18-2990(L)

**18-3710(CON), 18-3712(CON),
18-3715(CON), 18-3850(CON), 19-1272(CON)**

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

PETER GALBRAITH KELLY, JR., MICHAEL LAIPPLE, KEVIN SCHULER,

Defendants,

JOSEPH PERCOCO, STEVEN AIELLO, JOSEPH GERARDI,
LOUIS CIMINELLI, ALAIN KALOYEROS, AKA DR. K,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLANT STEVEN AIELLO

ALEXANDRA A.E. SHAPIRO
DANIEL J. O'NEILL
FABIEN M. THAYAMBALLI
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant Steven Aiello

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The Percoco Trial jury instructions were indisputably erroneous. Under *United States v. Silver*, a public official's "open-ended promise" to perform "official action…as specific opportunities arose" cannot satisfy the *quid pro quo* element of honest-services fraud. 948 F.3d 538, 559 (2d Cir. 2020). A jury must find that "a particular question or matter" was "identified at the time the official enter[ed] into a *quid pro quo* arrangement." *Id.* at 568-69. The instructions omitted that critical limitation and permitted conviction if Aiello paid Percoco "for official action as the opportunities arose," even if no specific "question or matter" was identified at that time. (A656/6449).

The government cannot demonstrate "beyond a reasonable doubt that a rational jury would have found [Aiello] guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). It is not enough that a properly instructed jury could convict. *See United States v. Silver*, 864 F.3d 102, 123-24 (2d Cir. 2017) (distinguishing sufficiency from harmlessness); *accord Lynch v. Dolce*, 789 F.3d 303, 317 (2d Cir. 2015). A new trial is required unless the Court finds beyond a "reasonable doubt that the error…did not contribute to the verdict." *Neder*, 527 U.S. at 15. Where, as here, it is "impossible" to tell whether the jury relied on the invalid theory, the conviction cannot stand. *United States v. Szur*, 289 F.3d 200, 208 (2d Cir. 2002); *accord United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993).

The *quid pro quo* element was hotly contested; the government specifically *invited* the jury to convict on the invalid theory; the jury deliberated for eight days, received two *Allen* charges, and acquitted Aiello on related bribery and false-statement counts. It is therefore impossible to be certain the erroneous instruction was harmless, and vacatur is required. *See Neder*, 527 U.S. at 19 (where "defendant contested the…element and raised evidence sufficient to support a contrary finding…[court] should not find the error harmless").

ARGUMENT

1. From the start, the government alleged exactly the type of open-ended *quid pro quo* that *Silver* held is *not* honest-services fraud. COR's alleged payments to Percoco were in August and October 2014—when Percoco was not a public official. The government used the open-ended theory to rely on acts Percoco took one year later, after he returned to office. The indictment charged a conspiracy to pay Percoco not for any specific matter, but for Percoco's "official assistance…on an as-needed basis" and "as the opportunity arose." (A292-93). Pre-trial, the government confirmed its theory was that Percoco "took official action to benefit [COR] and Aiello…*after* he returned to State service"—*i.e.*, after the LPA call. (SDNY.Dkt.264 at 75).

And at trial, the government introduced evidence about Percoco's actions in 2015 regarding State funds owed COR and a scheduled salary increase for Aiello's

son (*e.g.*, Tr.752-66, 891-973, 1279-87, 2099-101, 2526-41), even though those subjects were not "identified, or even *identifiable*," when COR made the 2014 payments. *See Silver*, 948 F.3d at 569. The prosecutors contended these acts proved an as-opportunities-arise agreement and invited the jury to convict without regard to Percoco's acts as campaign manager. (A627/5139-40 (Rule 29); A649/6008-09, Tr.6392-93 (summation)). They told the jury the 2014 payments "obligated Percoco to do what he could to benefit Aiello and Gerardi" and that Percoco "took actions for COR as opportunities arose" in 2015. (A647/5952-53; *see also* A648/5996, A649/6001, A651/6383-84). And, expressly invoking the erroneous instruction, the government argued that the defendants "just ha[d] to agree that [Percoco] would advocate for them as opportunities arise." (A651/6384; *see* Tr.5983 ("it's sufficient that Percoco took official action as opportunities arose, and that's what happened here")). These jury arguments foreclose harmlessness. *See*, *e.g.*, *Silver*, 864 F.3d at 120-21, 123 (rejecting harmlessness where government "emphasized" invalid theory in closing); *United States v. Joseph*, 542 F.3d 13, 19 & n.5 (2d Cir. 2008) (rejecting harmlessness because prosecutor "invited the jury to rely *solely* on" invalid theory).

