No. 18-3710-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

STEVEN AIELLO,

Defendant-Appellant.

REPLY IN SUPPORT OF EMERGENCY MOTION OF DEFENDANT-APPELLANT FOR STAY OF SURRENDER DATE AND BAIL PENDING APPEAL

Appeal from the United States District Court
for the Southern District of New York, No. 16 Cr. 776
Before the Honorable Valerie E. Caproni

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INTRODUCTION

The government does not dispute that Steven Aiello poses no flight risk or danger and that two of three counts of conviction raise substantial questions warranting bail. Aiello's motion demonstrated that the single remaining count does so as well, and that there is no reason to treat him differently from three co-defendants who remain on bail pending appeal.

The government's limp response fails to undermine Aiello's compelling showing. Indeed, the government doesn't even try to rebut most of Aiello's arguments. Instead, it regurgitates the district court's opinion without grappling with our challenges to the opinion's flawed reasoning. The government also takes an unduly crabbed, and clearly incorrect, view of "substantial question." Its attempt to defend the constructive amendment ignores the Grand Jury Clause violation. And its nearly double-size brief labors through a series of lengthy and tortuous efforts to distinguish, trivialize, and cabin *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which, if anything, only underscore how complex, and substantial, the appellate issues are.

McDonnell starkly conflicts with the legal theories in this case and raises novel issues, including one that this Court apparently has already found substantial in connection with Sheldon Silver's appeal. Whatever their ultimate merits, the

McDonnell questions here are paradigmatic substantial questions entitling Aiello to release pending appeal.

ARGUMENT

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

The government blatantly misstates the governing standards in two key respects. (Opp.11-12). First, its claim that bail pending appeal may only be granted in "exceptional circumstances" is flatly wrong. Where, as here, there is no flight risk or danger, bail is "mandatory" if the appeal presents a substantial question. *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004).[1] And Aiello's appeal is substantial because it presents "important questions concerning the scope and meaning of" *McDonnell* and "unique facts not plainly covered by the controlling precedents." *United States v. Handy*, 761 F.2d 1279, 1281 (9th Cir. 1985); *see United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985).

Second, whether an appellate question is "substantial"—like any legal determination—is reviewed *de novo*, without deference to the district court. *See Abuhamra*, 389 F.3d at 317; *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003); *United States v. Eaken*, 995 F.2d 740, 741 (7th Cir. 1993). The

[1] Bail pending appeal requires "exceptional reasons" only in cases involving violent, drug, and life-maximum crimes, where danger is presumed. *See* 18 U.S.C. §3145(c).

government's cases do not hold otherwise. *See United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) (deferring to flight risk fact-findings); *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991) (merely agreeing with district court that question was substantial).

II. There Is A Substantial Question Whether The Jury Instructions Constructively Amended The Indictment

The grand jury charged a conspiracy that occurred "while [Percoco was] serving as Executive Deputy Secretary to the Governor," for Percoco to "take official action" and "deprive the public" of his "honest services as a senior official in the Office of the Governor." (Dkt.321 ¶¶58-59). But the instructions allowed the petit jury to convict even if Percoco was not in office and thus owed no honest services as a public official, either at the time of any agreement or when he took the acts in question. (Tr.6446). The failure to present the private-citizen theory to the grand jury raises at least a substantial question whether Aiello's Fifth Amendment rights were violated. *See United States v. Hassan*, 578 F.3d 108, 133-34 (2d Cir. 2008). (*See* Mot.9-11).

The government elides the Grand Jury Clause violation and instead argues that snippets of the indictment gave "notice" of the government's theory. (Opp.33-34). But "[t]he substantial right implicated here is not [just] notice; it is the 'right to be tried only on charges presented in an indictment returned by a grand jury.'"

United States v. Roshko, 969 F.2d 1, 6 (2d Cir. 1992) (quoting *Stirone v. United States*, 361 U.S. 212, 217 (1960)). The government does not dispute that the grand jury was never presented with the theory that the conspiracy's *object* was to deprive the public of honest services that Percoco supposedly owed as a private citizen. The government did not even seek to present that theory at trial; its proposed jury instructions stated that "a private citizen…does not owe a duty of honest services to the public" and instructed exclusively on "a public official's honest services." (Dkt.379 at 32). It was the *district court—sua sponte*—that injected the private-citizen theory into the instructions, over defense objections. (Tr.5824-25, 5837, 5845-47).

The government also contends that the case concerned "Percoco's honest services" broadly defined, even though the indictment charged a deprivation of his "honest services as a senior official" only. (Opp.34-35). But "the government made the deliberate choice" to charge the conspiracy as it did, which made Aiello's intent to deprive the public of Percoco's honest services as a public official "an essential element of the offense." *Hassan*, 578 F.3d at 133-34. The district court's more expansive jury instruction "does not satisfy the burden assumed by the government" and impermissibly altered that essential element. *Id.* at 134. That is a "*per se* violation" of the Fifth Amendment. *Id.* at 133.

