UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): No. 16-1615

Caption [use short title]

Motion for: stay the mandate

UNITED STATES OF AMERICA,
Appellee,
v.
SHELDON SILVER,
Defendant-Appellant.

Set forth below precise, complete statement of relief sought:

stay the mandate pending the filing and disposition of a petition for certiorari

MOVING PARTY: Sheldon Silver

☐ Plaintiff ☑ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: United States

MOVING ATTORNEY: Steven F. Molo

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Court-Judge/Agency appealed from: SDNY (Caproni, J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: 03/16/17

Signature of Moving Attorney:
/s/ Steven F. Molo **Date:** 7/27/17

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 16-1615

In the United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

SHELDON SILVER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York

DEFENDANT-APPELLANT'S MOTION TO STAY THE MANDATE

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 41(d)(2), Mr. Silver respectfully moves the Court to stay the mandate pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court.

This Court vacated Mr. Silver's convictions and remanded for a new trial, concluding that *McDonnell v. United States*, 136 S. Ct. 2355 (2016), rendered the district court's "official act" jury instructions erroneous. But this Court rejected Mr. Silver's challenges to the sufficiency of the evidence on each count – challenges that would have precluded the Government from retrying the charges. Those rulings present substantial grounds for Supreme Court review. In particular, this Court's interpretation of a key federal money laundering statute, 18 U.S.C. § 1957, exacerbates a longstanding and acknowledged circuit conflict.

The Court should accordingly stay the mandate so Mr. Silver can seek Supreme Court review of this Court's sufficiency rulings. Given the clear circuit conflict, Mr. Silver's petition for a writ of certiorari would plainly present a substantial question. And there is good cause for a stay. Absent a stay, the Government could prosecute Mr. Silver for conduct that the Supreme Court later concludes is insufficient as a matter of law – a plain violation of his double jeopardy rights. Moreover, a retrial at this stage would burden the jury and the district court with evidence and legal argument on matters that could well be

rendered entirely irrelevant if the Supreme Court grants review. Finally, the Government will suffer no prejudice should this Court grant a stay for a relatively brief period to allow the Supreme Court to consider the petition.

Accordingly, the Court should stay the mandate pending the filing and disposition of a petition for a writ of certiorari.

BACKGROUND

The Government charged Mr. Silver with four counts of honest services fraud, two counts of extortion, and one count of money laundering stemming from his receipt of referral fees in connection with his private law practice. Slip op. at 16. According to the Government, Mr. Silver committed honest services fraud and extortion by performing various "official acts" for a respected mesothelioma doctor and two real estate developers in return for client referrals to the law firms with which he worked. *Id.* at 7-15. The Government also accused Mr. Silver of money laundering in violation of § 1957 – a statute that makes it unlawful for a defendant to "knowingly engage[ ] or attempt[ ] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." 18 U.S.C. § 1957(a). According to the Government, Mr. Silver violated that prohibition by investing the referral fees he earned from his law practice in various investment vehicles. Slip op. at 15-16.

On July 13, 2017, this Court issued a published opinion vacating Mr. Silver's convictions on all counts on the ground that the district court had given erroneous "official act" instructions. Those instructions, the Court held, did not comply with *McDonnell v. United States*, 136 S. Ct. 2355 (2016), because they did not inform the jury that "official acts" include only "formal exercise[s] of government power." Slip op. at 33-36.

Nonetheless, the Court rejected Mr. Silver's challenges to the sufficiency of the evidence on each count. Mr. Silver urged that the Government failed to prove extortion because there was no evidence he had "deprive[d]" anyone of property as required by *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013). This Court disagreed, opining that, "[b]y engaging in the alleged schemes, Silver is said to have deprived Dr. Taub, the Developers, and other law firms of property." Slip op. at 24. Mr. Silver also urged that the Government had failed to prove honest services fraud because there was no evidence of any "paradigmatic" bribe or kickback as required by *Skilling v. United States*, 561 U.S. 358, 409-11 (2010). Again, this Court disagreed, asserting that the referral fees Mr. Silver received were "bribes or kickbacks within the meaning of *Skilling*." Slip op. at 24-25.

