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.

REPLY IN SUPPORT OF 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

Alexandra A.E. Shapiro
Daniel J. O'Neill
SHAPIRO ARATO LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant Andrew Davenport

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INTRODUCTION

Davenport has demonstrated several substantial questions on appeal. The first is whether this prosecution was foreclosed by *Skilling v. United States*, 561 U.S. 358 (2010), or whether the honest-services statute is unconstitutionally vague as applied here. This case is well outside the limits of *Skilling*'s "paradigmatic" kickback case: the government's evidence showed that Tanner did not steer Valeant's business to Philidor; Philidor was not a true third-party because, among other things, Valeant directed Tanner to work on Philidor's behalf; Davenport gave Tanner an ownership stake in Philidor before any of the acts in question; and that ownership stake entitled Tanner to the funds Davenport later gave him. Second, there is a substantial question whether the district court eliminated the *quid pro quo* agreement requirement by instructing the jury that *Tanner's* motivation was dispositive. And third, there is a substantial question whether the government failed to prove a Travel Act conspiracy predicated on New York law, because it failed to prove any bribery in New York.

On each issue, the government is unable to point to any precedent foreclosing Davenport's arguments. It cites no comparable honest-services fraud prosecution, no authority for allowing conviction to turn solely on the co-defendant/recipient's state of mind, and no case upholding a Travel Act conviction based on laws of a state in which no bribery was committed. The government is

thus reduced to diversion tactics. It misstates the applicable standard of review. It ignores the peculiar facts of this case as if calling it a "straightforward kickback scheme" makes it so. It fixates on evidence—concerning nondisclosure of Tanner's ownership and his acts to benefit Philidor—that is equally consistent with undisclosed self-dealing as with a kickback. It makes no attempt to defend the substance of the plainly erroneous instruction. And it has the gall to claim that the Travel Act conviction rested on a hotel room and meal, rather than the $9.7 million payment that—at the government's request—the district court instructed the jury was the sole basis for that charge.

The Court should grant bail pending appeal.

ARGUMENT

I. This Court Determines "Substantial Questions" *De Novo* And Need Not Find "Exceptional Circumstances" To Grant Bail

The government blatantly misstates the governing standards in two key respects. (Opp.10-11). First, whether an appeal presents a "substantial question" is a legal determination reviewed *de novo*, not for clear error. *See United States v. Abuhamra*, 389 F.3d 309, 317 (2d Cir. 2004); *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003). It is well-settled that only facts relating to flight risk and danger—which are indisputably not at issue here—are reviewed for "clear error," as the case the government cites (Opp.11) demonstrates. *See United States*

v. Sabhnani, 493 F.3d 63, 75 (2d Cir. 2007) (involving *factual* issues concerning *pre-trial detention*).

Second, the government's claim that bail pending appeal may only be granted in "exceptional circumstances" is flat wrong. Where, as here, a defendant poses no risk of flight or public danger, bail is "mandatory" as long as the appeal presents a substantial question. *Abuhamra*, 389 F.3d at 319. Davenport's appeal easily qualifies. His appeal presents "unique facts not plainly covered by the controlling precedents," "important questions concerning the scope and meaning of decisions of the Supreme Court," "new and novel" questions, and, at a minimum, "issues that are fairly debatable." *United States v. Handy*, 761 F.2d 1279, 1281 (9th Cir. 1985) (quotation marks omitted); *see United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985).[1]

II. The Honest-Services Fraud Charges Present A Substantial Question

Under *Skilling*, allowing §1346 to reach any "wider range of offensive conduct" than "the paradigmatic cases of bribes and kickbacks" "would raise the due process concerns underlying the vagueness doctrine." 561 U.S. at 408, 411. (*See* Br.11-12). Due process likewise requires "paradigmatic cases of bribes and

[1] Bail pending appeal requires "exceptional reasons" only in cases involving violent, drug and life-maximum crimes, where danger to the community is presumed. *See* 18 U.S.C. §3145(c); *United States v. DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991).

kickbacks" to be a "principled and objective standard." *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015).

With respect to kickbacks, at least, it is: "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* Br.12-13). But the circumstances here do not fit that mold: (1) Valeant had already steered its business to Philidor; (2) Valeant aligned its interests with Philidor, embedded Tanner at Philidor and directed him to act in Philidor's best interests; (3) Davenport made Tanner a Philidor owner *before* the acts in question; (4) the supposed "kickbacks" were profits from that ownership interest—not a share of any commissions; and (5) Tanner had no role in Valeant's decision to acquire the Philidor option.

The government refuses to grapple with any of these facts, each of which differentiates this case from the paradigm.[2] Instead the government indiscriminately tosses around the word "kickback" as if repeatedly labeling this case "straightforward" or "a classic private-sector kickback scenario" makes it so. (Opp.12, 17). Wrong. The "classic kickback scheme" *Skilling* described was

[2] The government dismisses *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), because the payment came from the defendant's employer. (Opp.15). But *Brown* illustrates problems with invoking honest-services fraud where an employee's self-interests overlap with his employer's interests. (*See* Br.17).