III. There Is A Substantial Question Whether *McDonnell* Precludes The Private-Citizen Instruction

There is a substantial question that no Court of Appeals has yet addressed as to whether, under *McDonnell*, a private citizen can commit public-sector honest-services fraud. (Mot.13-16). Specifically, *McDonnell* significantly narrowed the definition of "official act," holding that the *quid quo pro* for public-sector honest-services fraud must involve a "public official" (a) making a decision or taking action on a matter involving the "formal exercise of governmental power" within his official duties, or (b) "using his official position to exert pressure on another official to perform" such an act. 136 S. Ct. at 2368-72. Yet the government does not even try to reconcile its private-citizen theory with *McDonnell*'s insistence on a "public official," "formal…governmental power," and an "official position." Instead, the government offers up inapposite caselaw, misreads language in *McDonnell* that supports Aiello's position, and makes a frivolous suggestion of harmlessness.

First, the government cites various cases employing the "reliance, *de facto* control and dominance" test for fiduciary status. (Opp.26). But none present any circumstances where the *public* could reasonably be said to "rely" on a private citizen who is not on the public payroll. (Mot.15). And the government is unable to come up with a single case—except the decades-old *United States v. Margiotta*,

688 F.2d 108 (2d Cir. 1982)—employing that test as a touchstone for a fiduciary duty to *the public*, let alone any case analyzing whether that test survives *McDonnell*. (*See* Mot.15-16).

Second, the government asserts that private citizens can perform official acts because *McDonnell* held that pressuring or advising "*another* official to perform an 'official act'" is itself an official act. (Opp.28 (emphasis in *McDonnell*)). But the district court itself acknowledged that the sentence in which this language appears can be read to suggest that only a public official can perform official acts. (Mot.16-17). And the government's partial quotation points to that same conclusion: only a public official can pressure or advise "*another* official."[2] The government's cases involving defendants who were "personally incapable" of taking the action they pressured others to take are irrelevant. As Aiello already explained, each involved a defendant who was himself a public official and "us[ed] his official position" to pressure "another official." (Mot.17). The government has no response to this argument.

Third, the government attempts to distinguish between the "official act" requirement and the class of persons "who could perform an official act."

[2] The government omits most of the sentence, which reads in full: "A *public official* may also make a decision or take an action on a 'question, matter, cause, suit, proceeding or controversy' by using his *official position* to exert pressure on *another official* to perform an 'official act.'" 136 S. Ct. at 2370 (emphasis added).

(Opp.28-30). As explained (and not rebutted), *McDonnell*'s definition of "official act" renders this distinction artificial. (Mot.16). *United States v. Halloran*, 821 F.3d 321 (2d Cir. 2016) (cited Opp.29), is inapposite: It did not involve a duty to the public, and predated *McDonnell* and could not anticipate how the opinion would be written. The government's reliance on *Dixson v. United States*, 465 U.S. 482 (1984), is equally misplaced. The defendants there had been designated to administer federal block-grant funds and thus were formally invested with official power and "charged with abiding by federal guidelines." *Id.* at 484, 497.

Lastly, the government's harmless error argument (Opp.30-32) is bogus. The government admits there was no evidence Aiello knew Percoco would return to office when he sought Percoco's help in July 2014, or even when COR paid Howe in August and October 2014. (Mot.18).[3] Percoco's actions in 2015 are irrelevant to Aiello's knowledge in 2014. (Opp.32). The government vaguely (and misleadingly) suggests that Aiello learned of Percoco's plans "*around* the time of the second payment" (Opp.31), because it knows that the cited email was sent in November 2014, nearly a month *after* the second payment. (GX571). And not surprisingly, the government entirely ignores Aiello's July 2014 email wherein he

[3] The government asserts that Aiello "directed payments…to Percoco through Percoco's wife." (Opp.9). That is both gratuitous and untrue. COR paid Howe in response to Howe's invoices; Howe testified that he—unilaterally and unbeknownst to Aiello—wrote checks to Percoco's wife. (Tr.2097, 2476-78).

made clear that he sought Percoco's assistance not if/when he returned to office, but only for a "few months" and only while Percoco was "off the 2nd floor working on the Campaign." (GX550; *see* Mot.5-6, 18). There is not a shred of evidence that Aiello ever intended COR to pay Percoco to do anything while he was in government or knowing that he planned to return to government. No wonder the jury deliberated for eight days, required two *Allen* charges, and acquitted Aiello of the other counts, including the bribery charge—facts nowhere acknowledged in the government's "harmless error" discussion.[4]

IV. There Is A Substantial Question Concerning The "As Opportunities Arise" Instruction

McDonnell requires three specific findings: Juries must (1) "identify a [matter] involving the formal exercise of governmental power"; (2) determine that the matter is "something specific and focused that is 'pending' or 'may by law be brought before any public official'"; and (3) find that the public official "made a decision or took an action—or agreed to do so—*on* the identified [matter]." 136 S. Ct. at 2374. These findings are incompatible with an "as opportunities arise"