The Court also rejected Mr. Silver's sufficiency challenge on the money laundering count. Mr. Silver urged that the Government could not prove money laundering beyond a reasonable doubt based on transactions from a commingled

account that contained sufficient "clean" funds to cover the transactions. The Court acknowledged that the Fifth and Ninth Circuits "both require the Government to trace criminally derived proceeds when they have been commingled with funds from legitimate sources to prove money laundering under Section 1957." Slip op. at 25-26 & n.52 (citing *United States v. Loe*, 248 F.3d 449, 467 (5th Cir. 2001); and *United States v. Rutgard*, 116 F.3d 1270, 1292-93 (9th Cir. 1997)). But the Court dismissed those holdings as a "minority" view and instead asserted that "the Government is not required to trace criminal funds that are comingled with legitimate funds to prove a violation of Section 1957." *Id.* at 26. "'[A] requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity,'" the Court asserted, "'would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds.'" *Id.* at 26-27.

ARGUMENT

Federal Rule of Appellate Procedure 41(d)(2) authorizes a party to "move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." Fed. R. App. P. 41(d)(2)(A). The motion must show that "the certiorari petition would present a substantial question" and that "there is good cause for a stay." *Id.* Each of those requirements is met here.

I. MR. SILVER'S PETITION FOR CERTIORARI WOULD PRESENT A SUBSTANTIAL QUESTION

Mr. Silver satisfies the first requirement for a stay of the mandate because his petition for certiorari would present a "substantial question." Fed. R. App. P. 41(d)(2)(A). The "substantial question" standard does not require Mr. Silver to show that his petition will more likely than not be granted. Rather, "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***.'" *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)) (interpreting same standard in 18 U.S.C. § 3143(b)(2)) (emphasis added). In particular, "[a] question may . . . be 'substantial' within the meaning of the Rule . . . if there is a ***contrariety of views concerning it in the several circuits***." *Herzog v. United States*, 75 S. Ct. 349, 351 (1955) (Douglas, J., in chambers) (emphasis added). Mr. Silver's petition for certiorari would present precisely such a question here.

A. The Court's Money Laundering Ruling Presents a Substantial Question

This Court upheld the sufficiency of the evidence underlying Mr. Silver's money laundering conviction based on its holding that "the Government is not required to trace criminal funds that are comingled with legitimate funds to prove a violation of Section 1957." Slip op. at 26. That ruling is the subject of an

acknowledged and wide-ranging circuit conflict on an important question of federal law. There is a very real probability that the Supreme Court may grant review to resolve that conflict in this case.

As this Court acknowledged, both the Fifth and Ninth Circuits have held that the Government cannot prove money laundering beyond a reasonable doubt where a commingled account contains sufficient "clean" funds to cover the charged transaction. Slip op. at 25-26. "[T]he Fifth and Ninth Circuits," this Court observed, "both require the Government to trace criminally derived proceeds when they have been commingled with funds from legitimate sources to prove money laundering under Section 1957." *Id.* at 25-26 & n.52.

In *United States v. Loe*, 248 F.3d 449 (5th Cir. 2001), for example, the defendant transferred $776,742 from a commingled account with a balance of $2.2 million, of which only $470,790 was traceable to other offenses. *Id.* at 467. "Since there was enough clean money in the account to cover the $776,742 transfer," the Fifth Circuit held, "[n]o reasonable juror could conclude that these money laundering convictions were warranted beyond a reasonable doubt." *Id.* "[W]here an account contains clean funds sufficient to cover a withdrawal, the Government cannot prove beyond a reasonable doubt that the withdrawal contained dirty money." *Id.*

Similarly, in *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997), the Government accused the defendant of transferring funds from a commingled account that contained $46,000 in fraud proceeds but also a large amount of "clean" funds sufficient to cover the transactions. *Id.* at 1290-92. The Ninth Circuit held the evidence insufficient because the transactions "did not necessarily transfer the . . . fraudulent proceeds." *Id.* at 1292. "The statute," it observed, "does not create a presumption that any transfer of cash in an account tainted by the presence of a small amount of fraudulent proceeds must be a transfer of these proceeds." *Id.* at 1292-93.

