

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

UNITED STATES OF AMERICA,)	
)	
v.)	Criminal No. 1:07CR209 (TSE)
)	
WILLIAM J. JEFFERSON,)	
)	
Defendant.)	

**MOTION FOR BOND PENDING APPEAL
AND MEMORANDUM IN SUPPORT OF MOTION**

Pursuant to 18 U.S.C. § 3143(b) and Fed. R. Crim P. 38(b)(1) and 46(c), defendant William J. Jefferson, by counsel, hereby respectfully moves the court to stay the execution of his sentence and to release him on bond pending appeal.¹ In support of his motion, the defendant relies upon the attached memorandum of points and authorities.

MEMORANDUM IN SUPPORT OF MOTION FOR BOND PENDING APPEAL

The court may order a defendant’s release pending appeal if it finds by clear and convincing evidence: 1) that the defendant is not likely to flee or pose a danger to the safety of any other person or the community; and 2) that 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). In the unique circumstances presented in this case, the court has ample grounds to make the necessary findings and order Mr. Jefferson’s release.

¹ Even if the court denies the motion for bond pending appeal, the defendant has requested that the court stay the execution of his sentence until after the Christmas holidays, and that the court permit him to remain on his personal recognizance pending the designation of a facility by the Bureau of Prisons and that he be permitted to self-report at that time.

I. MR. JEFFERSON IS NOT LIKELY TO FLEE OR ENDANGER THE COMMUNITY.

As the court found when it released Mr. Jefferson while he was awaiting the imposition of sentence, there is clear and convincing evidence to support the conclusion that he is not likely to flee or pose a danger to the safety of any other person or the community. Throughout the pendency of this case, he has complied with all of the conditions of his release and maintained regular contact with the Pretrial Services office. Since the time of the jury verdict, he has cooperated fully with the U.S. Probation Office. He appeared at every court hearing at which his appearance was required, and he was not absent or even late for a single moment of his 8 week trial. His seriousness of purpose, respectful attitude, and humble demeanor were on display every day in the courtroom. Moreover, as a condition of his pre-trial release, Mr. Jefferson was required to surrender his passport, and it has been secured in his attorneys' safe deposit box since the time of his arraignment.

Even if he could leave the country, there is absolutely no likelihood that the defendant would do so. Mr. Jefferson has a wife, five daughters, and four grandchildren to whom he is entirely devoted, and it is his fervent desire at this juncture in his life to spend as much time with them as possible. The Jeffersons attend church services at St. Stephens ministries every Sunday, and afterwards, the family, along with Mr. Jefferson's brothers and sisters and their families, gathers at the Jefferson home, just as they have for years. There is no reason to believe that Mr. Jefferson would voluntarily separate himself from the bonds of family and faith that tie him to Louisiana.

Mr. Jefferson became aware that he was the subject of a federal criminal investigation when the FBI agents appeared at his home on August 3, 2005, but he was not indicted until June of 2007. During the intervening two years, federal investigators questioned his friends, relatives,

and employees, and they took the extraordinary step of executing a search warrant in his office on Capitol Hill. They directed subpoenas to him personally and issued numerous other requests seeking his credit card and bank records. On January 11, 2006 and May 3, 2006, Brett Pfeffer and Vernon Jackson pled guilty to being involved in a bribery scheme with Mr. Jefferson and agreed to cooperate with the government. Throughout all of that time, Mr. Jefferson was not subject to any court supervision or restrictions on his travel. He had no illusions about the challenges he would face in contesting the allegations he knew were coming. Yet he took no steps to hide or relocate. In short, although Mr. Jefferson had every reason to believe that criminal charges would be brought, he did not flee, but stayed put to face them when they came.

Nothing about Mr. Jefferson has changed since that time. The court released him on his personal recognizance pending trial pursuant to 18 U.S.C. § 3142. After the jury reached its verdict, the court found by clear and convincing evidence that Mr. Jefferson would not flee or pose a danger to the community and that he could be released pending sentence pursuant to § 3143, the same statute that governs the instant motion. He has cooperated fully with the probation office since then, and will appear at sentencing.

All of the factors the government points to in opposing Mr. Jefferson's release predate this investigation. Whatever contacts he had with individuals in Africa were well established long before any charges were brought, and the wire transfers that the government admits it knows nothing about date back to 2002 and 2003. Gov't Sentencing Memo at 22. Yet, even when he had access to his passport, Mr. Jefferson did not make the slightest attempt to travel to West Africa or anywhere else in the world.

Mr. Jefferson is not going to run away from this court or its sentence. He has no interest in being a fugitive convicted forever of bribery. What he intends to do is what he has done all along: stand and defend himself.

