UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA	:	AFFIRMATION
Appellee,	:	Dkt. No. 16-1615-cr
- v. -	:	
SHELDON SILVER,	:	
Appellant,	:	

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

Tatiana R. Martins, pursuant to Title 28, United States Code, Section 1746, hereby affirms under penalty of perjury:

1. I am an Assistant United States Attorney in the Office of Joon H. Kim, Acting United States Attorney for the Southern District of New York, and am one of the Assistant United States Attorneys representing the United States on this appeal. I respectfully submit this affirmation in opposition to defendant Sheldon Silver's motion to stay the mandate vacating his convictions. Silver seeks a stay of the mandate while he prepares, files, and awaits disposition of a petition for certiorari. Such a stay would postpone Silver's inevitable re-trial by at least several months and likely longer.

2. Silver's motion appears to be little more than a delay tactic. Despite having won the vacatur of *all* counts of conviction in this Court and the new trial that he sought as a remedy, Silver intends to seek further review of three sufficiency arguments that this Court quickly dispatched. Review of a database of the criminal cases decided in the last 10 Supreme Court terms reveals *not a single case* in which that Court has granted a defendant's petition for certiorari when the defendant had all counts of conviction vacated in the Court of Appeals, and with good reason: The Supreme Court rarely grants certiorari on interlocutory appeals, because the impending trial could moot the issues (with an acquittal) or sharpen them for presentation later. Silver's transparent attempt to thwart the public interest in the speedy re-trial of his crimes should be denied so that trial can proceed promptly.[1]

3. Silver has not shown that his contemplated petition for certiorari would raise a "substantial question" of federal law, and that he has good cause to stay this Court's mandate. Accordingly, he has not met the standard for

[1] Of course, denying the defendant's motion to stay the mandate does not prevent him from seeking a grant of certiorari if he chooses to pursue it. It merely prevents him from further delaying the proceedings on a re-trial that he himself sought as a remedy from this Court.

obtaining a stay. The Government respectfully requests that the Court issue the mandate forthwith so that Silver can be promptly retried.

Background

4. On November 30, 2015, following a month-long jury trial before the Honorable Valerie Caproni, United States District Judge for the Southern District of New York, the jury convicted Silver of honest services mail and wire fraud, Hobbs Act extortion, and money laundering. These convictions resulted from two long-running criminal schemes in which Silver abused his enormous power as the Speaker of the New York State Assembly to obtain millions of dollars in bribes and kickbacks.

5. On July 13, 2017, this Court vacated Silver's convictions on all counts and remanded the case to the District Court, finding that the jury instructions were erroneous in light of the Supreme Court's intervening decision, issued after the Silver trial had concluded, in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), and that the error was not harmless. *See United States* v. *Sheldon Silver*, No. 16-1615, ___ F.3d ___, 2017 WL 2978386, at *17 (2d Cir. July 13, 2017). This Court also rejected the sufficiency-of-the-evidence challenges that Silver made to each of the counts of conviction. *Id.* at *8-*10.

6. On July 20, 2017, the Government informed this Court by letter that it did not intend to petition for rehearing or certiorari, and therefore asked the Court to issue the mandate forthwith. Silver responded by letter that same day, and on July 27, 2017, Silver filed the instant motion to stay the mandate.

ARGUMENT

A. Applicable Law

7. The grant of a motion to stay this Court's mandate pending a petition for a writ of certiorari in the Supreme Court is "far from a foregone conclusion," *Books* v. *City of Elkhart*, 239 F.3d 826, 827 (7th Cir. 2001), but rather is awarded only in "exceptional cases," *Nara* v. *Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007).

8. To obtain such a stay, the movant "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A).

9. "This standard requires the movant to show: (1) a reasonable probability that the Supreme Court will grant certiorari; (2) a reasonable possibility that at least five Justices would vote to reverse this Court's judgment; and (3) a likelihood of irreparable injury absent a stay." *Nara* v. *Frank*, 494 F.3d at 1133; *accord United States* v. *Warner*, 507 F.3d 508, 511 (7th Cir. 2007); *John Doe I* v.

Miller, 418 F.3d 950, 951 (8th Cir. 2005). "In a close case, the movant should make a showing that, on balance, the interests of the parties and the public favor a stay." *Nara*, 494 F.3d at 1133.

10. Even where the movant makes the required showing, this Court's decision to grant the stay of the mandate "is a matter of discretion." *Khulumani* v. *Barclay Nat. Bank Ltd.*, 509 F.3d 148, 152 (2d Cir. 2007).

