No. 18-3601-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ANDREW DAVENPORT,

Defendant-Appellant.

MOTION OF DEFENDANT-APPELLANT FOR BAIL PENDING APPEAL

Appeal from the United States District Court
for the Southern District of New York, No. 17 Cr. 61
Before the Honorable Loretta A. Preska

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Pursuant to Federal Rules of Appellate Procedure 9(b) and 27 and 18 U.S.C. §3143(b), Andrew Davenport moves for bail pending appeal. On October 30, 2018, following a jury trial, the Honorable Loretta A. Preska sentenced him to one year and one day in prison, denied bail pending appeal, and set a surrender date of January 31, 2019. Judgment was entered on November 27, 2018. Davenport filed a Notice of Appeal on November 30, 2018.

INTRODUCTION

This appeal raises substantial questions about the circumstances in which the honest-services fraud statute, 18 U.S.C. §1346, criminalizes a private-sector employee's undisclosed financial interests. The prosecution here is foreclosed by *Skilling v. United States*, 561 U.S. 358 (2010). There, to avoid a "vagueness shoal," the Supreme Court cabined §1346 to "the paradigmatic cases of bribes and kickbacks" that formed the "solid core" of prior caselaw. The Court expressly rejected the government's far more expansive construction, which would have encompassed any instance in which an employee acts to benefit his secret financial interest while feigning loyalty to his employer.

In this case, the government endeavored to convert mere private self-dealing into honest-services fraud simply by labelling the proceeds "kickbacks." But the conduct was well outside *Skilling*'s kickback "core."

In a classic kickback scenario, a corporate employee steers business to a vendor in exchange for a share of the vendor's commissions while concealing the payments he is receiving from his employer. Here, there were no shared commissions at all. The employer had partnered with Davenport's business long before the supposed kickback. The employer installed the employee, co-defendant Gary Tanner, in Davenport's offices, and directed him to work side-by-side with Davenport for nearly two years to make Davenport's company successful. According to the evidence at trial, after months of working together, Davenport gave Tanner an ownership interest in the company Tanner was helping Davenport build; Tanner didn't disclose that to his employer. The supposed "kickbacks" were proceeds Tanner received because of his ownership interest. But there was no evidence of any *quid pro quo* agreement—the evidence showed, at most, that Tanner took acts for Davenport's company because of his undisclosed interest. That is precisely the sort of self-dealing that *Skilling* held is *not* honest-services fraud.

We are not aware of any post-*Skilling* honest-services fraud prosecution on remotely similar facts. Even the district court acknowledged that "the unique facts of this case … make it so difficult." Under *Skilling*, the honest-services statute is unconstitutionally vague as applied to this highly unusual scenario.

The erroneous jury instructions compounded the vagueness problem. Well-settled law requires the government to show a *quid pro quo*—an agreement to exchange a payment for Tanner's acts. But the district court told the jury it could convict as long as *Tanner* was in any way motivated by a potential payment—in other words, regardless of Davenport's intent in making the payment. Notably, this Court recently granted bail pending appeal in *United States v. Silver*, No. 18-2380, which concerns a jury instruction that similarly gutted the *quid pro quo* agreement requirement.

Davenport was also convicted of conspiracy to violate the Travel Act, predicated on his supposed violation of New York's commercial bribery statutes. But New York had nothing to do with this case. The supposed bribery/kickback was committed entirely in other jurisdictions, raising another substantial question.

This Court should grant bail pending appeal.

BACKGROUND

A. Davenport's Relationship With Valeant

Davenport is the former CEO of Philidor RX Services LLC, a Pennsylvania mail-order specialty pharmacy. (Tr.261-62, 323).[1] The purported "victim" was Valeant Pharmaceuticals International, Inc., a multinational drug manufacturer

[1] Cited transcript pages and exhibits are attached to the accompanying Declaration of Alexandra A.E. Shapiro. "Tr." refers to the trial transcript.

with U.S. headquarters in New Jersey. (Tr.216). To boost revenues, Valeant took a vested interest in Philidor's growth and forged an unusually close relationship with Philidor.

