, 592-93 (2010) (statement of Sotomayor, J.), and that, "regardless of

how overwhelmingly the evidence may point in that direction," no court may direct a verdict for the government, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

The analysis below is based on a serious misreading of *Neder*, and it effectively attributes to this Court a sharp, unexpected, and inexplicable detour from a steady line of decisions protecting the jury trial right in Article III and the Sixth Amendment. *See, e.g.*, *Blakely* v. *Washington*, 542 U.S. 296 (2004); *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). If left unreviewed, the Seventh Circuit's abrogation of this fundamental right portends further division and confusion on a crucial and widely used doctrine that today "stands as the inevitable last resort of government lawyers—and, too often, ... of appellate judges." Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1173 (1995).

I. THE SEVENTH CIRCUIT'S DECISION MISCONSTRUED *NEDER* AND IS CONTRARY TO THE SIXTH AMENDMENT.

A. This Court previously ruled that the jury instructions authorized petitioners' convictions for something that is not a crime, because the honest-services charge encompassed purported fiduciary breaches that are neither bribes nor kickbacks. If the verdict was based on this instruction, it unquestionably violates due process. *Carella* v. *California*, 491 U.S. 263, 265 (1989) (per curiam) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

As *Stromberg* and *Yates* make clear, "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, be-

cause the verdict may have rested exclusively on the insufficient ground." *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983). The instructions in this case are plagued by precisely this sort of "*Yates* error." Indeed, not only was honest services a fully *independent* basis for conviction, the unanimity instruction allowed it to be a *partial* basis for the verdict, as well. *Cf. Zant*, 462 U.S. at 881-82 (*Yates* also applies if a count is based on *both* legal and illegal grounds).

Hedgpeth v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam), held that *Yates* errors differ from "structural" errors—such as defective reasonable-doubt instructions or a biased judge—whose precise effects are unknowable, making them never susceptible to harmlessness review. *See United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-51 (2006); *Sullivan*, 508 U.S. at 281. Alternative-theory error is not structural, *Pulido* reasoned, because a court can analyze the risk of harm from the *erroneous* part of a multiple-legal-theory instruction just as it can if no "good" theory is instructed at all. 129 S. Ct. at 532. *Pulido* held that it would be "patently illogical" to hold that giving the jury "both a 'good' charge and a 'bad' charge" on an issue is "somehow more pernicious than . . . where the *only* charge on the critical issue was a mistaken one." *Ibid.*

Pulido did not alter the *test* for harmless error; that test remains controlled by pre-existing caselaw. Nor did *Pulido* overrule or modify the *Stromberg-Yates* rule. It merely placed the *flawed* prong of alternative-theory error on the same footing as other instructional errors. In a case like this, *Pulido* allows the government to retain a conviction by demonstrating under *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny that the error in defining

honest services would not have led to reversal if that had been the only theory presented to the jury—by demonstrating, for example, that the verdict necessarily rests on a finding of bribes or kickbacks. If, as here, the government is unable to carry that burden, however, then *Yates* and *Stromberg* control: The convictions must be reversed if the jury could have convicted on the invalid theory.

B. This Court's cases do not support the proposition that an instructional error can be harmless where the prosecution's evidence is so "overwhelming" that some hypothetical "reasonable jury would have convicted" the defendant on an error-free theory. App., *infra*, 3a. *Chapman* requires reversal if there is *any* "reasonable possibility" that an error "might have contributed to the conviction"; the government must establish that the error "did not contribute to the verdict *obtained*." 386 U.S. at 24 (emphasis added).

Thus, under *Chapman*, an error "cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in this fashion would be to dispense with trial by jury." *California* v. *Roy*, 519 U.S. 2, 7 (1996) (Scalia & Ginsburg, JJ., concurring). "[T]he error in such a case is that the wrong entity judged the defendant guilty." *Rose* v. *Clark,* 478 U.S. 570, 578 (1986). Indeed, the lower court in *Chapman* had ruled the error harmless because proof of guilt was "overwhelming." 386 U.S. at 23 n.7. This Court rejected that standard as inconsistent with the jury-trial right; although the prosecution's case was "reasonably strong . . . it was also a case in which, absent

[the error,] honest fair-minded jurors might very well have brought in not-guilty verdicts." *Id.* at 23-24.[4]