The jury's verdict—convicting Aiello while acquitting Gerardi—confirms it probably did rely on the erroneous instruction. The main difference in proof against the two was Gerardi's non-involvement in the 2015 issue regarding

Aiello's son. This suggests the jury rested its verdict largely on that episode—which could only be linked to COR's 2014 payments under the invalid as-opportunities-arise theory, further undermining any suggestion of harmlessness. *See Lynch*, 789 F.3d at 317 (co-defendant's acquittal confirms instructional error not harmless); *United States v. Mahaffy*, 693 F.3d 113, 136 (2d Cir. 2012) (error not harmless considering acquittal on related count); *United States v. Bah*, 574 F.3d 106, 116 (2d Cir. 2009) (error not harmless where acquittal on another charge suggested jury relied on erroneous instruction).[1]

2. The government's principal argument—that it proved COR paid Percoco for assistance with the LPA in 2014 (G.Br.83; Dkt.343)—cannot save the conviction.

Evidence at best "sufficient to permit a conviction under the proper instructions" for the LPA doesn't prove harmlessness. *Lynch*, 789 F.3d at 317. Rather, a new trial is required unless "the guilty verdict…was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *United States v. Banki*, 685 F.3d 99, 114 (2d Cir. 2012) (reversing where "uncertain" which theory jury chose). The record precludes any such finding here.

[1] The government ignored harmless-error cases and instead cited an inapt case not applying harmless-error review. (G.Br.83).

Indeed, it is unlikely the jury convicted based on the LPA, considering Gerardi's greater involvement. Howe testified he spoke to Gerardi about paying Percoco in mid-2014 (A567/2409-10, A573/2476-77), and Gerardi subsequently emailed Percoco about the LPA and monitored Percoco's progress (A698, A700, A707, SA-0069; *see* GX582).

Although Aiello inquired about Percoco's help, the jury could have found that Aiello was simply asking Howe to request a favor from his close friend. Aiello's email does not mention any payment, let alone an illegal bribe. Aiello merely asked whether Howe thought there was "any way Joe P can help us with this issue while he is off the 2nd floor working on the Campaign[?]" (A680). This is consistent with innocence and the rejection of a *quid pro quo* respecting the LPA. *See United States v. Quattrone*, 441 F.3d 153, 179-80 (2d Cir. 2006) (error not harmless because defense proffered "innocent explanations" with "some basis in the record"); *United States v. Newman*, 773 F.3d 438, 451 (2d Cir. 2014) (error not harmless because defendants "contested" element and "elicited evidence sufficient to support a contrary finding").

And the government's proof hinged on Howe, a serial fraudster who committed multiple crimes of dishonesty, doctored emails and violated his cooperation agreement. Howe's credibility was eviscerated on cross-examination, culminating in his arrest mid-trial. (Br.5; PercocoBr.18-25). For harmless-error

analysis, this Court cannot assume the jury fully credited Howe's testimony. *See*, *e.g.*, *United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (disregarding cooperator testimony where "ample reason for…jury to question [cooperators'] credibility").

Finally, to base its conviction on the LPA, the jury had to find that Percoco "dominated and controlled" government business and was "relied" on to perform government functions while a campaign manager. (A655/6446) (*Margiotta* instruction). Such evidence was thin (indeed, insufficient, Br.41-43; ReplyBr.24-25). The jury also had to find Aiello *knew* Percoco had the requisite domination, control, and reliance. (A655/6447-48). There was zero evidence of that. All Aiello knew was that Percoco was Howe's close friend, and a former official who remained connected and was permitted to assist private entities while out of government. Aiello knew nothing of Percoco's office use or the other data the government cites to support its *Margiotta* argument. (Br.43-44; ReplyBr.23-24).