McNally, where the official routed business to an insurance company for a share of commissions. 561 U.S. at 410; *see also United States v. Aunspaugh*, 792 F.3d 1302, 1306 (11th Cir. 2015) ("classic kickback scheme" where third party split profits with employee who steered work to it); *United States v. Lupton*, 620 F.3d 790, 803 n.3 (7th Cir. 2010) ("paradigmatic kickback" where real estate broker sought share of buyer's broker's fee for selecting buyer as winning bidder). Not surprisingly, the government cites no case involving facts remotely similar to those here.

Instead the government contends two out-of-Circuit, pre-*Skilling* cases provided sufficient notice to Davenport. (Opp.15-16). But both just exemplify the vendor-commission pattern that *Skilling* and *DeMizio* described. *See United States v. Shyres*, 898 F.2d 647 (8th Cir. 1990) (vendor paid individuals for steering business to it); *Ranke v. United States*, 873 F.2d 1033 (7th Cir. 1989) (same).[3]

Lacking legal precedents, the government resorts to nefarious interpretations of the "Brian Wilson" name, use of partnerships and LLCs, and omission of Tanner on ownership schedules, arguing that evidence of non-disclosure proves the

[3] The government claims Tanner's ownership interest qualifies as a kickback because *United States v. Rosen*, 716 F.3d 691 (2d Cir. 2013), "describe[ed] kickback[s] as anything of value." (Opp.14 n.3). *Rosen* said no such thing. In any event, at trial the government never argued that the ownership interest was a kickback; its focus was the proceeds Tanner received a year later. (Tr.1509-10).

defendants believed their conduct fraudulent. (Opp.7-9, 16).[4] But the failure to disclose information is not indicative of criminality because undisclosed self-dealing—though it may have violated Valeant's policies—is not honest-services fraud. *Skilling*, 561 U.S. at 410.

The government also argues that jury instructions requiring a bribe or kickback cured the vagueness problem. (Opp.13). But the court defined "bribe or kickback" in terms of a "violation of a fiduciary duty." (Tr.1740). There was not a single reference throughout the trial to any fiduciary duty that Tanner owed Valeant. And the government's emphasis on Valeant's conflict of interest policies (*see* Br.15-16) suggested that simply taking an interest in a company doing business with Valeant would qualify as a bribe or kickback under the instructions. Although the district court instructed that "undisclosed self-dealing or failure to disclose a conflict of interest" is not enough (Opp.14 (citing Tr.1742)), it provided

[4] The government conceded that Tanner used "Brian Wilson" to keep protected health information off his Valeant email account (Br.7n.4; *see* Tr.93), and he used it for all his work for Philidor, including work unrelated to Valeant. (Tr.1295-1305). Davenport's entities, which he set up in mid-2013—well before the option payments—are also irrelevant. (*See* GX500; GX507) (cited exhibits and transcript pages not previously submitted are attached to the accompanying Reply Declaration of Alexandra A.E. Shapiro). He held his interest in Philidor through an entity wholly-owned by his LLC, in which he gave Tanner an ownership interest. (Tr.480-81). That is why the Philidor ownership schedules listed only the shareholder-entity, and not Tanner (or even Davenport) in a personal capacity. (GX300-18 at VRX-0017-0215214).

no guidance on distinguishing between undisclosed self-dealing and a kickback when self-dealing yields the payment at issue. *Skilling*, 561 U.S. at 409-10 (self-dealing to "further[] [one's] own undisclosed financial interests" is not honest-services fraud).

Finally, the government's attempt to downplay its jury arguments about Tanner's conflict of interest as having been merely about intent (Opp.14) is belied by the record. The prosecutors made the conflict the centerpiece of their arguments. They argued that that conflict led Tanner to take the actions he did. (Tr.1524-25, 1527). And they expressly invited the jury to convict based on undisclosed self-dealing alone: The government pointed to Tanner's certifying compliance with Valeant's conflict-of-interest policy at the same time he was helping Davenport and proclaimed, "[L]adies and gentlemen, that is honest services fraud." (Tr.1541).[5]

[5] This is just one example of the government's mischaracterizations of its trial arguments. The government now claims Tanner concealed information from his financial advisor (Opp.8), but argued at trial that "Tanner was not worried about telling [her] the truth." (Tr.1537-38, 1675). Similarly, the government asserts that "[t]here was no proof that Tanner held a legitimate interest in Philidor" because he "was not named in the schedule of owners Davenport provided to Valeant." (Opp.14). But the government argued at trial that Tanner had a legitimate interest which the ownership schedules concealed. (Tr.1537-39, 1542-43,1558, 1675).