To be sure, the strength of the government's case may be *relevant* to a harmless-error inquiry, particularly in cases involving the erroneous admission or exclusion of evidence. *See Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986). Erroneously admitted evidence may be unimportant in the context of everything else the jury heard, though the converse is also true: Some evidence is so powerful that the jury would likely consider little else, regardless of how "overwhelming" the other evidence might seem. *Compare Schneble* v. *Florida*, 405 U.S. 427, 431 (1972) (improperly admitted evidence "at most tended to corroborate certain details" of defendant's properly admitted "grisly" and "comprehensive" confession), *with Arizona* v. *Fulminante*, 499 U.S. 279, 297 (1991) (error in admitting coerced confession not harmless despite State's "overwhelming evidence"); *id.* at 313 (Kennedy, J., concurring). The focus always must remain on the error's likely effect on the jury, and whether "honest, fair minded jurors" could have acquitted, *Chapman*, 386 U.S. at 26, not on the strength of the government's evidence.

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[4] Chief Justice Traynor explained that *Chapman* "expressly rejected this court's reliance on overwhelming evidence to establish harmless error," a rejection "explained only on the theory that a substantial error that might have contributed to the result cannot be deemed harmless regardless of how clearly it appears that the jury would have reached the same result by an error-free route had the erroneous route been denied it." *People* v. *Ross*, 429 P.2d 606, 621 (Cal. 1967) (Traynor, C.J., dissenting). This Court vindicated his view with a summary reversal. *Ross* v. *California*, 391 U.S. 470 (1968) (per curiam).

The same is true for instructional error. An essential premise of harmless-error review is that "jurors are reasonable and generally follow the instructions they are given." *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991) (citing *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987)). Thus, although "the harmlessness of an error is to be judged after a review of the whole record," a flawed instruction may "so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing" that charge. *Id.* at 405.

"To satisfy *Chapman*'s reasonable-doubt standard," therefore, it is not "enough that the jury considered evidence from which it could have come to the verdict without" the error, because this "will not tell us whether the jury's verdict *did rest* on that evidence." *Evatt*, 500 U.S. at 404, 407 (emphasis added); *see also Bihn* v. *United States*, 328 U.S. 633, 638-39 (1946). As this Court noted in *Sullivan*, the proper inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." 508 U.S. at 279; *see also Pope* v. *Illinois*, 481 U.S. 497, 503 n.6 (1987).

C. *Sullivan* also suggested that the absence of a jury verdict on every element of an offense can *never* be harmless. *Neder* concluded that this part of *Sullivan* swept too broadly, 527 U.S. at 11, but it did not question (much less overrule) either *Sullivan*'s holding that harmless-error review must focus on the error's effect on the actual verdict or *Chapman*'s emphasis on assessing whether a fair-minded jury could have acquitted.

Neder chose not to contest the materiality element in a tax prosecution, and the trial judge did not instruct the jury on it, mistakenly believing materiality to be a question of law. This Court concluded that the error was not structural and that a failure to instruct on an element is harmless under *Chapman* if the evidence is overwhelming *and* the element is undisputed. 527 U.S. at 16-17. Although four Justices thought this analysis improperly diluted the showing required for harmlessness, the Court homed in on the fact that *Chapman* requires a focus on the "verdict obtained." *Id.* at 15.

Neder reasoned that a failure to instruct on a proposition never questioned by the accused at trial, and on which the evidence was overwhelming, could not possibly have influenced the verdict. 527 U.S. at 15-17. But the Court expressly reaffirmed the right of the accused not to suffer a directed verdict on a *contested* element, *id.* at 17 n.2, and it emphasized that "safeguarding the jury guarantee" still requires "a thorough examination of the record," *id.* at 19. "[W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," this Court concluded, "the court . . . should not find the error harmless." *Ibid.*

Indeed, any contrary reading of *Neder* would be inconsistent with this Court's assessment of whether particular errors are "structural"—a practice this Court has continued after *Neder*. *See, e.g.*, *Gonzalez-Lopez*, 548 U.S. at 148-51. Even dispensing with reasonable doubt could be made to seem "harmless" in some sense because an appellate court can always assess whether the government's evidence "would have" satisfied a "reasonable jury" correctly apprised of the government's burden.