II. THE APPEAL RAISES A SUBSTANTIAL QUESTION OF LAW.

This case presents unusually strong circumstances to support the second finding that must be made under § 3143(b): that the appeal is not for the purpose of delay and raises a substantial question of law. From the outset, this case has hinged upon the resolution of complex legal questions concerning the meaning and applicability of the bribery and the wire fraud statutes, and there is nothing frivolous about the defendant's intention to seek review of the court's rulings on those matters.²

The court is not required to express doubt about its decisions or to predict that the defendant will prevail on appeal in order to grant the defendant's motion for release. Rather, according to the Fourth Circuit, when applying § 3143, the court must simply determine, after it concludes that the appeal is not for purposes of delay, whether the question presented on appeal is a "substantial" one, and whether, if decided in favor of the accused, "the substantial question is important enough to warrant reversal or a new trial on all counts for which the court imprisoned the defendant." *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991). A "substantial question" is defined as "a 'close' question or one that very well could be decided the other way." *Id.* Given the closeness of the issues and their centrality to the counts upon which sentence is to be imposed, the court can find that the necessary showing has been made.

² The defendant has not yet made a final determination as to which issues he will raise on appeal, so this motion addresses some of the significant questions likely to be part of any appeal.

A. The challenges to the bribery related counts.

1. The definition of “official act.”

Mr. Jefferson has consistently asserted that the indictment did not allege, and that the evidence did not establish, a violation of 18 U.S.C. § 201: that he solicited or accepted something of value in return for being influenced in his performance of an official act. It is undisputed that the case did not involve the sale of legislation, appropriations, earmarks or other legislative initiatives; rather all of the allegations turned upon Mr. Jefferson’s use of his stature and access, and/or the resources of his office, to promote business ventures – primarily in Africa – in which his family had an interest. While the court denied the motion to dismiss the indictment and the motion at the close of the government’s case, it recognized that the issues raised by the defense were worthy of serious consideration.

The defense will not try the court’s patience by repeating Mr. Jefferson’s legal challenge to the charges here. But the fact that those questions are substantial is evident in the unique procedural history of their resolution in this case.

- Mr. Jefferson moved to dismiss the bribery and bribery-related conspiracy, honest services, money laundering, and RICO counts on the grounds that the indictment alleged a use of influence but not the solicitation of something of value in return for a “decision or action on any question, matter, cause, suit, proceeding or controversy” that was or could have been pending for decision before Mr. Jefferson in his capacity as a U.S. Congressman.
- The parties filed multiple briefs on the matter advancing good faith arguments based upon their interpretation of the case law, and the court heard argument on October 12, 2007. While the government primarily based its argument on broad language in a Supreme Court case from 1914, *United States v. Birdsall*, 233 U.S. 223, 230 (1914), and decisions out of the Second Circuit, *United States v. Biaggi*, 853 F.2d 89 (2d. Cir. 1988) and *United States v. Carson*, 464 F.2d 424 (2d. Cir. 1972), the defendant urged that those cases could be distinguished, and that the matter should be governed by the Supreme Court’s more recent pronouncements in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), principles of strict statutory construction, including the

rule of lenity,³ and D.C. Circuit case law such as *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007), and *United States v. Muntain*, 610 F.2d 964 (D.C. Cir. 1979).

- The defense also pointed to the fact that there was legislation pending before Congress to expand the definition of official act to explicitly include the broader reading advanced by the government. See Defendant's Supplemental Memorandum in Support of Motion to Dismiss the Bribery Related Counts, Dkt. # 94 (November 9, 2007). The Public Corruption Prosecution Improvements Act, S. 1946, 110th Cong., 1st Sess. § 13 (2007), provides: "Section 201(a)(3) of Title 18, United States Code, is amended to read as follows: ...'(3) the term 'official act' means any action within the range of official duty *and* any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official" (emphasis added).
- On May 23, 2008, the court issued a Memorandum opinion denying the motion to dismiss. *United States v. Jefferson*, 562 F. Supp. 2d 687 (E.D. Va. 2008). After reviewing the cases presented by the parties, the court enunciated its own test for the definition of an "official act." It determined that "an act must satisfy two criteria to qualify as an 'official act' under §201. First, the act must be among the official duties or among the settled customary duties or practices of the official charged with bribery. And second, performance of the act must involve or affect a government decision or action." *Id.* at 691. For the second criterion, the court cited *Valdes*, 474 F.3d at 1324. *Id.* n. 3.
- In its May 2008 opinion, the court also explained:

[The defendant] argues that none of the acts alleged in Counts 3 and 4 are "official acts" because none involved a decision that defendant himself was empowered to make. But §201 applies when an official may influence *any* government decision through the performance of his duties; the official charged under § 201 need not be the official empowered to make the decision at issue.

