No. 12-4685
(consolidated with 12-2889, 12-2940, 12-2972, 12-2976, 12-3078, and 12-4556)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EMILIO A/K/A "TONY" FIGUEROA, MICHAEL YARON, MOSHE BUCHNIK, SANTO SAGLIMBENI, CAMBRIDGE ENVIRONMENTAL & CONSTRUCTION CORP., D/B/A NATIONAL ENVIRONMENTAL ASSOCIATES, OXFORD CONSTRUCTION & DEVELOPMENT CORP., and ARTECH CORP.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(Honorable George B. Daniels)

OPPOSITION OF APPELLEE UNITED STATES OF AMERICA TO EMILIO A/K/A "TONY" FIGUEROA'S MOTION FOR RELEASE PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

MISCELLANEOUS

PRELIMINARY STATEMENT

On February 2, 2012, a jury sitting in the Southern District of New York convicted Emilio A/K/A "Tony" Figueroa of conspiring to commit wire fraud for helping Santo Saglimbeni, his boss at New York Presbyterian Hospital (the Hospital), steer contracts for asbestos abatement, air monitoring, and construction to companies owned and/or controlled by Michael Yaron and Moshe Buchnik in exchange for kickbacks to Saglimbeni. On July 31, 2012, Figueroa pled guilty to mail fraud and conspiring to commit mail fraud for awarding HVAC contracts to a different vendor in exchange for kickbacks. The Honorable George B. Daniels sentenced Figueroa to thirty-six months' imprisonment on each of the three counts to be served concurrently. Sent. Tr. 94.[1]

Figueroa moved for bail pending appeal. The District Court denied the motion "for similar reasons that I denied the request of Yaron and Buchnik." Sent. Tr. 101, *i.e.*, the defendant was a possible flight risk and failed to raise a substantial issue on appeal, *e.g.*, Buchnik Bail Decision. In addition, as the District Court

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[1] All the district court materials cited in this opposition (except for the PSR) are attached as exhibits to the declaration of Stephen J. McCahey, lead trial counsel for the Government in this case. "Tr." refers to the trial transcript pages in Ex. B; "5/17/12 Tr." and "7/10/12 Tr." refers to the transcript pages from those hearings in Exs. C and D; "Plea Tr." refers to the transcript pages from the plea hearing in Ex. E; "Sent. Tr." refers to the sentencing transcript pages in Ex. F; "GX" refers to Government exhibits or, in the case of audio recordings, transcripts thereof, in Ex. G; "June 28 Order" refers to the District Court's Memorandum Decision and Order of June 28, 2012 (Doc. 174) in Ex. M; and "Buchnik Bail Decision" refers to the District Court's Order of August 27, 2012 (Doc. 198) in Ex. N.

explained, there was a "singular reason" that bail pending appeal was improper. Sent. Tr. 101. "Regardless of whether or not the defendants were to even have a valid issue on appeal with regard to the trial, they pled guilty to the other two counts, and I sentenced them to concurrent time on those counts, so under no scenario could you present an issue, in my judgment, to the Second Circuit Court of Appeals that could warrant either a reversal of their entire conviction or would warrant a lesser sentence than what I imposed in this case." *Id.*

The District Court wanted "the record [to] be real clear" that "even if there was the basis for me to find that they would be entitled to a new trial on the counts on which the jury found them guilty, they would not be entitled to withdraw their pleas nor a different sentence than the sentence that I believe was appropriate based on the record before me." *Id.* at 101-02. "So, based on that alone, I think that that precludes the possibility that the defendants can make any argument that they have met the standard required for bail pending appeal, given their subsequent guilty plea to similar conduct and conduct originally in the same indictment with the conduct with which they take issue with the jury's verdict." *Id.* at 102.

