Nos. 13-3162-cr(L), 13-3303-cr(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

BETTEJANE HOPKINS,

Defendant,

JILL PLATT and DONNA BELLO,

Defendants-Appellants.

MOTION OF DEFENDANT-APPELLANT JILL PLATT FOR RELEASE PENDING APPEAL

Appeal from the United States District Court
for the District of Connecticut, No. 12 Cr. 84
Before the Honorable Alvin W. Thompson

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Pursuant to Federal Rules of Appellate Procedure 9(b) and 27 and 18 U.S.C. §§3141(b) and 3143(b), Jill Platt moves for an order granting bail pending her appeal from her criminal conviction. On August 13, 2013, following a jury trial before the Honorable Alvin W. Thompson (D. Conn.), Platt was sentenced to 54 months' imprisonment.[1] Judge Thompson denied Platt's application for bail pending appeal, and set a surrender date of October 15, 2013.[2] Through her trial counsel, Platt filed a Notice of Appeal to this Court on August 20, 2013.

Platt surrendered as ordered, and subsequently retained new counsel to represent her on appeal. Platt filed her opening brief on March 24, 2014. The government's brief is due July 10, 2014.

BACKGROUND

Platt was tried for participating in "gifting tables," women's social and philanthropic groups with a financial element. The government alleged that the groups were involved in tax and wire fraud. However, the defendants (and many participants who testified as government witnesses) argued that they believed in good faith that the tables were legal.

The court permitted the government to shore up its case with highly prejudicial but inadmissible testimony, which it barred Platt from rebutting by

[1] The sentence also included a term of supervised release, a special assessment, and restitution in the amount of $32,000.

[2] The jury also convicted Platt's co-defendant Donna Bello. The two appeals have been consolidated.

refusing to compel immunity for three defense witnesses. In an otherwise close case, these errors, individually and cumulatively, deprived Platt of a fair trial, and were compounded by an unreasonable and severe sentence.

The factual and procedural background relevant to Platt's appeal and this bail application are set forth at pp. 2-19 of her opening brief.

ARGUMENT

A defendant is entitled to bail pending appeal if there is clear and convincing evidence that she is not likely to flee or pose a danger to public safety, and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in…reversal [or] an order for a new trial…or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. §3143(b)(1)(A), (B)(i), (ii), (iv). As Platt does not present a risk of flight or danger to the community,[3] the issue is whether her appeal presents a "substantial question."

I. This Appeal Raises Substantial Questions Of Law

Entitlement to bail pending appeal does *not* require a finding that the district court erred, or that reversal is the most likely outcome on appeal. The Court need only find the presence of a substantial question that, *if* resolved in appellant's favor, would result in reversal, a new trial, or a lower sentence. *United States v.*

[3] Platt was released on bail on May 2, 2012, and fully complied with her conditions of release prior to surrendering on October 15, 2013. (PSR ¶ 4).

Randell, 761 F.2d 122, 124-25 (2d Cir. 1985); §3143(b)(1)(B). A "substantial question" is "one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." *Randell*, 761 F.2d at 125 (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)); *see also United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985) ("[A] substantial question is one that is fairly debatable." (quotation marks omitted)).

Platt's appeal presents several substantial questions, each of which is discussed in detail in her opening brief. For purposes of her bail application, Platt relies principally on her brief, and only briefly summarizes each issue and why it is "substantial" within the meaning of the statute and this Court's decision in *Randell*.

First, there is a substantial question as to whether the district court committed reversible error by admitting the testimony of an attorney (William O'Connor) who testified that he met with other women—but not the defendants—and advised them that the financial payments women made through the gifting tables were taxable. This evidence was critical to the government's argument that Platt knew the payments were not "gifts" for tax purposes, but there was no evidence that this lawyer's advice was ever shared with Platt. On the contrary, the evidence at trial suggested the opposite—that at least one of the women who met with O'Connor told Platt he advised that the tables were legal.

The admission of O'Connor's testimony was reversible error under this Court's decision in *United States v. Kaplan*, 490 F.3d 110 (2d Cir. 2007). *Kaplan* squarely holds that evidence of this kind is irrelevant to a defendant's *mens rea* and inadmissible, absent proof that the advice was communicated to the defendant. The unfair prejudice from this error was palpable, and vastly outweighed any conceivable probative value: The only evidence of Platt's knowledge suggested that O'Connor's clients told Platt his advice supported their tax position, yet the government invited the jury to speculate that Platt must have known that O'Connor warned them it was wrong. Given how critical the evidence was, whether its admission was reversible error is, at the very least, a "'close' question or one that very well could be decided the other way." *Randell*, 761 F.2d at 125 (quotation marks omitted). *See generally* Brief pp. 9-10, 24-27.