B. Discussion

1. Silver Has Not Presented a Substantial Question

11. Silver's contemplated petition for certiorari simply reiterates three separate arguments regarding the sufficiency of the evidence that this Court has considered and swiftly rejected. Because sufficiency arguments "rarely carry the day," *United States* v. *Tillem*, 906 F.2d 814, 821 (2d Cir. 1990), and the Supreme Court reviews such claims "[o]nly in rare instances," *Scales* v. *United States*, 367 U.S. 203, 230 (1961), Silver has not presented a substantial question.[2]

a. The Money-Laundering Counts

12. Silver argues that the evidence was insufficient to prove that he committed money laundering because the proceeds of his two schemes had been

[2] In light of the vacatur of all counts, a petition for certiorari at this stage may not even be proper. *Richardson* v. *United States*, 468 U.S. 317 (1984).

comingled into an account with untainted funds. This Court considered and rejected this argument, holding that "the Government is not required to trace criminal funds that are comingled with legitimate funds to prove a violation of Section 1957." *Silver*, 2017 WL 2978386, at *10. This Court's decision was consistent with the view of the substantial majority of circuits to have considered the question. *See id.* at *9-*10 & nn. 52 & 53. It is also the better-reasoned view. As this Court explained, "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." *Id.* at *10 (quoting *United States* v. *Moore*, 27 F.3d 969, 977 (4th Cir. 1994)). Silver has not offered a persuasive reason to conclude that five justices will disagree—he simply repeats arguments this Court already considered and soundly rejected. Thus, even if certiorari were granted on this issue, he has not shown a reasonable possibility he will prevail.

13. Moreover, victory in the Supreme Court would not necessarily give Silver the relief he now seeks—a judgment of acquittal. To obtain that result, Silver must prevail on the extreme position that tainted funds deposited into a comingled account with untainted funds exceeding the amount of the transfers at

issue can *never* be the subject of money laundering charges, even if the timing and circumstances of the transfers make clear that the transferred funds were in fact criminal proceeds. This Court rejected that position, and for good reason. *Id.* at *10. But even if the Supreme Court decides that the Government must trace the illegal funds, it does not necessarily follow that it would adopt Silver's extreme position on this issue. Indeed, the Supreme Court also could rule that, although tracing is required, it may be shown in a comingled account through evidence regarding the timing and circumstances of that transaction. *See United States* v. *Weisberg*, No. 08-CR-347, 2011 WL 4345100, at *5-*6 (E.D.N.Y. Sept. 15, 2011) (siding with minority view that tracing is required but holding that a fact-finder may nevertheless conclude, based on the timing and circumstances of the transactions, that the funds were in fact tainted).

14. In this case, the evidence at trial included a tracing analysis from which a rational jury could have concluded that Silver funded the financial transactions at issue with proceeds of his criminal schemes. *See* Gov't Br. 52 (citing Tr. 2526-35; GX 1511-1513). Thus, even if the Supreme Court granted certiorari on this issue (which is unlikely, *see* ¶ 15, *infra*), and either reaffirmed the majority view, or adopted a rule that permitted the jury to find, based on circumstantial evidence, that the comingled funds in fact were tainted, Silver

would not get a judgment of acquittal on the money laundering counts. At best, Silver would win a new trial on this count—relief this Court has *already* granted him on other grounds. For this reason, this case presents a poor vehicle for Supreme Court review. *See The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the conflict at issue] can await a day when the issue is posed less abstractly.").

15. Finally, notwithstanding Silver's claims regarding the importance of this issue, the Supreme Court has let the apparent split stand for at least 20 years, *see United States* v. *Moore*, 27 F.3d 969, 976 (4th Cir. 1994); *United States* v. *Rutgard*, 116 F.3d 1270, 1292-93 (9th Cir. 1997), suggesting that the issue may not in fact be sufficiently "important" to warrant Supreme Court intervention. *See* U.S. Sup. Ct. R. 10(a) (factors favoring certiorari include conflict between courts of appeals on an "important matter"). Indeed, the Supreme Court recently denied a petition for certiorari presenting the identical issue. *See* Petition for Certiorari, *Castronuovo* v. *United States*, 2016 WL

4363503, at *9-*10 (Aug. 11, 2016), *cert. denied* 137 S. Ct. 248 (2016).[3] Having let the split stand for 20 years, it would be surprising if the Supreme Court were to use its scarce resources to take up this issue in a case in which the defendant has already obtained a new trial in the Court of Appeals. If Silver is convicted of money laundering again at his re-trial, he will again have an opportunity to raise this issue with the Supreme Court. A grant of certiorari at this stage would be premature. *See California* v. *Rooney*, 483 U.S. 307, 312-13 (1987) (dismissing grant of certiorari where issue was not squarely presented because petitioner won on other grounds below and issue could be raised in future petition). Accordingly, Silver has failed to demonstrate that there is a reasonable probability that certiorari would be granted on this issue, much less a reasonable possibility that the judgment of this Court would be reversed.