III. The *Quid Pro Quo* Instruction Presents A Substantial Question

The instruction that "[a]ll 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," vitiated the government's burden to prove Davenport's *quid pro quo* agreement for Tanner's acts as a Valeant employee. (Br.18-21). The government is unable to defend the instruction or cite any case supporting it, because the instruction was unquestionably wrong. *See McDonnell v. United States*, 136 S. Ct. 2355, 2370-71 (2016); *Evans v. United States*, 504 U.S. 255, 268 (1992). The government also ignores its repeated—and similarly erroneous—closing arguments that the jury only had to find that *Tanner* was motivated by money. (Tr.1507, 1509, 1510, 1513, 1677, 1692). At a minimum, the instruction raises a substantial question for appeal.

The government's attempt to distinguish *Silver*, in which this Court granted bail pending the appeal of a similar instructional error (Opp.19-20), makes no sense. Both cases present the identical issue—whether an agreement is required. Whether the defendant was the payor or the payee is immaterial. Moreover, this was one of only two issues Silver raised (not "one among many claimed errors," Opp.20), and the Court devoted extensive discussion to it at oral argument. (*See* Shapiro Reply Decl. Ex. 4 at 7-23, 32-41). Lastly, the fact that the jury here was

charged on specific intent is of no moment; *Silver* contained a specific intent instruction, too. (Case No. 18-2380, JA-1143).

Nor can the intent instruction save the earlier error. This Court has "reject[ed] the notion … that a court's earlier incorrect statements are necessarily 'cured' so long as the charge contains the correct standard elsewhere." *Hudson v. New York City*, 271 F.3d 62, 70 (2d Cir. 2001). (*See* Br.20). Moreover, the intent instruction was confusing. It said the defendants must have acted "with the specific intent to deceive for the purpose of depriving Valeant of its right to Tanner's honest services," which was in turn defined to mean an employee's "tak[ing] an action on behalf of a person or entity at least in part because of a concealed bribe or kickback," which was in turn defined to mean "anything of value, which is solicited, offered, or provided directly or indirectly, to an employee in exchange for taking action in violation of a fiduciary duty owed by that person." (Tr.1740-41). As discussed above, there was no evidence about Tanner's fiduciary duties, but the jury heard substantial evidence that Tanner violated Valeant's conflict-of-interest policies.

Finally, the government mischaracterizes Davenport's argument as about sufficiency. (Opp.18). If, in fact, the jury instruction was erroneous then the error will be reviewed for harmlessness—a far more difficult standard for the government than the sufficiency test. *See United States v. Nouri*, 711 F.3d 129,

140 (2d Cir. 2013) (Court can only sustain conviction if it finds "the jury would have returned the same verdict beyond a reasonable doubt" absent the instructional error) (quotation marks omitted). None of the "evidence" the government cites—which is all equally consistent with undisclosed self-dealing (Opp.19)—could render harmless the district court's failure to instruct the jury on the *quid pro quo* agreement requirement.

IV. The Travel Act Conviction Presents A Substantial Question

The government's attempts to defend the Travel Act conviction miss the mark.

First, the government erroneously asserts that Davenport raised his vagueness challenge only in a footnote. (Opp.22n.6). In fact, his motion to dismiss was addressed to the *entire* indictment, and he incorporated his vagueness challenge into his Travel Act argument in the text of his memorandum of law as well. (*See* Dkt.43 at 10). The government has always treated this count as an after-thought. It devoted only five sentences of its summations to it, arguing that the Travel Act "is a form of money laundering" across state lines and that it was satisfied because the $9.7 million payment moved from Davenport's company to Tanner's. (Tr.1571-72).

Davenport's independent Travel Act argument is not, as the government maintains, a venue or procedural challenge. (Opp.21). The Travel Act itself

requires interstate activity related to "bribery … in violation of the laws of the State in which [it is] committed," and the theory the government presented at trial gave the jury no basis to find that Davenport intended to commit bribery in New York. (Br.22-23).

The government cites evidence that Davenport paid for a hotel and meal in New York. (Opp.21-22). But the government never argued that to the jury except for purposes of venue (*see* Tr.1571-72), and it never suggested that the hotel stay and meal themselves constituted bribes. It focused exclusively on the $9.7 million "kickbacks," and even requested a jury instruction—which the court gave—explaining that its Travel Act theory was that "Andrew Davenport paid kickbacks to Gary Tanner in an effort to influence his conduct as an agent for Valeant." (Tr.1756; *see* Dkt.87 at 43).

CONCLUSION

This Court should grant bail pending appeal.

Dated: New York, New York
January 9, 2019

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Daniel J. O'Neill
SHAPIRO ARATO LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant
Andrew Davenport

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Date: January 9, 2019

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

CERTIFICATE OF SERVICE

I hereby certify that, on January 9, 2019, an electronic copy of this Reply in Support of 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:

Richard A. Cooper
Sarah K. Eddy
Amanda K. Kramer

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