This basic reality compels denial of Figueroa's motion regardless of the merits of challenges to his wire fraud conspiracy conviction. In any event, Figueroa's claims of error below are wrong, as the Government has explained in responses to bail motions by Yaron (which this Court denied, Dkt. 138, McCahey Decl., Ex. O)

and by Buchnik (which is pending). Indeed, the only unique issue here is Figueroa's claim (Mot. 16-22) that there was insufficient evidence of his participation in the wire fraud conspiracy. But the District Court properly rejected this argument. *See* June 28 Order at 6. Figueroa's claim that the government failed to prove that he "ha[d] any knowledge of the purportedly illegal actions of the co-conspirators" (Mot. 19) is directly contradicted by his own admissions on the Porath recordings. Moreover, when pleading guilty, Figueroa "admit[ted] similar [conspiratorial] conduct [to what] he was facing trial on." Sent. Tr. 80.

Figueroa reported to prison on March 11, 2013. As with Buchnik, the United States does not believe that oral argument is necessary.

STATEMENT OF THE FACTS

A. The Charged Offenses

On June 15, 2011, the grand jury issued a Superseding Indictment charging Figueroa with conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349, and mail fraud and conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 1341, 1346, 1349 and 2. McCahey Decl., Ex. A.

1. The Wire Fraud Conspiracy. The Superseding Indictment alleged that Yaron and Buchnik paid kickbacks to Santo Saglimbeni, a Hospital employee, so that he and Figueroa, another Hospital employee, would "steer[] [over $42 million of] air monitoring services, asbestos abatement services, and later, construction

services contracts at [the Hospital] to companies owned or controlled by defendant YARON and/or defendant BUCHNIK." *Id.* ¶¶ 24, 36. As part of the kickback scheme, defendants committed numerous fraudulent acts – including the creation of a sham corporation, Artech Corp. (Artech), by Saglimbeni "to conceal the kickbacks he received from defendants YARON and BUCHNIK." *Id.* ¶¶ 30, 31, 33. The conduct violated the Hospital's competitive bidding procedures, *id.* ¶¶ 18, 20, and a New York City Department of Environmental Protection regulation (DEP Regulation) "requir[ing] that any air monitoring company be completely independent of any asbestos abatement company that was performing work on the same asbestos abatement project," *id.* ¶¶ 21, 27. And the scheme was designed both to "obtain money and property from [the Hospital] by means of false and fraudulent pretenses" and to deprive the Hospital of "its intangible right to the honest and faithful services of its employees." *Id.* ¶¶ 23, 36.

2. The Mail Fraud Charges. The Superseding Indictment also alleged that Saglimbeni and Figueroa fraudulently caused HVAC contracts at the Hospital to be awarded to a contractor in exchange for "kickbacks in the form of cash, goods and services," and used the mail in furtherance of the fraudulent scheme. *Id.* ¶¶ 38-53.

B. The Wire Fraud Trial

The District Court severed the trial on the wire fraud charges from the mail fraud charges, and the wire fraud trial lasted approximately three weeks. The

Government presented fifteen witnesses and over 250 exhibits. The evidence included four excerpts from two consensual audio recordings (described more fully on pp. 11-12) between Figueroa and David Porath, a then-cooperating witness.

The evidence at trial established that, from 2000 to at least January 2008, Yaron and Buchnik conspired with Hospital employees Saglimbeni and Figueroa to defraud the Hospital. Specifically, beginning in 2000, Yaron and Buchnik paid kickbacks to Saglimbeni so that essentially all asbestos removal work at the Hospital was awarded to National Environmental Associates (NEA), Tr. 1198, and all air monitoring work was awarded to E.Tal Environmental Consultants, Inc. (E.Tal), Tr. 1202, 1207 – companies owned and/or controlled by Yaron and Buchnik. Tr. 538, 540, 632-33, 686-91, 708-10. Moreover, defendants made numerous material misrepresentations to conceal the true relationship between NEA and E.Tal, so that E.Tal could be the air monitor on NEA's asbestos removal work in violation of the DEP Regulation. *See* GX 121, 122, 123, 124, 125, 303, 613, 614, 615. This deception also enabled Saglimbeni to circumvent the Hospital's competitive bidding policy to ensure that NEA always received the asbestos work. Tr. 542-47, 723-31, 1207.

The evidence also established that Buchnik subverted the competitive bidding process for awarding the asbestos removal contracts by asking one of his subcontractors to submit a fake bid that Buchnik prepared and, on another

occasion, by opening at least one sealed bid from another contractor (using a steamer) before preparing NEA's bid. Tr. 542-48, 726-28.