Before Philidor was formed, insurance companies drove patients from Valeant's branded products to lower-cost generics by requiring detailed information, or a prior authorization, to reimburse patients for prescriptions filled at retail pharmacies. (Tr.451-52, 907, 1027, 1221). This was time-consuming and frustrating for patients and doctors, many of whom stopped prescribing Valeant products. (GX302-1). In response, Valeant launched an alternative fulfillment program ("AFP") using Philidor as Valeant's dedicated "concierge pharmacy." (Tr.917, 1027-29, 1037). AFPs enable patients to access branded drugs through a cheaper and more convenient process because the pharmacy performs the insurance-related legwork itself. (Tr.913-14, 1025-27, 1037). This, in turn, spurs doctors to prescribe, and patients to buy, the company's branded products instead of generics. (Tr.1037; GX302-1).

Valeant projected Philidor would generate hundreds of millions of dollars. (Tr.1036). Accordingly, in January 2013, Valeant's CEO, Michael Pearson, approved a distribution agreement with Philidor. (Tr.323-26; DX88-A; GX100-13A). Valeant was Philidor's only client and remained so for many months. (Tr.335). To fund Philidor's growth, Valeant advanced $2 million and mulled an

equity stake in the company. (Tr.336-37, 1053-54). And Valeant assigned four Valeant employees—including Tanner—to work in Philidor's offices. (Tr.289-90, 339-40, 1034). Tanner lived in Arizona, but every week Valeant flew him across the country to Philidor. (Tr.339-40, 1502; DX1453).

Day-in-and-day-out, at Valeant's direction, Tanner worked with Davenport to grow Philidor into a sustainable and profitable business. (Tr.289-90, 1022, 1047, 1059). For instance, Tanner was instrumental in designing Philidor's prior authorization process. (Tr.1037). And Valeant treated Tanner as a hybrid employee: Tanner led Valeant's executives on tours of Philidor's facilities and presented on Philidor's finances, and Valeant executed special paperwork so Tanner could access confidential patient information, something pharmaceutical company employees are prohibited from doing. (Tr.266-69, 400-01, 932-33, 986-88, 1058-59, 1194, 1200).

Through their daily efforts over nearly two years, Davenport and Tanner successfully built Philidor into a stable and productive operation. (Tr.1034, 1072). By September 2014, for example, Philidor had expanded from one location to four and from fewer than 25 employees to over 450. (DX397 at 397-4). Philidor dispensed over 48,000 Valeant products (up from 49), and its net revenue for the first three quarters of 2014 alone approached $46 million. (DX397-9, DX397-12).

B. The Alleged "Kickback"

The indictment charged Davenport and Tanner with: (1) honest-services fraud conspiracy for alleged "kickbacks" to Tanner; (2) substantive honest-services fraud for the same "kickbacks"; (3) Travel Act conspiracy predicated on commercial bribery; and (4) money laundering conspiracy. (*See* Dkt.66). The trial centered on a 7.5% ownership interest in Philidor that Davenport purportedly gave Tanner in December 2013, after they had been working together for months. (GX302-1; *see* Tr.1537-39, 1542, 1558, 1675).[2] Tanner disclosed this interest to his financial advisors but not to Valeant. (Tr.182-83, 475; GX302-1). Nonetheless, Tanner's supervisor at Valeant suspected the equity interest and raised that concern to Pearson. (Tr.998-1000). But Pearson left Tanner in place and commenced negotiations with Davenport about acquiring Philidor. (Tr.637, 643-44, 1180). In December 2014, Valeant and Philidor signed an agreement through which Valeant purchased a $133 million option to buy Philidor at a later date. (Tr.273, 528; GX300-18).

[2] Davenport disputed ever giving Tanner an ownership interest. And the district court improperly excluded other evidence that undermined the government's theory of a *quid pro quo*. For example, at the same time Tanner supposedly agreed to take acts *as a Valeant employee*, Tanner proposed to Valeant that he leave Valeant to join Philidor. (Tr.360-68, 1064-70). But this motion relies solely on the evidence admitted at trial, drawing all inferences in the government's favor.