Id. at 693.

- Both parties responded to different aspects of the court's opinion. In March 2009, the defense moved in limine to exclude evidence of alleged efforts to influence decisions

³ In *United States v. Santos*, ___ U.S. ___, 128 S. Ct. 2020, 2025 (2008), the Supreme Court subsequently reiterated the importance of the rule of lenity: "Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead."

made by foreign officials on the grounds that, applying the second prong of the court's test, those acts did not "involve or affect a government decision or action."

- In addition, the defendant took issue with the first prong of the court's test. He argued that the court's customary duties or practices language was not consistent with the terms of the statute and that broadening the scope of the definition was contrary to traditional principles of statutory interpretation as well as the admonitions in the *Sun-Diamond* opinion quoted by the court. *See* 562 F. Supp.2d at 691, citing *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 412 (1999). ("Courts are not authorized to construe the bribery statute to sweep within its ambit all manner of seeming venal or corrupt conduct by public officials.... [W]here the statutory language is capable of either broad or narrow application, courts must apply that language with the precision of the scalpel, not the blunt force of the meat axe.")
- In addition, pointing to the language in the bribery statute that prohibits the solicitation or receipt of something of value "in return for *being influenced in the performance* of any official act," 18 U.S.C. § 201(b)(2)(A), the defendant sought reconsideration of that portion of the court's ruling that stated that the defendant "need not be the official empowered to make the decision at issue." 562 F. Supp. 2d at 693.
- At the same time, the government moved to clarify the ruling, citing the same language in 18 U.S.C. § 201(b)(2)(A). The government thus agreed with the defense that the defendant must be the official empowered to make the decision at issue.
- On May 22, 2009, the court issued its second Memorandum Opinion. It denied the defendant's motion in limine, but ruled that clarification was warranted:

[T]he second prong of the May 2009 Opinion's test – that the "official act" must "involve or affect a government decision or action" – could be misinterpreted as suggesting that the "decision or action" required by the statute may be, or is required to be, a decision or action by someone *other* than the charged public official. This is neither correct, nor what was intended by the May 2008 Opinion. Rather the statute clearly requires that in exchange for the alleged bribe, *defendant* — and not some third party, government or otherwise – be *influenced* in the *performance* of a decision or action.

United States v. Jefferson, 634 F. Supp.2d 595, 600-01 (E.D. Va. 2009). The court reaffirmed the result reached in the May 2008 order, but ordered that the opinion be vacated and superceded by the 2009 opinion.

- The court also revisited its earlier analysis of *Valdes*, 475 F.3d. at 1319. While in its May 2008 opinion, the court cited *Valdes* for the proposition that the scope of §201(a)(3) is limited to "a class of questions or matters whose answer or disposition is determined by the government," *id.*, *quoted in Jefferson*, 562 F. Supp. 2d at 691, n.3, 692, the court concluded in 2009: "no such limitation appears on the face of §201(a)(3), nor does such a

limitation square with the broad reading of § 201(a)(3) and its predecessor statutes in *Birdsall, Carson, and Biaggi ...*” *Jefferson*, 634 F. Supp.2d at 602, n. 14.

- Ultimately, the court adopted the government’s broad reading of the statute. *Id.* at 602 (“§ 201(a)(3) has been read ‘sufficiently broadly to encompass all of the acts normally thought to constitute a congressman’s legitimate use of his office.’”)(internal citations omitted).

Not all cases require the issuance of lengthy published opinions on questions of law.

Very few cases involve the issuance of two published opinions on the same issue, much less, a second opinion vacating and superseding the original opinion. The fact that the court has devoted a great deal of thought to this issue, that both sides have expended such a significant amount of effort in the airing of adamantly defended, but differing views, and that Congress has taken up the issue as well suggests that the appeal will indeed pose a “substantial question” of law.

A further indication of the thorny nature of the issues to be appealed is the fact that the court gave neither the jury instruction on official acts proposed by the defense nor the instruction proposed by the government. The defense proposed that the jury should be provided with the statutory language alone: “the term ‘official act’ means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” 18 U.S.C. § 201(a)(3). The statutory language is used without more in the Pattern Jury Instructions in the Fifth, Seventh, Tenth, and Eleventh Circuits. *See* Pattern Jury Instructions of the Fifth Circuit, Criminal Cases, Instruction No. 2.12 (2001); Federal Criminal Jury Instructions of the Seventh Circuit, Instruction No. 201[5] (1999); Pattern Federal Criminal Jury Instructions for the Tenth Circuit, No. 2.11 (2006); and Instruction OI 5.1, Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (2003).