The evidence further established that, in approximately 2002, the conspirators expanded the kickback scheme to include construction contracts awarded to Oxford Construction & Development Corp. (Oxford), a firm owned by Yaron. Tr. 989, 1265. At this time, Saglimbeni created a sham corporation, Artech, to conceal the kickback payments he received, and Yaron and Buchnik funneled over $2.3 million through five intermediaries to Artech (using some wire transfers). GX 1504, 1505, 1508-01; Tr. 1787-97. [2]

The jury convicted Figueroa of conspiracy to commit wire fraud, finding both "a scheme to fraudulently obtain money or property from [the Hospital]" and "a scheme to fraudulently deprive [the Hospital] of the honest and faithful services of its employees through kickbacks." Tr. 2617-18.

C. The Post-Trial Motions

Figueroa moved for acquittal due to insufficient evidence of his participation in the conspiracy. He also sought a new trial because of Porath's unavailability at trial. Porath initially cooperated with the Government but stopped, and later was

[2] Figueroa's motion erroneously suggests that the kickbacks to Saglimbeni started in 2003 with the construction contracts. Mot. 3. The evidence at trial showed that Yaron and Buchnik paid Saglimbeni kickbacks on the asbestos and air monitoring contracts starting in at least 2000, Tr. 540, 710-11, and that Buchnik had given envelopes of cash and a Rolex to Saglimbeni's predecessor, Tr. 2032-34.

indicted while he was in Israel. Porath was arrested in Israel on November 27, 2011. On January 5, 2012 (a few days before the trial here was to begin), an Israeli magistrate declared Porath extradictable, and Porath waived appeal. Porath was returned to the United States on February 16, 2012 (after the trial here was complete). Figueroa claimed that the Government "deliberately kept [him] out of the jurisdiction until after the defendants' trial" and "concealed from the Court and from defense counsel" that Porath could "be called as a witness" and "consent[ed] to return" in violation of Figueroa's rights under the Compulsory Process Clause. Mem. In Supp. Defs.' Mot. For New Trial, at 1-2, McCahey Decl., Ex. J.

The District Court denied the motion for acquittal, holding that "based on his own statements and activities, a rational trier of fact could have found Figueroa guilty of knowing participation in the conspiracy beyond a reasonable doubt on the evidence submitted at trial." June 28 Order at 6. The District Court also denied the motion for a new trial because Figueora failed to prove any of the three elements of a Compulsory Process Clause claim: bad faith by the Government, materiality, and lack of fundamental fairness. *Id.* at 8-11. As the District Court explained, there was no evidence that "the government deliberately delayed Porath's return" and that claim was "entirely contravened by [the declaration of Patricia L. Petty, Office of International Affairs, who handled the extradition]." *Id.* at 9. Moreover, Porath "was now a non-cooperating witness facing three felony

counts" who could "have invoked his Fifth Amendment Right not to incriminate himself." *Id.* at 10. Even assuming that Porath testified, there was no basis to assume that testimony would have helped Figueroa, because Figueroa did not "proffer any specific testimony that Porath would have given that is exculpatory or favorable to the defense." *Id.* Finally, the District Court found that, even if there was error, "there was no prejudicial impact on the outcome of the trial" because the jury separately found both money and property fraud and honest services fraud, and there was an "abundance of evidence" supporting those charges. *Id.*

D. The Guilty Plea

On July 31, 2012, Figueroa pled guilty to mail fraud and conspiracy to commit mail fraud. He specifically admitted that from 2003 to 2006 he gave work to an HVAC vendor in exchange for goods, services, and cash. Plea Tr. 16-22.

E. Sentencing

The District Court sentenced Figueroa to thirty-six months' imprisonment on each of the three counts to be served concurrently, imposed a $25,000 criminal fine and a mandatory special assessment, and ordered $603,981.98 in restitution to the Hospital (jointly with Saglimbeni). Sent. Tr. 94. Figueroa moved for bail pending appeal, which the Government opposed. *Id.* at 97-101. The District Court denied the motion "for similar reasons that I denied the request of Yaron and Buchnik" and because Figueroa could not satisfy the standard for bail pending appeal given

the concurrent thirty-six month sentences on the two pleaded counts. *See* pp. 1-2 *supra* (quoting the District Court's denial).