In this case, the Court refused to follow those decisions. The Court described the Fifth and Ninth Circuit view as a "minority one" and instead "adopt[ed] the majority view of [its] sister Circuits." Slip op. at 26 & n.53 (collecting other cases). The Court's holding on the money laundering count thus implicates a direct conflict among the courts of appeals.

That circuit conflict is a paradigmatic basis for Supreme Court review. The Supreme Court's intervention is clearly warranted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). "[A] square and irreconcilable conflict [among courts of appeals] ordinarily should be enough to secure review, assuming that the underlying question has substantial practical

importance." Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 4.4, at 243 (10th ed. 2013) (emphasis omitted).

The conflict, moreover, is important. According to the Bureau of Justice Statistics, "[b]etween 1994 and 2001 about ***18,500 defendants*** were charged in U.S. district court with money laundering." Bureau of Justice Statistics, *Special Report: Money Laundering Offenders, 1994-2001*, at 1 (July 2003) (emphasis added). Of those, "10,610 were charged with money laundering as the most serious offense." *Id.* The Government continues to charge money laundering on average more than a thousand times per year. *See* Internal Revenue Service, *Statistical Data – Money Laundering & Bank Secrecy Act* (Oct. 12, 2016) (average of 1,045 money laundering indictments per year from 2014 to 2016). Prosecutions under § 1957 make up a substantial portion of that total. *See* U.S. Dep't of Treasury *et al.*, *2007 National Money Laundering Strategy* 94 (May 3, 2007) (884 out of 4,592 convictions – roughly 20% – from 2002 to 2005).

The reason the Government charges defendants under § 1957 with such frequency is not hard to imagine. The statute requires no independently culpable conduct in any traditional sense. It applies ***whenever*** a defendant engages in a sizeable transaction with funds from another offense. *See* 18 U.S.C. § 1957(a); *Rutgard*, 116 F.3d at 1291 (observing that the statute is a "draconian" provision that applies to "the most open, above-board transaction[s]" and potentially "any

transaction by a criminal with his bank"). The U.S. Attorneys' Manual thus acknowledges that § 1957 applies even where a defendant simply "obtains proceeds from specified unlawful activity . . . and then deposits the proceeds into a bank account" – and it requires only "consultation" before prosecuting such offenses. U.S. Attorneys' Manual § 9-105.330 (2007). The statute's sprawling reach underscores the need to rigorously enforce its limits – and to ensure that those limits apply evenly nationwide.

Although this Court rejected Mr. Silver's interpretation, the Supreme Court could easily construe the statute differently. By its terms, § 1957 requires that the defendant "engage in a monetary transaction ***in*** criminally derived property." 18 U.S.C. § 1957(a) (emphasis added). The plain meaning of that language is that the ***transaction itself*** must consist of proceeds of another offense – not merely funds from a commingled account. This Court reasoned that "'[a] requirement that the government trace each dollar of the transaction to the criminal, as opposed to the non-criminal activity, would allow individuals effectively to defeat prosecution for money laundering by simply commingling legitimate funds with criminal proceeds.'" Slip op. at 26-27. But that is what the statute requires. And there is no unfairness in holding the Government to its burden of proof, particularly when the statute is already so overbroad in other respects.