Pearson praised Tanner's work. He gave Tanner the highest possible rating on his performance reviews (which glowingly cited his hard work on Philidor) and rewarded him with $5 million in restricted shares. (Tr.797-98, 815-16, 1010, 1022).[3]

Davenport also gave Tanner his proportionate share (as a part owner) of Philidor's proceeds from the option transaction, approximately $9.7 million. (Tr.508-11, 855-61). The government alleged that these payments were "kickbacks" in return for Tanner taking, or refraining from taking, certain acts to benefit Philidor. (Dkt.66 ¶¶5, 16, 18). Those acts concerned, among other things, the terms of a distribution agreement and Valeant's relationships with other pharmacies. (*Id.* ¶9). But there was no direct evidence of any *quid pro quo* agreement for Tanner to perform those (or any) acts. Instead, to prove a *quid pro quo*, the government relied largely on the bare fact that Tanner later engaged in acts that benefitted Philidor.[4]

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[3] Tanner left Valeant before the shares vested. (Tr.816).

[4] Tanner used the name "Brian Wilson" for his Philidor work and maintained a separate email account under that name. Although it was unclear why he did this (*see* Tr.1619-20) and the district court ruled those reasons "irrelevant" (Tr.66-67), the government brandished it as evidence of criminal intent. (*See*, *e.g.*, Tr.1505). Yet Valeant already knew Tanner's work was centered on Philidor. There is no plausible connection between the use of "Brian Wilson" and the alleged *quid pro quo*.

C. District Court Rulings

The defendants moved to dismiss the indictment on the ground that the honest-services statute is unconstitutionally vague as applied to "an employee directed by his employer to advance the interests of a related business entity" who is given "financial benefits from the related entity for advancing its interests." (Dkt.43 at 2). The district court denied the motion (Dkt.84) but discerned a "problem" with the government's theory in that Tanner "was tasked with growing Philidor" and "some of the actions taken were well within Valeant's interests, were approved by the executives." (8/10/17 Tr.28, 36, 44).

At trial, the defendants sought instructions that would have required the jury to find that Davenport and Tanner mutually entered a *quid pro quo* agreement—even implicitly—before Tanner took the acts in question, in order to convict on the honest-services fraud counts. They asked the district court to instruct that the jury must find that both "defendants specifically intended there to be a quid pro quo" and that Davenport, for his part, gave a benefit "to procure the act done in the exercise of [Tanner's] authority." (Dkt.100 at 9, 10). They also asked for an instruction that it is not sufficient if Davenport merely intended "to curry favor or build goodwill" or "nurture a relationship with Mr. Tanner," or if he conveyed a benefit for acts Tanner "ha[d] already decided to take, or for a past act that he ha[d] already taken." (Dkt.100 at 10).

The district court refused to give these instructions. In explaining *quid pro quo*, it effectively took Davenport out of the equation—in the very same paragraph—by instructing: "*All that is required* is that Tanner performed or promised to perform, the act in question at least in part because of a potential bribe or kickback." (Tr.1739) (emphasis added). The court continued to emphasize Tanner's state of mind, and ignore Davenport's, throughout the honest-services charge. It instructed the jury what evidence it could consider "in determining whether Tanner took any action at least in part because of a potential bribe or kickback." (Tr.1739). And it charged that the *quid pro quo* element would be satisfied "if Tanner understood that he was expected as a result of the payment to exercise particular types of influence, that is, on behalf of the payor, Davenport, as specific opportunities arose." (Tr.1740).

The government repeatedly reinforced this myopic focus on Tanner in its closing arguments to jury: "The government has to prove that Tanner got a secret payment from Davenport and that he took actions that were motivated at least in some small part by that money. That's it. That is what honest services fraud is." (Tr.1513; *see also* Tr.1507, 1509, 1510, 1513, 1677, 1692).

The district court denied Davenport's Rule 29 motion, and the jury convicted on all counts. (Tr.1496, 1787-88).

ARGUMENT

A court "shall order" bail pending appeal if there is clear and convincing evidence that the defendant is "not likely to flee" or "pose a danger" to public safety, and "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." 18 U.S.C. §3143(b). When a defendant satisfies that standard, bail is "mandatory." *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004). Davenport does not present a risk of flight or danger to the community, so bail is required if his appeal presents a "substantial question."[5]

To be "substantial," a question need only be "one of more substance than would be necessary to a finding that it was not frivolous"—in other words, "a 'close' question or one that very well could be decided the other way," or one that is "novel, which has not been decided by controlling precedent." *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985). A defendant need not prove that he is likely to succeed on the substantial questions he raises; it is sufficient that if he does succeed, reversal or a new trial is likely. *Id*. at 124-25.