b. <u>The Hobbs Act Extortion Counts</u>

16. Silver argues that the evidence was insufficient to prove a "deprivation of property," which requires reversal of his Hobbs Act extortion convictions. This Court considered and rejected this argument, finding that the

[3] Castronuovo's money laundering conviction had been *affirmed* in the Court of Appeals and was the *only* count of conviction, making his claim considerably stronger than that advanced by Silver. However, it does not appear that Castronuovo adequately raised the tracing issue in the Court of Appeals.

evidence was, in fact, sufficient to prove a deprivation of property because "both the mesothelioma leads and the tax certiorari business from which Silver profited were valuable and transferable property (albeit intangible property)." *Silver*, 2017 WL 2978386, at *8. This Court's brisk rejection of Silver's argument demonstrates that Silver has not shown a reasonable possibility that five justices will reach a different outcome, and Silver presents no arguments in his motion that this Court has not already considered and rejected.

17. Not only has Silver not shown a reasonable possibility that he would win this claim if the Supreme Court were to grant certiorari, he has not even shown a reasonable probability that he will obtain Supreme Court review on this issue. Silver claims that this Court's holding was contrary to Supreme Court precedent. But Silver's argument on appeal consisted of both a legal argument (that a "deprivation of property" is an essential element of Hobbs Act extortion), and a factual argument (that the Government had failed to prove such a deprivation). This Court declined to rule on the legal question "[b]ecause a deprivation of property occurred on the record before us." *Id.* at *8 n.47. This Court's holding was thus a fact-specific application of a properly (according to Silver himself) stated legal rule—exactly the sort of case that the Supreme Court "rarely" reviews. U.S. Sup. Ct. R. 10 ("A petition for certiorari is rarely granted

when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *see also Texas* v. *Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.) ("We do not grant a certiorari to review evidence and discuss specific facts." (quotation omitted)). Silver has thus failed to establish that his sufficiency argument regarding the Hobbs Act convictions is substantial.

c. The Honest Services Fraud Counts

18. Silver argues that the evidence was insufficient to prove that he engaged in a bribe or kickback scheme, as opposed to mere "undisclosed self-dealing." Again, this Court considered and rejected this argument, finding that the payments solicited by Silver were bribes and kickbacks within the meaning of *Skilling* v. *United States*, 561 U.S. 358 (2010) and that "[t]he evidence at trial demonstrated that Silver's proven conduct . . . went far beyond undisclosed self-dealing." *Silver*, 2017 WL 2978386, at *9 & n.50. Once again, this Court's swift rejection of Silver's argument demonstrates that there is no reasonable possibility that five justices will reach a different outcome, and Silver has made no arguments this Court has not already rejected.

19. Moreover, as with his Hobbs Act argument, Silver's argument regarding the mixed question of law and fact regarding the honest services counts is precisely the type of claim that rarely warrants a grant of certiorari. *See* U.S.

Sup. Ct. R. 10. He does not explain how this Court's opinion is contrary to Supreme Court precedent, but instead states in conclusory fashion that "the Supreme Court could well interpret *Skilling* differently." Silver Motion at 12. That sort of speculation does not create a substantial question. There is no reasonable probability that Silver will even have the opportunity to argue the merits of this claim to the Supreme Court, let alone secure a reversal of this Court's ruling.

2. Silver Has Not Established Good Cause

20. Silver has not demonstrated any irreparable injury he will suffer absent a stay. To the contrary, granting the stay would delay Silver's re-trial on public corruption charges by at least many months, thereby thwarting the public interest in a speedy trial in this case.

21. This Court has previously recognized that the public has just as great an interest in a speedy trial as the defendant: "Certainly, the public is the loser when a criminal trial is not prosecuted expeditiously, as suggested by the aphorism 'justice delayed is justice denied.'" *United States* v. *Gambino*, 59 F.3d 353, 360 (2d Cir. 1995). That is especially so where, as here, the trial involves a matter of significant public interest—the long-standing corruption of one of the most powerful officers in New York State government. Staying the mandate

while Silver pursues a meritless certiorari petition would only further delay the justice sought by the real victims of Silver's crimes, the citizens of New York. And it would do so for a period of at least several months and likely even longer, given the coordination required by the parties and the District Court to schedule a month-long trial.

22. Moreover, Silver's apparent desire for further delay surely is motivated by his recognition that, as time passes, necessary witnesses and other evidence may be lost. *See Barker* v. *Wingo*, 407 U.S. 514, 521 (1972) ("Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade."). Indeed, one of the central witnesses in Silver's trial is over 80 years old. *See United States* v. *Pleau*, 680 F.3d 1, 23 (1st Cir. 2012) (denying motion to stay mandate in part because of witness's advanced age). Silver should not be permitted to use the certiorari process—particularly one with an exceedingly remote chance of success—to gain a strategic advantage at his re-trial.