Finally, this case presents an excellent vehicle for Supreme Court review. This Court acknowledged that the sufficiency of the evidence in this case turned on whether the Court adopted the Fifth and Ninth Circuits' interpretation of the statute. Slip op. at 25-26. Bank statements introduced into evidence showed that more than ***$8.3 million*** was deposited into Mr. Silver's bank account from 2004 through 2014, including his monthly salary, tax refunds, flex spending payments, health insurance, and countless other receipts that the Government never attempted to prove unlawful. *See* Silver Opening Brief at 51-52. That commingled account contained more than enough clean funds to cover ***every one*** of the charged transactions. *See* Silver Reply Brief at 25-26 & n.10. This Court's refusal to apply the Fifth and Ninth Circuit rule was thus dispositive.

B. The Court's Extortion and Honest Services Rulings Also Present Substantial Questions

The Court's sufficiency rulings on the remaining counts likewise present substantial questions for review. Supreme Court review is warranted where "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court." Sup. Ct. R. 10(c). Indeed, "[a] direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari." Stephen M. Shapiro *et al.*, *Supreme Court Practice* §4.5, at 250. That is the

situation here: This Court's rulings on the extortion and honest services counts conflict directly with governing Supreme Court precedent.

Mr. Silver has a more than reasonable argument that this Court's extortion ruling conflicts with *Sekhar v. United States*, 133 S. Ct. 2720 (2013). Under that decision, extortion requires not just an "acquisition" of property but also a "deprivation." *Id.* at 2725; *see also Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 404 (2003) (statute "require[s] not only the deprivation but also the acquisition of property"). The victim must actually ***part with*** property. This Court deemed that requirement met here. Slip op. at 23-24. But the Supreme Court could well take a narrower view of its precedents.

Even if Mr. Silver obtained mesothelioma leads from Dr. Taub, he never ***deprived*** Dr. Taub of those leads. Dr. Taub remained free to give the leads to other lawyers too – and he often did so. *See* Silver Opening Brief at 47-48. The Government offered no evidence that a lead became worthless to Dr. Taub after Dr. Taub recommended that a patient contact Mr. Silver.

Nor did Mr. Silver deprive the real estate developers of tax certiorari business. There was no evidence that the developers paid any fees for work they would not otherwise have had to obtain from another firm. And the developers acknowledged that Goldberg & Iryami charged industry standard rates for high-quality legal work with which they were fully satisfied. *See* Silver Opening Brief

at 48. There is a substantial question whether those facts constitute a "deprivation" of property within the meaning of *Sekhar*.

Mr. Silver has a similarly reasonable argument on the honest services counts. In *Skilling v. United States*, 561 U.S. 358 (2010), the Supreme Court limited the scope of the honest services statute to "paradigmatic cases of bribes and kickbacks" – cases where a defendant "solicited or accepted side payments from a third party." *Id.* at 411, 413. In this case, the Court opined that the referral fees Mr. Silver earned were "bribes or kickbacks within the meaning of *Skilling*." Slip op. at 24-25. But the Supreme Court could well interpret *Skilling* differently.

Mr. Silver never received any illicit side payments from a third party. The only benefits he received were referral fees from the law firms with which he was associated. There was no evidence that those referral fees were a sham or that the amount of the fees was inflated – they were the same referral fees that other lawyers at the firms received when clients they had brought in achieved successful outcomes. *See* Silver Opening Brief at 49-51; *United States v. Robinson*, 663 F.3d 265, 272 (7th Cir. 2011) ("[C]ompensation paid in the ordinary course shall not be construed as a bribe."). The Supreme Court could readily conclude that those payments of ordinary compensation pursuant to unexceptional referral fee agreements are simply not the sort of "paradigmatic" bribes or kickbacks that fall within the ambit of *Skilling*.

Those questions are important. The Government aggressively prosecutes public corruption, with the U.S. Attorney's Offices in many major cities – and indeed Main Justice itself – having separate units devoted to this area. The honest services statute and the Hobbs Act are the laws that prosecutors most often invoke to bring such cases. *See, e.g.*, *Restoring Key Tools To Combat Fraud and Corruption After the Supreme Court's Skilling Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 5 (Sept. 28, 2010) (statement of Lanny A. Breuer, Assistant Attorney General) (urging that public corruption is "among the highest priorities for the Department of Justice" and that the honest services statute is "extremely valuable to the Justice Department's efforts to attack corruption"). The Supreme Court has demonstrated a keen interest in the scope of those broad criminal statutes – as *Skilling*, *Sekhar*, *McDonnell*, and other cases make clear. This case is an excellent vehicle for providing further guidance to the lower courts.