[5] Davenport suffers from major cardiac health issues, lives with his wife and two children, and is extremely close to his extended family. (Dkt.197). He has fully complied with his conditions of release.

Davenport easily meets this standard.[6]

I. The Honest-Services Fraud Charges Raise A Substantial Question Under *Skilling*

A. This Case Falls Outside *Skilling*'s Narrow Parameters

On its face the honest-services statute is hopelessly imprecise and virtually unbounded. Section 1346 criminalizes schemes "to deprive another of the intangible right of honest services," but it neither defines "honest services" nor defines what conduct deprives another of the "intangible right" to those services. *See United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002) ("The plain meaning of 'honest services' in the text of §1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute."); *United States v. Panarella*, 277 F.3d 678, 698 (3d Cir. 2002) ("Deprivation of honest services is perforce an imprecise standard.").

To address the statute's obvious "vagueness problem," the Supreme Court could have simply held it unconstitutional. *Skilling*, 561 U.S. at 404-06. Indeed, three Justices voted to do so. 561 U.S. at 415-25. But the Court chose "[t]o preserve the statute without transgressing constitutional limitations" by paring it down to its "solid core": the "paradigmatic cases of bribes and kickbacks" that

[6] If Davenport prevails on any question regarding the honest-services and Travel Act convictions, the money laundering conviction will also need to be vacated. *United States v. Silver*, 864 F.3d 102, 124 (2d Cir. 2017).

predominated honest-services fraud prosecutions before *McNally v. United States*, 483 U.S. 350 (1987). *Id.* at 408-09, 411; *see id.* at 412 ("no other misconduct falls within §1346's province"). "Reading the statute to proscribe a wider range of offensive conduct," the Court held, "would raise the due process concerns underlying the vagueness doctrine." *Id.* at 408.

The Court expressly declined the government's invitation to construe the statute to cover cases of "undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 409-10. Invoking the rule of lenity—a principle "especially appropriate in construing §1346"—the Court held that "a reasonable limiting construction … must exclude th[e] amorphous category" of conflict-of-interest cases. *Id.* at 410-11 (quotation marks and alteration omitted).

This case is far afield from the "paradigmatic" kickback case to which *Skilling* confined the honest-services statute. "A kickback scheme typically involves an employee's steering business of his employer to a third party in exchange for a share of the third party's profits on that business." *United States v. DeMizio*, 741 F.3d 373, 381 (2d Cir. 2014); *see*, *e.g.*, *United States v. LaSpina*, 299 F.3d 165, 170 (2d Cir. 2002) (employee entered contracts with vendor and received share of vendor's commissions on those contracts); *United States v. McDonough*,

56 F.3d 381, 384 (2d Cir. 1995) (official received share of insurance commissions from insurers used by public entities).

In fact, each of the private-sector kickback cases that *Skilling* identified within the "solid core" of pre-*McNally* caselaw adhered to that fact pattern. *See Skilling*, 561 U.S. at 407 (citing U.S. Br. at 42 n.4, which cites *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985) (employee purchased property for employer and received portion of seller's proceeds); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980) (employee engaged insurers for employer and received share of their commissions); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975) (employee purchased from suppliers in return for portion of salesmen's commissions); and *United States v. George*, 477 F.2d 508 (7th Cir. 1973) (employee purchased from suppliers and received portion of sale proceeds)). And the Court noted that "the *McNally* case itself, which spurred Congress to enact §1346, presented a paradigmatic kickback fact pattern" and "a classic kickback scheme," in which an insurance company "share[d] its commissions" from state business. *Id.* at 407, 410.

Here, by contrast, the government did not—and could not—contend that Davenport paid Tanner to steer Valeant's business toward Philidor, because Valeant had done that well before Tanner had an interest in Philidor. Nor was Philidor a true "third party" to Valeant. Driven by the prospect of significant

revenues for itself, Valeant deliberately nurtured a relationship with Philidor that was less than arms-length: It advanced millions of dollars for Philidor to use as seed capital, flew Tanner across the country week-after-week to work in Philidor's offices and act in Philidor's best interests, and for all intents and purposes treated Tanner as Philidor's representative. Valeant's senior-most executives embraced and rewarded Tanner's hybrid role with glowing performance reviews and an enormous stock grant. Moreover, unlike the classic kickback schemes in *Skilling*, Tanner had no decision-making role with respect to the transaction that generated the payment: Whether, when, and for how much Valeant would purchase the option to buy Philidor was dictated by Valeant's CEO and other senior executives—not Tanner.