ARGUMENT

THE COURT SHOULD DENY FIGUEROA'S MOTION FOR RELEASE PENDING APPEAL

I. The Defendant Has The Burden Of Proving That The Conditions For Bail Pending Appeal Are Satisfied.

The bail statute provides that a defendant must be detained pending appeal unless a judicial officer finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in – (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b). This provision reflects Congress's view that "once a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances." *United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985) (citation omitted); *see United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (following the "analysis of section 3143(b) that the Third Circuit enunciated in *Miller*").

A "substantial question" is "a 'close' question or one that very well could be decided the other way." *Randell*, 761 F.2d at 125. Moreover, bail is inappropriate unless the question is likely to result in a reversal or a new trial on all counts on which the defendant is incarcerated. *Id.*

On appeal, this Court defers to a district court's bail decisions, and will reverse only for "clear error" – that is, only if "on the entire evidence," the Court is "left with the definite and firm conviction that a mistake has been committed." *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) (citation and internal quotation marks omitted). The burden of persuasion "on all the criteria set out in subsection (b)" rests "on the defendant." *Randell*, 761 F.2d at 125.

II. Figueroa Does Not Satisfy The Conditions For Release Pending Appeal.

A. The District Court Expressly Found That Figueroa Would Not Be Able To Withdraw His Guilty Plea Or Get A New Sentence On The Pleaded Mail Fraud Counts, Even If His Wire Fraud Conspiracy Conviction Were Reversed On Appeal.

The District Court imposed the same sentence on all three counts to be served concurrently and wanted the record to be "real clear" that, even if Figueroa obtained a reversal or new trial on the wire fraud conspiracy count, he "would not be entitled to withdraw [his] plea[] nor [get] a different sentence." Sent. Tr. 94, 101-02. Indeed, Figueroa's crimes are grouped under U.S.S.G. § 3D1.2. Even if his wire fraud conspiracy conviction were reversed and he was resentenced on the two counts to which he pled guilty, the District Court still could consider the

kickback scheme on the asbestos removal, air monitoring, and construction contracts as relevant conduct and impose the same sentence on the pleaded counts. *See United States v. Broxmeyer*, 699 F.3d 265, 282 (2d Cir. 2012) ("under the Sentencing Guidelines, an 'offense' includes not only the specific conduct satisfying the elements of the crime of conviction, but all conduct 'relevant' to the crime as detailed in § 1B1.3") (citations omitted).

Figueroa does not dispute this, but argues (Mot. 26-27) that he could get a substantially reduced sentence on both the tried count and the pleaded counts if he prevails on his challenge to the District Court's reliance on Application Note 3(B) to Section 2B1.1 when calculating his offense level. That challenge, however, is clearly meritless. *See* Section II.B.4, *infra*. Thus, he cannot meet the standard for bail pending appeal.

B. There Are No Substantial Issues On Appeal.

Like Yaron and Buchnik, Figueroa raises three issues related to the admission of consensual audio recordings between him and Porath, who was then cooperating with the Government. The recordings were made in June 2005 while the Hospital was conducting an audit that the conspirators were afraid would uncover their conspiracy. The Government sought to admit four substantive excerpts (totaling fourteen minutes) from the tapes on the ground that Figueroa's statements were admissions and co-conspirator statements made in furtherance of the conspiracy.

The Government "laid a proper foundation to admit those tapes into evidence through [FBI Special Agent Fortunato]," 5/17/12 Tr. 6, and the District Court admitted them into evidence after "very scrupulously examin[ing]" the tapes, 5/17/12 Tr. 64-65, and requiring redaction of a potentially testimonial statement by Porath. Tr. 1709-37; GX 1701-01, 1702-01.

These three issues are not "substantial" because the District Court's rulings on them were correct. Moreover, though powerful, the tapes were cumulative of other evidence and only a small fraction of the overwhelming evidence of guilt. *See* June 28 Order at 10 (discussing the "abundance of evidence" supporting the jury's findings of both money and property fraud and honest services fraud). Thus, even if there were error, it had no effect on Figueroa's conviction or sentence.