The government proposed providing the statutory definition but also additional language broadening the definition of “official act” to include acts customarily associated with a particular position:

The term “official act” includes the decisions or actions generally expected of the public official. These decisions or actions do not need to be specifically prescribed by any law, rule, or job description to be considered to be an “official act.” Thus, “official acts” include those duties and activities customarily associated with a particular position.

The court’s instruction tracked the statutory definition and then went on:

In order to violate the bribery statute, the defendant must have corruptly sought, received, or agreed to receive a thing of value in return for being influenced in his own performance of an official act – that is, a decision or action on any question, matter, cause, suit, proceeding, or controversy that may at any time be pending, or which may by law be brought before the defendant in his official capacity.

An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, “official acts” include those activities that have been clearly established by settled practice as part of a public official’s position. Moreover, an act on a particular question or matter may still be official even if the public official did not have the authority to make a final decision or take binding action on the issue.

At bottom, whether one agrees with the court’s interpretation of the statute or with the arguments advanced by the defense, it cannot be debated that the elements of bribery underlie the verdict on every count for which sentence is to be imposed: bribery, conspiracy to commit bribery, use of the wires in furtherance of a bribery scheme, and RICO. And if the court of appeals agrees that the law requires a more strict interpretation of the statute, those convictions cannot stand. There was no evidence of “official acts” that would fall squarely within the definition when read narrowly – the government charged only that Mr. Jefferson promoted the business ventures by attempting to influence decisions made by others – primarily African officials and some U.S. government officials. Thus, the court can find that the appeal raises a substantial question of law likely to result in reversal or an order for a new trial.

2. The quid pro quo requirement.

The defendant also expects to appeal the court's instruction on the quid pro quo element. There was considerable discussion about this instruction during the instruction conference,⁴ and the defense objected to the following language:

[T]he quid pro quo requirement is satisfied if you find that the government has established beyond a reasonable doubt that the defendant agreed to accept things of value in exchange for performing official acts on an "as needed basis," so that whenever the opportunity presented itself he would take specific action on the payor's behalf.

It was the defendant's position that this instruction was inconsistent with the holding of *Sun-Diamond*, 526 U.S. at 404: "The insistence upon an "official act," carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." The court noted that it was bound to follow Fourth Circuit precedent, and pointed to *United States v. Harvey*, 2008 WL 2720718, *5 (4th Cir. 2008), quoting *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1998) ("The intent to receive a specific benefit, however, is not as limiting as it first appears; it is sufficient that the gift is made on the condition that the offeree act favorably to the offeror when necessary.")

As with the official act issue, the defense does not intend to reargue the legal point at this juncture. But the conflict between the directive in *Sun-Diamond* and the instruction given by the court, and the fact that the Fourth Circuit made the statements contained in *Arthur* but also focused on the need for specificity in *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998),

⁴ Without the benefit of a transcript, the defense is unable to discuss the instruction conference in detail here.

supports a finding that the question is a close one.⁵ And the court can find that if the issue is decided in favor of the accused, the question is important enough to warrant reversal on the counts for which the defendant is to be sentenced, because the testimony on the quid pro quo element was generally vague and unspecific and all of the counts of conviction are predicated – at least in part – on bribery.

B. The challenges to the wire fraud counts.

Mr. Jefferson was convicted on three counts of “honest services” wire fraud (Counts 6, 7 and 10) under 18 U.S.C. § 1346, which provides that for purposes of the wire and mail fraud statutes, “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” Honest services wire fraud was also one of the objects of the conspiracies charged in Counts 1 and 2, and served as the basis for multiple predicate acts in the RICO count (Count 16). Prior to trial, Mr. Jefferson moved to dismiss all of the honest services-related charges in the indictment on the grounds, *inter alia*, that Section 1346 is unconstitutionally vague, and he intends to pursue this issue, along with others, on appeal. While the court denied the motion to dismiss by order dated July 8, 2008 (Dkt. No. 207), the defendant submits that the arguments raised in his motion papers demonstrate that the question of the constitutionality of the honest services statute is a substantial question of law within the meaning

⁵ See *Jennings*, 160 F.3d at 1013 (“A bribe requires that the payment be made ‘corruptly,’ that is, with ‘corrupt intent.’ Under § 201 ‘corrupt intent’ is the intent to receive a specific benefit in return for the payment. In other words, the payor of a bribe must intend to engage in ‘some more or less specific quid pro quo’ with the official who receives the payment.”) and 160 F.3d at 1019 (“[A] court must instruct the jury that it may convict a defendant ... only if it finds that the defendant intended to exchange a payment for some specific official act or course of action.” A jury instruction properly sets forth the concept of a quid pro quo “if it requires the jury to find that the defendant made or promised a specific payment in exchange for a specific official act or omission.”).

of 18 U.S.C. § 3143(b). Moreover, this position finds strong support in very recent activity in the Supreme Court in cases involving the honest services statute.