23. Perhaps recognizing the difficulty he has in showing good cause to stay the mandate, Silver claims that he will suffer irreparable harm absent a stay because his double jeopardy rights will be violated. This claim is meritless. "The Double Jeopardy Clause confers its protections in three different situations—

where there is a second prosecution for the same offense after acquittal of that offense; where there is a second prosecution for the same offense after conviction of the offense; and where there are multiple punishments for the same offense." *United States* v. *Estrada*, 320 F.3d 173, 180 (2d Cir. 2003). None of those three situations is applicable here: The Government seeks to retry him after his convictions were vacated due to an error in the jury instructions. *See Bravo-Fernandez* v. *United States*, 137 S. Ct. 352, 363 (2016) (no double jeopardy issue under such circumstances).

24. Silver's claimed injury would come to pass only in the unlikely scenario that he were retried only to have the Supreme Court later grant certiorari and find that the evidence at the first trial was insufficient. But even then, Silver would need to prevail on *all three* of his sufficiency claims in the Supreme Court to avoid a re-trial. And that is significant, because Silver's hypothetical injury is not that he would be *punished* for the same crime twice, but rather that he would be injured by the expense and stress of standing trial for the same crime twice. *See* Silver Motion at 14 (citing *Abney* v. *United States*, 431 U.S. 651, 661 (1977)). Because Silver will be retried even if he were victorious on one or even two of his three proffered arguments in the Supreme Court, these concerns are considerably less pressing, particularly in light of the unlikelihood that the Supreme Court will

grant certiorari on his claims, much less decide in his favor, as detailed above. *Cf.* *United States* v. *Salerno*, 868 F.2d 524, 539 (2d Cir. 1989) (district court may retain jurisdiction to proceed with a trial, despite pendency of a defendant's interlocutory double jeopardy appeal, where the appeal is found to be frivolous); *United States* v. *Tom*, 787 F.2d 65, 68 (2d Cir. 1986) (defendant could not appeal denial of motion to dismiss predicate act of RICO count because even if appeal were successful he would still be tried based on other predicate acts); *United States* v. *Randell*, 761 F.2d 122, 125-26 (2d Cir. 1985) (denying bail pending appeal because issues raised, even if substantial, would not affect all counts of conviction).

25. Silver also claims that there is good cause to stay the mandate because the issues at a re-trial may be narrowed if he is victorious on some counts in the Supreme Court. He is wrong. First, Silver's fear that the District Court's time will be wasted with an "evidentiary dispute" regarding the money laundering evidence is overblown; it should take the District Court little time to reach the same, correct conclusion it did the first time. Second, even if one count were reversed, the evidence and arguments at Silver's re-trial will be substantially identical.[4]

[4] Silver does not contend that the evidence would be materially different if he were

26. Silver argues that the money laundering counts "consumed a significant portion" of the trial because the evidence consisted of "nearly a full day of testimony." Silver Motion at 15. But "nearly a full day" is another way of saying less than a day. And in a month-long trial, that is not a significant portion of the evidence.[5] Moreover, even in the unlikely event that the money laundering counts were reversed, the evidence Silver describes would nevertheless be admissible to show how Silver tried to conceal from the public, and his colleagues in the Assembly, the fruits of his criminal schemes. *See* Gov't Br. 56; *see also United States* v. *Bruno*, 661 F.3d 733, 744 (2d Cir. 2011) (concealment evidence probative of *quid pro quo*). In any event, Silver's arguments regarding the degree to which proceeding to a re-trial will result in the presentation of unnecessary evidence are best made to the District Court, which will ultimately rule on whether such evidence is admissible in the first instance, and can then decide whether to proceed with a re-trial or await disposition of Silver's certiorari petition.

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to prevail on his Hobbs Act or honest services fraud arguments in the Supreme Court. He focuses solely on the money laundering count.

[5] The testimony that Silver cites is not focused solely on the money laundering counts. *See* Silver Motion at 15 (citing Tr. 2314-2551). Most notably, Deanna Pennetta was a summary witness, the bulk of whose testimony related to the other counts. And the page-count of bank records is hardly indicative of the time devoted to such records, particularly where, as here, they were succinctly described by a summary witness.

27. Silver's re-trial is inevitable, regardless of the outcome of any one of his claims in the Supreme Court (which, as demonstrated above, is highly unlikely to grant certiorari in any event). There is no good cause for delay.

Conclusion

28. For the foregoing reasons, the Court should deny Silver's motion to stay the mandate and issue the mandate forthwith.

Dated: New York, New York
July 28, 2017

/s/
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