B. Criminalizing Davenport's Conduct Renders The Honest-Services Fraud Statute Unconstitutionally Vague

Shoehorning the unique facts of this case into *Skilling*'s narrow category of paradigmatic bribe and kickback cases would render §1346 vague and ambiguous as applied.

A statute violates the Due Process Clause if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *accord McDonnell v. United*

States, 136 S. Ct. 2355, 2373 (2016). The task of determining whether conduct falls within a statute's prohibited scope cannot "devolv[e] into guesswork and intuition." *Johnson v. United States*, 135 S. Ct. 2551, 2559 (2015). When a criminal statute's scope is ambiguous, the rule of lenity requires that it be construed narrowly and in favor of the defendant. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 25 (2000); *Williams v. United States*, 458 U.S. 279, 290 (1982).

For at least two reasons, neither §1346 nor controlling precedent put Davenport on notice that his acts violated that statute.

First, *Skilling* drew a clear line between undisclosed conflicts of interest and self-dealing, on the one hand, and bribes and kickbacks, on the other; §1346 reaches the latter but not the former. 561 U.S. at 410. But characterizing the conduct in this case as honest-services fraud impermissibly blurs any distinction between the two.

That is, Tanner's ownership stake in Philidor presented a classic conflict-of-interest, and any acts he took to "further[] his own undisclosed financial interests while purporting to act in [Valeant's] interests" amount at most to self-dealing. *See id.* at 409. The government introduced hundreds of pages of Valeant's conflict-of-interest policies and training manuals to make this very point. (Tr.221-23, 233-36, 242-43, 253-55). It even called Valeant's chief compliance officer to

testify that those policies prohibited Tanner from acquiring "[o]wnership ... of a substantial interest in any concern that does business with Valeant." (Tr.221-36, 243-45, 253-55). And the government argued that Davenport knew Tanner's conduct was illegal because "Philidor itself had the same conflict of interest policy." (Tr.1539-40). The government thus portrayed Tanner's "crime" to the jury as self-dealing to further an undisclosed conflict of interest.

Moreover, the purported "kickback" payments were funds to which Tanner was entitled based on the ownership interest that the government maintained Davenport had given him a year earlier. *See* Del. Code Ann. tit. 6, §18-702(b)(2) ("An assignment of a limited liability company interest entitles the assignee … to receive such distribution or distributions, and to receive such allocation of income, gain, … to which the assignor was entitled"). How was Davenport to determine whether these payments were unlawful kickbacks, as opposed to Tanner's lawful profit on an undisclosed financial interest?

Second, this Court has previously held that bribing a company's employee to act in the bribe payor's interests "*instead of*" his employer's interests can constitute private-sector honest-services fraud. *United States v. Rybicki*, 354 F.3d 124, 132 (2d Cir. 2003) (en banc) (emphasis added). But application of the doctrine becomes unconstitutionally vague in this rare circumstance where the employer

has seconded its employee to the alleged bribe-payor and merged the two companies' interests.

When Davenport made Tanner a co-owner, Tanner had already been working at Philidor for months—with Valeant's blessing and at Valeant's direction—taking actions that were in Philidor's interest and, in turn, benefited Valeant. Even if Davenport gave Tanner the ownership interest so he would continue working hard on Philidor's behalf, it was reasonable for Davenport to conclude that that served Valeant's interests as well.[7] The commingling of Philidor with Valeant defied *Rybicki*'s otherwise straightforward us-or-them dichotomy.

Accordingly, the Fifth Circuit has suggested that this type of circumstance *precludes* a finding of honest-services fraud:

> [W]here an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest-services theory of fraud ….

United States v. Brown, 459 F.3d 509, 522 (5th Cir. 2006).