D. The Seventh Circuit's analysis cannot be reconciled with this Court's focus on whether the jury was presented with evidence that could have led to acquittal. To the contrary, its assessment of the supposed strength of the government's case ignored or ridiculed all evidence that favored the defense, recited remaining evidence in the light most favorable to the prosecution and, other than to misstate them, ignored the acquittals.

1. The large number of acquittals—including nine counts of fraud and multiple other charges predicated on "theft"—demonstrates that *this jury* found the government's case so underwhelming that it was unprepared to accept it even when given the option to convict on something (fiduciary nondisclosure) that is *not* a crime.[5] As this Court noted in *Olden* v. *Kentucky*, acquittals "cannot be squared with the [government's] theory of the alleged crime" and powerfully demonstrate that the government's evidence "was far from overwhelming." 488 U.S. 227, 233 (1988); *see also United States* v. *Acker*, 52 F.3d 509, 518 (4th Cir. 1995); *United States* v. *Price*, 13 F.3d 711, 730 (3d Cir. 1994); *United States* v. *Slade*, 627 F.2d 293, 308 (D.C. Cir. 1980).

Yet in a case in which the jury largely rejected the testimony of the government's witnesses, the Seventh Circuit ruled the same testimony so "compelling" that no jury "could refuse" to convict. Indeed, the court vacated the APC counts—"barely," App., *infra*, 14a—without even adverting to the gov-

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[5] The jury could *convict* on fraud without even considering the theft charge, but it could *acquit* only after considering—and rejecting—*both* of the government's theories of fraud.

ernment's own star witness, who refuted the "theft" claim at trial. Quite simply, the Seventh Circuit did not hold the government to its burden under *Chapman*. It did not even try.

The Seventh Circuit also did not address the jury instructions when reviewing count 7. But such a review is essential under this Court's cases, because courts must presume the jury followed those instructions. Here, the instructions make clear that (1) the "honest services" charge was so much easier for the government that no juror needed even to *consider* "theft" in order to convict petitioners of fraud, and (2) the unanimity instruction means that the error could not possibly be harmless unless the government establishes that not a single juror took that route.

In affirming count 7, the Seventh Circuit focused, not on whether *this jury* could have acquitted, but on what a hypothetical properly instructed "reasonable jury" would do if faced with the government's best spin on its own evidence. For example, the court did not mention, much less discuss, the many acquittals that necessarily rejected the government's "theft" theories. The one exception was the acquittals on counts 2 and 3, which—like count 7—involved the Forum/Paxton sales. The court distinguished those on the theory that the covenants in counts 2 and 3 were with "Hollinger," which it viewed (unlike the individuals) as a credible competitor.

But the "Hollinger" in those counts was *Inc.*, the Canadian holding company, not Hollinger International, the publishing empire. The information's theory was that Inc. was just as implausible a competitor as the individuals. Most importantly, both of the Forum/Paxton witnesses gave the same testi-

mony as to all three counts: that they neither requested nor needed covenants from Inc. or the officers. Had the jury found those witnesses as credible and "disinterested" as the Seventh Circuit did, it would have convicted on all three counts.

The remainder of the court's analysis is similarly infirm. The court not only ignored Radler's exculpatory testimony that petitioners were unaware of Kipnis's oversight when the Forum/Paxton money was paid, but also derided the probative value of his contemporary memorandum confirming that individual non-competes had been requested. The facts recited by Radler were confirmed by a different memorandum from Kipnis, and the jury acquitted on other counts based on the same evidence and arguments—particularly count 5, which involved a CNHI transaction also described in Radler's memorandum.

Reviewing the same evidence in the light most favorable to the government, however, the court concluded that Radler's use of humor amounted to a confession that the covenants were "fabrications." App., *infra*, 13a. A properly instructed jury *might* conclude that Radler was letting petitioners in on a fraud merely because one part of his memorandum was tongue-in-cheek, but an appellate court cannot conclude, on that basis, that a jury *must* find that the memorandum means the opposite of what it actually says. The jury credited petitioners' defense on several similar charges. Once this Court ruled that the remaining convictions are infected with constitutional error, it was wrong for the Seventh Circuit to review the record in the light most favorable to the government.