Earlier this year, Justice Scalia dissented from the denial of certiorari in *Sorich v. United States*, 129 S.Ct. 1308 (2009), an honest services case. His dissent catalogued the troubling issues raised by the scope of the prosecutions brought under Section 1346 and the multiple ways in which courts had attempted to interpret and limit the undefined language of that statute. Justice Scalia acknowledged that there was a significant question as to whether the honest services statute violated the long-standing and fundamental principle that “a criminal statute must give fair warning of the conduct that it makes a crime.” 129 S.Ct. at 1310, quoting *Bowie v. City of Columbia*, 378 U.S. 347, 350 (1964). Specifically, he stated that “There is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct.” 129 S.Ct. at 1310. And common law crimes are “utterly anathema” today:

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. “How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?” [*United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003)], at 160 (Jacobs, J., dissenting).

129 S.Ct. at 1310. Justice Scalia would have granted certiorari in *Sorich* so that the court could address both “the meaning and the constitutionality of § 1346.” 129 S.Ct. at 1311.

This term, the Supreme Court heeded Justice Scalia’s call, clearly recognizing that the honest services statute is in need of serious examination. It has granted certiorari in *three* cases challenging convictions under the honest services statute: *Black v. United States*, No. 08-876 (*cert. granted* at 129 S.Ct. 2863 (2009)); *Weyhrauch v. United States*, No. 08-1196 (*cert. granted* at 129 S.Ct. 2863 (2009)); and *Skilling v. United States*, No. 08-1394 (*cert. granted* at 2009 WL

1321026 (2009)). The *Skilling* case directly presents the question of whether § 1346 is void for vagueness, but the Supreme Court could reach the constitutionality of the statute in any of the pending cases, and with respect to prosecutions of public officials, particularly in *Weyhrauch*. See amicus brief of the National Association of Criminal Defense Lawyers in *Weyhrauch*, urging the court to strike down § 1346 as unconstitutionally vague.⁶

Thus, the constitutional viability of § 1346 is very much an open issue. As Justice Scalia has stated, there is a “serious argument” that the honest services statute fails to give fair notice of what conduct it criminalizes and is therefore void for vagueness. Mr. Jefferson’s challenge to the statute on these grounds accordingly presents a substantial question of law for purposes of this motion.

Should the honest services statute be declared unconstitutional, Mr. Jefferson’s convictions on Counts 1, 2, 6, 7, 10 and 16 will be subject to reversal or a new trial. While there are other counts of conviction that are not based on § 1346,⁷ evidence relating to the government’s honest services allegations pervaded the trial. Over the defendant’s objection, the government was permitted to raise the conflict of interest theory of honest services fraud and to argue that Mr. Jefferson had acted illegally by failing to disclose his family’s interest in various businesses that he assisted. Witness after witness was asked if Mr. Jefferson had disclosed these interests in meetings and whether that information would have been important to them – even though the government never identified any specific source for a duty to disclose. The jury was also told repeatedly that Mr. Jefferson failed to disclose his family’s interests to African officials

⁶ Available on-line at: [http://www.nacdl.org/public.nsf/newsissues/amicusattachments/\\$FILE/Weyhrauch_Amicus.pdf](http://www.nacdl.org/public.nsf/newsissues/amicusattachments/$FILE/Weyhrauch_Amicus.pdf)

⁷ For the reasons stated above, Mr. Jefferson’s appeal on those counts will also raise substantial questions of law.

– even though the government admitted that Mr. Jefferson had no duty to make any disclosures to foreign officials. This evidence was extremely prejudicial, and must have affected the jury’s consideration of all of the charges against Mr. Jefferson. Accordingly, a successful appeal of the honest services convictions would require reversal or a new trial on all of the counts on which Mr. Jefferson was convicted.

III. CONCLUSION.

For all of the reasons set forth above, the court should stay the execution of Mr. Jefferson’s sentence and release him on bond pending appeal pursuant to 18 U.S.C. § 3143(b).

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 10th day of November, 2009, I electronically filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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