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[7] Over objection (Tr.1479), the district court instructed the jury that "the government is not required to show that any acts Tanner performed or promised to perform, were contrary to Valeant's interests." (Tr.1739).

Neither this Court nor the Supreme Court has ever considered whether the honest-services statute applies to private-sector conduct that does not involve classic bribes and kickbacks to steer business to a preferred vendor, or the unusual scenario presented here. "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J., dissenting from the denial of *cert.*). At a minimum, these issues are "novel," and thus "substantial" within the meaning of the bail statute. *See Randell*, 761 F.2d at 125.

II. There Is A Substantial Question Whether The Jury Instructions Permitted Conviction Absent A *Quid Pro Quo* Agreement

The *sine qua non* of honest-services fraud is *an agreement* to exchange something of value for an official act. *See*, *e.g.*, *McDonnell*, 136 S. Ct. at 2371 (jury must "determine whether the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*"); *Evans v. United States*, 504 U.S. 255, 268 (1992) (bribery "is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts"); *Silver*, 864 F.3d at 111 (honest-services fraud requires "*quid pro quo* agreement"). Unless the bribes are campaign contributions, that agreement need not be explicit, and "may be implied from the defendant's words and actions." *United States v. Rosen*, 716 F.3d 691, 701 (2d Cir. 2013); *see McCormick v. United States*, 500 U.S. 257, 273

(1991). But whether explicit or implied, "the Government ha[s] to prove"—and the jury must find—"beyond a reasonable doubt, the existence of a *quid pro quo* agreement." *Silver*, 864 F.3d at 111.

The instructions here gutted that requirement.[8] By expressly telling the jury that "[a]ll that is required" is that Tanner was motivated by "a potential bribe or kickback," the court permitted conviction based solely on Tanner's state of mind—irrespective of Davenport's intent.[9] Under the court's instructions, the jury could convict even if Davenport merely intended to curry Tanner's goodwill or to reward acts he had already taken. But such payments, if proven, would be *lawful* gratuities, not honest-services bribes. *United States v. Sun-Diamond Growers of Calif.*, 526 U.S. 398, 405-06 (1999). Bribery requires a payment "made in exchange for a commitment to perform … acts … in the future." *United States v. Ganim*, 510 F.3d 134, 147 (2d Cir. 2007). Whether or not Tanner actually performed any act motivated by a payment, moreover, is immaterial. *See McDonnell*, 136 S. Ct. at 2370-71 ("[A] public official is not required to actually

[8] Defendants did not contemporaneously object to the instruction. But the instructional error substantially lessened the government's burden on the central trial issue—Davenport's intent—and thus constitutes plain error. *See United States v. Rossomando*, 144 F.3d 197, 200-01 (2d Cir. 1998) (reversing for plain error).

[9] The court's reference to "potential" payment also permitted the jury to convict based on Tanner's *mere hope* that he would receive a payment in the future, even if nothing had been agreed to prior to the act in question.

make a decision or take an action"); *Evans*, 504 U.S. at 268 ("[F]ulfillment of the *quid pro quo* is not an element of the offense.").

By focusing on whether Tanner engaged in acts because of a payment, instead of whether *Davenport* agreed to pay Tanner in return for Tanner's acts, the instruction misled the jury into thinking that Tanner's motivation controlled. At a minimum, it could have confused the jury. *See United States v. Kopstein*, 759 F.3d 168, 172 (2d Cir. 2014) (reversible error when jury instructions "mislead the jury as to the correct legal standard" or are "highly confusing"). Nor was the instruction saved by the later instruction regarding "intent to defraud." (Tr.1741). *See Hudson v. New York City*, 271 F.3d 62, 70 (2d Cir. 2001) ("reject[ing] the notion … that a court's earlier incorrect statements are necessarily 'cured' so long as the charge contains the correct standard elsewhere"). *Accord Kopstein*, 759 F.3d at 182. The district court unequivocally instructed that Tanner's motivation was "all that is required," and this Court "cannot assume the jury disregarded [that instruction]." *DeLima v. Trinidad Corp.*, 302 F.2d 585, 587 (2d Cir. 1962).