There is no guarantee Aiello's jury made any finding on these hotly disputed questions, let alone resolved them against Aiello. The jury may have simply determined that Aiello and Percoco entered an open-ended *quid pro quo* for acts as a public official "and gone no further." *Silver*, 864 F.3d at 123 n.114.[2]

[2] At oral argument, the government mischaracterized a statement in Aiello's brief that the evidence depicted "at most" an LPA agreement (Br.39-40) as a harmless-error "concession." But our point there was that the evidence is insufficient if

3. At oral argument, Judge Raggi asked: "What other matter was there to influence other than the LPA?" In fact, COR was a major upstate developer, with a longstanding "partnership" with the State and several significant active or potential projects at any given time. (Tr.1296-99). Indeed, COR broke ground on the film-hub project in mid-2014 and quickly grew frustrated with the State's failure to pay. (A539/1337; Tr.3805). A rational jury could find that such a developer sought a state official's general backing, as opportunities arise, without identifying a particular project. By contrast, in *Silver*, when a mesothelioma researcher referred clients to the Assembly Speaker, "there could be but one conclusion," that he sought "state funding for mesothelioma research" in return. 948 F.3d at 561. Respectfully, therefore, the dispositive question is: "Can the Court conclude beyond a reasonable doubt that any agreement concerned a specific matter, and not Percoco's future assistance as opportunities arose?" On this record, the answer is plainly "no."

4. The government also argued that the 2015 acts satisfied *Silver* because COR/Aiello identified the matter on which it hoped Percoco would act just before Percoco did so. But that did not happen until a full year *after* the COR payments, and there is no evidence of *any* promise to make further payments at *any* time. Nor

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Margiotta is invalid. That does not preclude the possibility that the jury relied on the erroneous "as-opportunities-arise" instruction and the 2015 act(s).

did Aiello, Percoco, Howe, or anyone else allude to the 2014 payments in connection with those 2015 requests.[3] By contrast, the *Silver* real-estate scheme involved a steady stream of referrals over a course of 18 years. *Id.* at 564.

The government's loose conception of *quid pro quo* would eviscerate *Silver*, which held that, under *McDonnell*, "the relevant point in time…is *the moment at which the public official accepts the payment*." *Id.* at 556. *McDonnell* requires juries to find that "a particular question or matter" was "identified at the time the official enter[ed] into a *quid pro quo* arrangement." *Id.* at 568. If identifying the matter one year after payment sufficed, *Silver*'s limitation would be meaningless.

Finally, with respect to the government's "retainer" argument, it is unclear what distinguishes a "retainer" from "as opportunities arise," and *Silver* noted the terms are used "interchangeably." *Id.* at 553 n.7. Regardless, the jury was charged on "as opportunities arise," not "retainer." The conviction cannot be affirmed based on a theory on which the jury never made any finding. *See*, *e.g.*, *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991); *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980).

[3] Although Aiello's September 2015 text message about his son's salary mentioned that he "keep[s] giving" (A723), this is not sufficiency review, and the comment almost certainly referred to COR's significant, lawful campaign contributions to Governor Cuomo. (*See*, *e.g.*, Tr.1441, 2443-51; GXS-19).

CONCLUSION

Because there is no way to conclude beyond a reasonable doubt that the jury convicted on a legally valid theory, Aiello is entitled to new trial. *E.g.*, *Silver*, 864 F.3d at 122-24 (granting new trial because "conceivable that a properly instructed rational jury" might have acquitted). The new trial should not include the legally invalid[4] private-citizen theory, which was not in the indictment. (Br.21-27; ReplyBr.3-9).

Dated: New York, New York
March 23, 2020

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

Attorneys for Defendant-Appellant Steven Aiello

[4] *See* Br.27-39; ReplyBr.9-16; *United States v. Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003) (en banc) (pre-*McNally* caselaw not binding). The district court erroneously suggested Aiello waived his challenge to the private-citizen instruction. But in the cited transcript, Aiello's counsel merely provided a page number in *Margiotta*. (A645/5843). That is not waiver. Indeed, shortly thereafter Aiello's counsel specifically objected to the private-citizen instruction, and the court acknowledged, "You got your objection." (A646/5845-47). Aiello also joined repeated objections to instructing on any private-citizen theory. (A640/5765, A640/5779-80, A641/5824-25, A643-44/5832-36, A658/6475). *See United States v. Squires*, 440 F.2d 859, 862 (2d Cir. 1971) (claim preserved if defendant "clearly objected to any instruction on the issue," even if he didn't challenge particular language used).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Defendant-Appellant Steven Aiello certifies pursuant to Federal Rule of Appellate Procedure 32(g) that the foregoing brief contains 2,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016, and is therefore in compliance with this Court's Order dated March 16, 2020, permitting Aiello to file a supplemental brief of 2,000 words or less.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of Times New Roman.

Dated: March 23, 2020

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