2. The Seventh Circuit's analysis of the obstruction conviction suffered from similar flaws and more.

The obstruction statute requires the government to show that the defendant *corruptly* impeded some *underlying* "official proceeding" that was then pending or that he reasonably contemplated. This includes not only a "wrongful intent" but also a "nexus": To convict a defendant of obstructing justice, "the [obstructive] act must have a relationship in time, causation, or logic with the judicial proceedings." *United States* v. *Aguilar*, 515 U.S. 593, 599 (1995). Thus, to establish the "corrupt" intent required by the statute, the government had to prove that Black "contemplat[ed]" a "*particular official proceeding* in which those documents might be material." *Arthur Anderson LLP* v. *United States*, 544 U.S. 696, 708 (2005) (emphasis added).

The Seventh Circuit emphasized that SEC and grand jury proceedings were pending when Black's assistant packed up his belongings to be moved. This, however, is irrelevant if the jury's verdict instead was based on the third choice offered up as an obstruction object: the prosecution in this case, which then was only "contemplated." The government, faced with mountains of evidence showing Black's compliance with each investigation that *did* exist, touted interference with this prosecution as the most plausible motive for alleged obstruction.

Given that theory, the erroneous instructions on honest-services fraud naturally would sway the jury toward conviction. The instructional error—which told the jury that a vast range of conduct involving fiduciary nondisclosure was criminal—greatly improved the plausibility of the government's claim that Black had much to fear. Indeed, this Court curbed the government's expansive use of honest-services prosecutions precisely because, under the

government's sweeping theory, rare would be the citizen who was not at risk of prosecution.

It is no answer to say, as the Seventh Circuit reasoned, that the then-pending investigation (and ultimate criminal indictment) also embraced pecuniary fraud, which *is* a crime. App., *infra*, 6a-8a. That might suggest how a proper obstruction charge *could* have been framed, but it does not show that *this jury* found obstruction on a proper basis. When a jury may have rested its verdict on an erroneous view of the *law*, it is never a good answer to say that the jury had available *other* legally sound theories on which a verdict could have rested. *Compare Yates*, 354 U.S. at 311-12, *and Bachellar* v. *Maryland*, 397 U.S. 564, 569-72 (1970), *with Griffin* v. *United States*, 502 U.S. 46, 59 (1991).

The government presented a weak, heavily circumstantial—and compellingly impeached—case on the key elements of corrupt-motive and nexus. The defense severely hobbled the government's theories on both elements, and presented a far more reasonable (and innocent) explanation for the removal of the boxes. Faced with this conflicting evidence, the jury—clearly unpersuaded by the government's "looting" allegations—had only its flawed understanding of the crime that Black purportedly was motivated to impede to sway it toward conviction. The government could not remotely meet the burden that this Court's precedents demand: to negate this possibility beyond a reasonable doubt.

II. THE LOWER FEDERAL AND STATE COURTS ARE DEEPLY DIVIDED ON THE APPLICABLE STANDARD FOR HARMLESSNESS AFTER *NEDER*.

Neder has led to substantial confusion in the lower courts, both in the context of alternative-

theory error and, more generally, in cases involving the harmlessness of myriad other constitutional errors.

A. The Tenth and Eleventh Circuits hold that courts dealing with alternative-theory errors cannot affirm, as the Seventh Circuit did here, on the ground that the government presented strong evidence of guilt on the "good" theory. In *United States* v. *Holly*, 488 F.3d 1298 (10th Cir. 2007), a sheriff was convicted of civil-rights violations on instructions that permitted conviction if he used either force or fear to subdue his victims; the fear instruction was defective. The Tenth Circuit noted that the harmless-error inquiry "must focus exclusively on the erroneously instructed 'fear' element," because a "court may not affirm a conviction based solely on overwhelming evidence of the properly instructed ground." *Id.* at 1307 & n.6. "Reliance on the valid ground, without an actual jury finding, too closely resembles a presumption that the jury relied on that ground, thus undermining even the most narrow applicability of *Stromberg*." *Id.* at 1307 n.6; *see also United States* v. *Holland*, 116 F.3d 1353, 1358 (10th Cir. 1997) (sufficiency of the evidence on valid theory not enough).