The error was not harmless. The government repeatedly reinforced the incorrect legal standard by arguing to the jury that Tanner's motivations controlled. (Tr.1507, 1509, 1510, 1513, 1677, 1692). And there was no direct evidence of any *quid pro quo* agreement—not even "winks and nods." *Evans*, 504 U.S. at 274 (Kennedy, J., concurring). What circumstantial evidence did exist was limited to

(1) Davenport's and Tanner's having worked together at Philidor; (2) acts that Tanner later took which benefitted Philidor; and (3) the payments. But Tanner's acts cannot substitute for the lack of an actual *quid pro quo* agreement. *See United States v. Brewster*, 408 U.S. 501, 526 (1972). And the evidence gave "equal or nearly equal circumstantial support," *United States v. Cassese*, 428 F.3d 92, 99 (2d Cir. 2005), to inferences that Davenport merely intended to curry goodwill with Valeant, to reward Tanner's prior efforts, or to compensate him for other Philidor work having nothing to do with Valeant—such as Tanner's efforts to pitch Philidor to *other* pharmaceutical companies. (Tr.1295-1305). Whether or not such conduct violated Valeant's conflict-of-interest policies or breached a covenant against outside employment, it was not honest-services fraud. *Skilling*, 561 U.S. at 410.

The instructional error thus raises a substantial question. Indeed, this Court recently granted bail in *United States v. Silver*, a public-sector honest-services fraud case presenting a nearly identical issue. The district court there charged that for honest-services fraud: "The Government only has to prove that Mr. Silver—not the bribe giver—understood that, as a result of the bribe, he was expected to exercise official influence or take official action." That instruction is at the center of Silver's appeal, and this Court granted him bail. *See* Order, *United States v. Silver*, No. 18-2380, Dkt.51 (Oct. 3, 2018) and Dkt.30 at 13-18. The Court should do so here too.

III. The Travel Act Conviction Raises A Substantial Question

Reversing Davenport's honest-services fraud convictions on vagueness grounds would also doom the Travel Act conviction. The New York commercial bribery statutes—the alleged predicate for the Travel Act conspiracy—are unconstitutionally vague as applied for the same reasons as the honest-services statute. Indeed, in the proceedings below, the government never disputed that the Travel Act count would have to be dismissed if the court dismissed the honest-services counts on vagueness grounds. (*See* Dkt.43 at 10 n.3).

The Travel Act conviction also raises a separate substantial question because there was no basis for the jury to find that Davenport intended to commit a crime in New York. As relevant here, the Travel Act is violated when a defendant uses the mail or interstate facilities to "promote, manage, establish, [or] carry on" "bribery … in violation of the laws of *the State in which [it is] committed*." 18 U.S.C. §1952(a)(3), (b) (emphasis added). A person commits commercial bribery under New York law when he or she "'confer[s], or offer[s] or agree[s] to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs." *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 222 (2d Cir. 2004) (quoting 5 N.Y. Penal L. §180.00). *See also Niagara Mohawk Power Corp. v.*

Freed, 265 A.D.2d 938, 939, 696 N.Y.S.2d 600, 602 (4th Dep't 1999). Except in other limited circumstances not applicable here, the New York commercial bribery statutes do not reach conduct occurring outside the state unless conduct "sufficient to establish" an element of the offense occurred in New York. N.Y. Crim. Proc. Law §20.20(1)(a).

Even if bribery occurred in this case, it was not committed in New York. It could have been committed only in Pennsylvania, where Philidor was based and Davenport lived and worked, Arizona (Tanner's residence) or New Jersey (Valeant's headquarters). *See*, *e.g.*, *United States v. Walsh*, 700 F.2d 846, 855 (2d Cir. 1983) (bribery "committed" in state where official agreed to accept money for official actions).

Accordingly, the evidence was insufficient to sustain the Travel Act conviction.

CONCLUSION

If this Court denies bail, and Davenport prevails on appeal, he will likely already have served most, if not his entire sentence (effectively 10 months under Bureau of Prisons policy). For the reasons set forth above, this Court should grant bail pending appeal.

Dated: New York, New York
December 21, 2018

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,148 words.

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

Date: December 21, 2018

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

CERTIFICATE OF SERVICE

I hereby certify that, on December 21, 2018, an electronic copy of this Motion of Defendant-Appellant for Bail Pending Appeal was filed with the Clerk of Court using the ECF system and thereby served upon the following counsel:

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