Second, the admission of O'Connor's testimony raises an additional substantial question: whether the trial court's refusal either to preclude the testimony or require the government to immunize two defense witnesses (Eileen Brennan and Nancy Dillon) who had met with O'Connor and would have rebutted his testimony violated Platt's constitutional right to present a defense. Brennan and Dillon would have contradicted O'Connor, and the content of O'Connor's advice would have been a credibility issue for the jury to decide. The jury easily could have concluded that Platt relied on what she was told about that advice. *See*

Brief p. 28. The exclusion of evidence this critical to the theory of defense was a violation of Platt's right to present a meaningful defense. *See, e.g.*, *United States v. Murray*, 736 F.3d 652, 659 (2d Cir. 2013) (exclusion of evidence that would have rebutted inculpatory evidence and rendered the case a credibility contest violated defendant's rights to present a defense and to fair trial); *United States v. Sternstein*, 596 F.2d 528, 530-31 (2d Cir. 1979) (exclusion of evidence rebutting government contention that was "unquestionably crucial" to defense was reversible error). *See generally* Brief pp. 10-11, 28-30. At a minimum, the issue is "debatable" and warrants bail pending appeal.

Third, the district court's refusal to compel immunity for Brennan, Dillon and a third defense witness, Deanne Capotosto, violated Platt's due process rights. The government used Brennan's and Dillon's exculpatory statements to show that they had waived the attorney-client privilege, thereby permitting O'Connor to testify. It granted immunity to its own witness but refused to immunize the defense witnesses. By condoning this selective use of immunity, the district court erroneously sanctioned unfair and manipulative government tactics, which distorted the fact-finding process and concealed critical exculpatory evidence from the jury. This too presents a substantial question for appeal. *See United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006); *see also United States v. Dolah*, 245 F.3d 98, 106 (2d Cir. 2001) (recognizing the "essential unfairness of permitting the

Government to manipulate its immunity power to elicit testimony from prosecution witnesses who invoke their right not to testify, while declining to use that power to elicit from recalcitrant defense witnesses testimony"); *Gov't of V.I. v. Smith*, 615 F.2d 964, 974 (3d Cir. 1980) (reversing conviction where refusal to immunize defense witness barred "exculpatory" and "essential" evidence); *United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976) (reversing conviction where "prosecutorial misconduct caused the defendant's principal witness to withhold out of fear of self-incrimination testimony which would otherwise allegedly have been available to defendant"); *United States v. De Palma*, 476 F. Supp. 775, 781 (S.D.N.Y. 1979) (reversing conviction where government utilized immunity grant for key testimony, but "the evidence sought by the defense [wa]s affected by the government's…denial of limited use immunity"). *See generally* Brief pp. 10-11, 30-33.

Fourth, there is no uniform legal test for determining what a "pyramid scheme" is. The evidence showed that Platt was aware of some guidance from regulatory agencies on the subject and that, like other participants, she reasonably believed, based on that guidance, that the tables were distinguishable from such schemes. Yet the district court admitted an expert's opinion that the tables were a pyramid scheme based solely on their structure and the flow of money. This was a legal opinion, which is prohibited by controlling authority. It also violated Federal

Rules of Evidence 403 and 704(b) by suggesting that the characteristics that Platt and others believed distinguished the tables from pyramid schemes were irrelevant, and that Platt had to know the tables were a pyramid scheme because she knew how they were structured. Given the lack of evidence that Platt knew the tables were a pyramid scheme, it is, at a minimum, a "close question" whether this was reversible error, warranting bail pending appeal. *See generally* Brief pp. 17-18, 34-41.

Fifth, Platt has joined in two arguments by co-Appellant Donna Bello, which also present substantial questions on appeal. *See* Bello Brief pp. 18-34 (arguing that the government's discriminatory use of peremptory challenges exclusively against women violated the Equal Protection Clause), and 36-55 (arguing that the district court imposed an unconstitutional "trial tax" by punishing the defendants for exercising their Sixth Amendment rights to a trial rather than pleading guilty, where a third defendant who was similarly situated but pleaded guilty received a probationary sentence).

Finally, it is also, at the very least, a close question whether Platt's 54-month sentence was procedurally and substantively unreasonable. Platt is a 65-year-old widow with no criminal history, who used most of the $75,000 she made from the tables to pay for her late husband's pacemaker and gave the rest to other women. This severe sentence was procedurally unreasonable because the district court's

Guidelines computation (the principal driver of the sentence) was based on a legally flawed loss calculation that vastly overstated the only proven loss. The court used the gain to 19 table-participants as an alternative measurement of the loss caused by the conspiracy. But the government never proved, and the district court never found, that those participants were all members of the conspiracy, and the evidence did not support such a finding. The gain amount also erroneously included substantial "losses" of women who were not victims. Moreover, the court never considered Platt's arguments for a downward departure. *See generally* Brief pp. 42-59.

The sentence was also substantively unreasonable. The court ignored or unreasonably minimized several mitigating factors; it employed a Guidelines range that, even if correctly calculated, applies to much more serious crimes; and the sentence was significantly greater than in "pyramid scheme" and gifting table cases involving comparable conduct. *See generally* Brief pp. 59-68.

II. Resolution In Platt's Favor Will Lead To A Reversal, Or Resentencing

Resolution in Platt's favor of any of the evidentiary issues discussed above would lead to a reversal of her conviction. *See* Brief pp. 27, 28-30, 33, 40-41. Additionally, if the Court does not reverse the conviction, it is likely that her sentence will be reduced to a term of imprisonment that is less than the total time she has already served. *See* Brief pp. 55-59, 59-68.

CONCLUSION

For foregoing reasons, this Court should grant release pending appeal.

Dated: New York, New York
April 15, 2014

Respectfully submitted,

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