Similarly, "[t]he Eleventh Circuit has concluded that in a *Stromberg*-type case, the reviewing court may not consider whether the strength of the evidence on the valid theory submitted to the jury is sufficient to render harmless the error of instructing the jury on an alternative theory." *Becht* v. *United States*, 403 F.3d 541, 546 (8th Cir. 2005) (discussing *Adams* v. *Wainwright*, 764 F.2d 1356, 1362 (11th Cir. 1985)). "If the law were otherwise," the Eleventh Circuit explained, "the rule of *Stromberg* would be

eviscerated." *Parker* v. *Sec'y for the Dep't of Corr.*, 331 F.3d 764, 778 (11th Cir. 2003). Indeed, *Parker* concluded that state courts had violated clearly established federal law in reasoning that an erroneous theory of conviction could be rendered "harmless" by "overwhelming evidence" that supported a different theory. *Id.* at 779.

By contrast, the Eighth Circuit in *Becht* concluded that, in cases like *Stromberg* and *Yates*, a conviction may be "affirmed if the trial record established guilt beyond a reasonable doubt" under the *valid* "alternative theory." 403 F.3d at 548. Becht had been convicted of possessing child pornography. The charge permitted conviction if the images were, or appeared to be, those of children. Congress had enacted the "appear to be" standard to criminalize computer-generated images of "virtual" children, but this Court declared it unconstitutional in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). The Eighth Circuit conceded that "*Stromberg* prevents a reviewing court" from upholding the conviction "merely because the evidence was *sufficient* to support the [valid] ground." 403 F.3d at 548. Nonetheless, like the Seventh Circuit, the court upheld the conviction because its own review of the evidence persuaded it that the images supported the valid alternative—actual, rather than virtual, children. *Id.* at 549.

B. The conflicting approaches to harmless-error review adopted by the courts of appeals in the context of alternative-theory error are alone sufficient to warrant this Court's review. But *Neder*'s invocation of the "overwhelming evidence" rubric has sown even broader confusion in the lower federal and state courts: It has fueled a dispute on the extent to which

appellate courts may excuse errors as "harmless" based on their perceived effect on hypothetical juries or on the courts' own assessments of the strength of the evidence.

1. The Second Circuit, for example, has held that failure to charge the jury on a contested element of the crime can be harmless—even if the jury *could* have found for the defendant based on the evidence—if the court believes a properly instructed jury *would* have convicted. *United States* v. *Jackson*, 196 F.3d 383, 389 (2d Cir. 1999). As a later panel of the same court noted, allowing "the court to decide on its own whether the jury would have convicted the defendant, even where the evidence can support a finding in the defendant's favor," is in "some tension" with *Neder*. *Monsanto* v. *United States*, 348 F.3d 345, 350-51 (2d Cir. 2003) (Calabresi, J.).

The Fourth Circuit disagrees with the Second Circuit, emphasizing that *Neder* itself instructed lower courts *not* to find an error harmless if "the defendant contested the . . . element and raised evidence sufficient to support a contrary finding." *United States* v. *Brown*, 202 F.3d 691, 701 & n.19 (4th Cir. 2000). In striking contrast with the Seventh Circuit's methodology here—and in keeping with the heavy burden *Chapman* places on the government—the Fourth Circuit canvassed the record for evidence that *undermined* the government's case.[6] It concluded that the defendant "genuinely

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[6] *Accord United States* v. *Hands*, 184 F.3d 1322, 1330-31 & n.23 (11th Cir. 1999) (court must consider factors affecting credibility of the government's case); *United States* v. *Manning*, 23 F.3d 570, 575 (1st Cir. 1994) (error not harmless when prosecution and defense witnesses "gave a plausible account,"

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contested the evidence supporting [the government's case], and there was a basis in the record for the jury to have rationally disbelieved the testimony of any of the Government's witnesses." *Id.* at 702. "Put simply," the court reasoned, "the Government's case turned upon the credibility of witnesses whose vulnerabilities were exposed by [the defense], and we are unable to discern which of these witnesses were actually believed and relied upon by the jury." *Ibid.*

2. A similar dispute has unfolded among state courts of last resort. In a decision authored by one of the judges who affirmed the convictions below, the Supreme Court of Wisconsin concluded in *State* v. *Harvey*, 647 N.W.2d 189 (Wis. 2002) (Sykes, J.), that a trial court committed constitutional error in taking judicial notice on one of the elements of a sentencing enhancement: whether the offense occurred near a "city park." But while no evidence was introduced on that element—indeed, the defendant had moved for a directed verdict on this basis—the court ruled the error harmless under *Neder* because "[t]he elemental fact on which the jury was improperly instructed is undisputed and indisputable: Penn Park is a city park, and no one says otherwise." *Id.* at 202.