II. THERE IS GOOD CAUSE FOR A STAY

Finally, there is good cause for a stay. This Court's sufficiency rulings threaten irreparable harm to Mr. Silver by violating his double jeopardy rights. At a minimum, proceeding with a retrial while the Supreme Court weighs the substantial legal issues at stake would waste the district court's time with counts that may be rendered moot by the Court's decision.

It is well-settled that a reversal for insufficiency of the evidence – unlike a mere instructional error – precludes the Government from retrying a defendant on double jeopardy grounds. *See Burks v. United States*, 437 U.S. 1, 18 (1978) (holding that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient"). Accordingly, if the Supreme Court disagrees with this Court's resolution of any of Mr. Silver's sufficiency challenges, a retrial of those counts would be a violation of Mr. Silver's double jeopardy rights.

It is equally well-settled that a violation of those rights constitutes irreparable harm that cannot adequately be vindicated by a subsequent appeal. Because the Double Jeopardy Clause is a "guarantee against being twice ***put to trial*** for the same offense," "the rights conferred . . . would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Abney v. United States*, 431 U.S. 651, 660-61 (1977) (emphasis added); *see also United States v. Olmeda*, 461 F.3d 271, 278 (2d Cir. 2006) (similar). Because Mr. Silver faces irreparable harm from a retrial that violates his double jeopardy rights, he easily satisfies the more lenient "good cause" standard that applies to a motion to stay the mandate. *See, e.g.*, *United States ex rel. Chandler v. Cook Cnty.*, 282 F.3d 448, 451 (7th Cir. 2002) (Ripple,

J., in chambers) (granting motion to stay the mandate pending review of alleged denial of immunity from suit).

Even apart from double jeopardy concerns, there is good cause to stay the mandate here. If the Supreme Court reverses this Court's sufficiency ruling on any of the charged offenses, it will significantly narrow the issues in the case. Staying the mandate so the Supreme Court can act before the retrial goes forward would avoid wasting the district court's and the jury's time with evidence and legal issues rendered moot by the Supreme Court's decision.

The money laundering count alone consumed a significant portion of the first trial. The Government devoted nearly a full day of testimony to that count, calling two different financial advisors and an FBI case agent to testify about Mr. Silver's investments. *See* 11/18/15 Tr. 2314-551 (Dkt. 158) (Paul Cody, Jordan Levy, and Deanna Pennetta). It introduced dozens of exhibits, including a single exhibit with over ***2,700 pages*** of bank records. *See* Gov't Ex. 1229; Gov't Exs. 950-982, 1007-1061, 1511-1513. The money laundering charge even spawned its own evidentiary dispute due to the Government's inflammatory and irrelevant arguments about the supposedly lucrative and exclusive nature of the investments. *See* A604-05, A612 (summation) ("Look at all those transactions with Jordan Levy, these private investments in an Australian satellite company, a private real estate fund, an exclusive lender that paid him absolutely unbelievable interest

rates. . . . He took his [c]rime proceeds and invested it in exclusive accounts with guaranteed returns . . . ."); Silver Opening Brief at 57-59.

Denying a stay would burden the jury and the district court with wide-ranging, inflammatory evidence and argument on an issue that could be irrelevant if the Supreme Court agrees with the Fifth and Ninth Circuits' interpretations of the money laundering statute. By contrast, granting a brief stay so the Supreme Court can consider Mr. Silver's important legal issues would threaten no prejudice to the Government whatsoever. For all those reasons, there is good cause to stay the mandate in this case.

CONCLUSION

The Court should grant the motion and stay the mandate pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court.

July 27, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because:

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/s/ Steven F. Molo
Steven F. Molo