[4] The government repeatedly and misleadingly characterizes Percoco's departure from government as "technical" (*see* Opp.6, 10, 23, 30, 31 n.8, 33, 37). As several prosecution witnesses testified, however, when Percoco resigned he had no intention of returning to government, and only decided to do so months later after other top officials had resigned, leaving the Governor without experienced senior staff. (Tr.476-77, 574, 606-07, 1185-86).

theory, which permits juries to convict based on an abstract and open-ended understanding that an official will take any type of action, on any type of matter. (Mot.19-20). Rather than grapple with or even acknowledge this conflict, the government opted to ignore it.[5]

Instead, the government pretends there is no open issue by citing various inapposite and/or non-controlling cases. (Opp.14-18). But it fails to identify any case dealing with the precise issue Aiello's appeal presents. The cited cases decided before *McDonnell* (Opp.14-15) necessarily did not consider it and are therefore irrelevant,[6] as are those in which the defendants did not challenge the "as opportunities arise" theory (Opp.15, 18).[7] The handful of cases that have re-examined the theory in light of *McDonnell* have addressed only whether *McDonnell* requires agreement as to specific official acts—which is not Aiello's

[5] The government also has no response to Aiello's argument that the basis on which *United States v. Ganim*, 510 F.3d 134, 145 (2d Cir. 2007), distinguished §201 is no longer valid now that this Court has extended §201's "official act" definition to honest-services fraud. (Mot.21; *see* Opp.18 n.6).

[6] The government invokes precedent (Opp.15), but ignores the significance of an intervening Supreme Court decision. *Gelman v. Ashcroft*, 372 F.3d 495, 499 (2d Cir. 2004). (*See* Mot.21).

[7] *United States v. Skelos*, 707 F. App'x 733, 738 (2d Cir. 2017), for example, is an unpublished opinion in which the appellants did not raise the specific issue, because the jury instruction defining "official act" was plainly wrong under *McDonnell*'s principal holding.

argument. (Mot.21-22). None confronts *McDonnell*'s holding that juries must identify the specific *matter* and *type* of action that the *quid pro quo* concerns.

The government's efforts to diminish *McDonnell* are unavailing. The government suggests that the Supreme Court implicitly endorsed the "as opportunities arise" theory by not rebuking it. (Opp.16). But the issue was not directly presented, and the Court had no reason to address it. The government also notes *McDonnell*'s comment that the *quid pro quo* agreement "need not be explicit" and the public official "need not specify the means that he will use to perform his end of the bargain." (Opp.17). But that merely confirms that the agreement can be implied from "winks and nods." *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring). It has nothing to do with *McDonnell*'s requirement that juries agree on what specific "matter" the official agreed to act on and the type of decision or action the official agreed to take. 136 S. Ct. at 2374.

The government's attempt to minimize the grant of bail in *Silver* also ignores reality. (Opp.19-20). At Silver's bail argument the Court and the government had an extended discourse about the impact of *McDonnell* on "as opportunities arise," and both acknowledged that the question is "important" and thus "substantial." *See Handy*, 761 F.2d at 1281 (question is "substantial" if it involves "important" questions about Supreme Court precedents) (*see* Mot.22).

The government's focus was its harmless error claim. (Shapiro Decl. Ex. 9 at 43-44).

The government also claims the "official act" instruction somehow cured any error. (Opp.18-19). That makes no sense. A correct definition of "official act" does not solve the problem created by telling the jury that it could convict based on an agreement for Percoco to take official acts "as the opportunity arose" without having to identify a specific "matter" and find Percoco's agreement to make a "decision" or take an "action" on that matter. *See McDonnell*, 136 S. Ct. at 2374.

Finally, the government contends that the instructional error was harmless because there was evidence of an agreement for Percoco "to take specific official action" on the LPA when he was not in office. (Opp.21-23). But the jury was permitted to convict based on Percoco's honest services as *either* a public official or a private citizen (Tr.6445-46), and so it very well may have ignored the LPA and convicted solely based on Percoco's later acts. Indeed, the government ignores that Aiello's co-defendant and fellow COR principal, Joseph Gerardi, was acquitted of honest-services conspiracy, even though he was more directly involved in the LPA issue than Aiello. (*See* GX556A; GX572; GX574; GX583; GX586). The only reasonable explanation for the jury's divergent verdicts is that the jury relied heavily on Percoco's 2015 acts relating to Aiello's son—acts it

could not have linked to the alleged 2014 agreement except under an "as opportunities arise" theory. Thus, the instructional error was plainly not harmless, and at a minimum the harmless error doctrine is no obstacle to bail.

CONCLUSION

This Court should grant bail pending appeal.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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Date: February 27, 2019

/s/ Alexandra A.E. Shapiro
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CERTIFICATE OF SERVICE

I hereby certify that, on February 27, 2019, an electronic copy of this Reply in Support of Emergency Motion of Defendant-Appellant for Stay of Surrender Date and 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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