Under this analytical framework, an accused may not rely on the presumption of innocence or the fact that the jury heard no evidence at all on an element. An omitted element may be viewed as "uncontested and supported by overwhelming evidence" un-

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neither of which "was *inherently* unlikely to be true," because "we are precluded from making independent credibility determinations on appeal").

der *Neder* so long as reference materials available to the appellate court establish it. *See Harvey*, 647 N.W.2d at 203 (Crooks, J., concurring) (noting court's abandonment of "reasonable possibility" standard); *id.* at 207 (Abrahamson, J., dissenting) (decrying abandonment of *Chapman*); *see also State* v. *Hale*, 691 N.W.2d 637, 651 (Wis. 2005) (Abrahamson, J., concurring). Other courts likewise treat *Neder* as having superseded this Court's earlier caselaw mandating a focus on the particular jury that heard the case. *See Nitz*, 848 N.E.2d at 990-91; *People* v. *Rivera*, 879 N.E.2d 876, 888 (Ill. 2007) (reaffirming *Nitz*), *aff'd on other grounds*, 129 S. Ct. 1446 (2009); *People* v. *Shepherd*, 697 N.W.2d 144, 146-47 & n.6 (Mich. 2005) (per curiam).

By contrast, several state courts of last resort do not read *Neder* as superseding the rule that "[h]armless error review looks to the basis on which the jury actually rested its verdict." *Lowry* v. *State*, 657 S.E.2d 760, 765 (S.C. 2008) (citing *Sullivan*, 508 U.S. at 279). And others have "explicitly rejected the overwhelming evidence test as a proper analysis of harmless error." *Ventura* v. *State*, 29 So. 3d 1086, 1091 (Fla. 2010) (per curiam) ("the test" is "whether there is a reasonable possibility that the error affected the verdict" (emphasis omitted)); *see also Cooper*, 43 So. 3d at 43; *Rigterink* v. *State*, 2 So. 3d 221, 256 (Fla. 2009) (per curiam), *vacated on other grounds*, 130 S. Ct. 1235 (2010); *Fields* v. *United States*, 952 A.2d 859, 866-67 (D.C. 2008); *People* v. *Hardy*, 824 N.E.2d 953, 957-58 (N.Y. 2005). As the New Mexico Supreme Court explained, *Neder* "did not indicate disapproval" of *Sullivan*'s "explanation of the *Chapman* harmless error analysis" but instead reaffirmed the right to trial by jury. *Alvarez-Lopez*, 98 P.2d at 708. Given those limitations, a "constitu-

tional error cannot be deemed harmless simply because there is overwhelming evidence of the defendant's guilt. Our focus must remain squarely on assessing the likely impact of the error on the jury's verdict." *Id.* at 709-10.

* * *

Both in the alternative-theory context presented by this case, and in the more general run of criminal cases, the lower courts are hopelessly divided on the extent to which *Neder* abandoned decades of harmless-error precedents that jealously safeguarded a defendant's jury-trial right while forgiving errors that presented little threat to that right. Although the Seventh Circuit is not alone in misreading *Neder* to permit an abstract inquiry into the "overwhelming" nature of the prosecution's case, the ruling below conflicts with the approach of other federal and state courts that have kept faith with this Court's earlier cases—cases that only this Court, and not the lower courts, may abandon. *See Agostini* v. *Felton*, 521 U.S. 203, 237-38 (1997).

The Seventh Circuit's extreme application of the "overwhelming evidence" approach presents an ideal vehicle to review these issues: It transformed *Neder* into a sufficiency-of-the-evidence review that indulged every inference in the government's favor. The decision below, therefore, dispensed not only with the jury that actually heard the case but also with *Chapman*'s insistence that the government, as the beneficiary of an error it created, bear a heavy burden in disproving prejudice. Because the lower courts could not be more divided on these essential and recurring questions—which are of crucial importance to the administration of justice in the lower

state and federal courts—this Court's review is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, N.Y. 10022
(212) 308-7900
Counsel for Petitioner Boultbee

MICHAEL S. SCHACHTER
IAN K. HOCHMAN
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, N.Y. 10019
(212) 728-8000
Counsel for Petitioner Atkinson

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com
Counsel for Petitioner Black

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