Like Buchnik, Figueroa also raises an issue related to the computation of his offense level. Mot. 23-27. But this argument ignores probative evidence of loss to the Hospital and does not warrant relief either.

Figueroa also challenges the sufficiency of the evidence supporting his wire fraud conspiracy conviction. Mot. 16-22. But he has failed to carry his "'heavy burden'" of overturning a conviction on this basis, *United States v. Glenn*, 312 F.3d 58, 63 (2d Cir. 2002) (citation omitted), as the evidence presented at trial – including his own admissions on the tapes – was sufficient to prove his guilt beyond a reasonable doubt.

1. Admission of the Porath tapes did not violate the Confrontation Clause.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment's Confrontation Clause bars the introduction of out-of-court testimonial statements in criminal proceedings unless the declarant is unavailable to testify and the defendant previously had the opportunity to cross-examine the witness. Figueroa does not argue that his own statements on the tapes violated *Crawford*. Mot. 9-13. But he claims that Porath's statements did, because Porath "certainly" knew about the recordings. *Id.* at 13.

This argument fails. In *United States v. Burden*, 600 F.3d 204, 225 (2d Cir. 2010), this Court held that a cooperating witness's statements "made to elicit inculpating statements by others present" were not testimonial statements subject to exclusion under *Crawford*. *See also Bierenbaum v. Graham*, 607 F.3d 36, 49 (2d Cir. 2010) (nontestimonial statements "do not implicate the Confrontation Clause"). The District Court "very scrupulously examined" the audio recordings to ensure that all of Porath's statements played to the jury complied with *Burden*. 5/17/12 Tr. 64-65, 82; *id.* at 68 ("There's not a single statement that I think you can point me to by Porath that you say is a testimonial statement that raises a confrontation issue."); Tr. 1709-17, 1737 (requiring a redaction of a potentially testimonial statement by Porath).

Figueroa identifies two statements by Porath that he deems testimonial because they were used to establish "two critically important facts." Mot. 11. "First, Porath made the detailed factual assertion that Santo (Saglimbeni) signed and filled out every one of those reqs (requisitions)." *Id.* "Second, Porath made the detailed, factual assertion that ETAL (an air monitoring company connected to Yaron and Buchnik) and NEA (an asbestos abatement company connected to Yaron and Buchnik) were connected and that this connection was the 'worst part' of conduct that was clearly unlawful." *Id.*

But, as the District Court explained, both of these statements were made to elicit incriminating admissions by Figueroa and were therefore non-testimonial under *Burden*. 5/17/12 Tr. 70-71 (The Court: Porath's statement about the NEA-E.Tal. connection was made to elicit the "incriminating" admission by Figueroa that "'[i]f [the auditors] find out [about the connection], we're done.'"); Tr. 1713-17 (same); Tr. 1726 (The Court: "And Figueora says every one of them. That's the whole point. I looked at this in minute detail. . . . Obviously Mr. Figueroa thinks that [Santo] signed them all. Whether [Santo] signed them all or not is not the import of the statement. . . .").[3]

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[3] Indeed, the transcript of the recording confirms that Porath was simply confirming what Figueroa – who worked directly for Saglimbeni – had already strongly implied. *See* GX 1702-02B, at 101-02 (Figueroa: "[The Hospital's internal auditor is] going through every manifest, every single fucking proposal,

Figueroa argues (Mot. 12-13) that *Burden* is distinguishable because the informant there sought to "capture a criminal transaction" in the act, whereas Porath sought to generate "evidence of past criminal acts." This distinction is untenable, however, because the evidence clearly showed that the conspiracy was ongoing when the recordings were made. *See*, *e.g.*, Tr. 1919-26, 1933 (recordings made in June 2005); GX 1503; Tr. 1323-24, 2067-74 (the conspiracy continued until at least January 2008).

Figueroa also claims (Mot. 13) that *Burden* is distinguishable because Porath made factual assertions. But as the Court made clear in *Burden*, the key is the "purpose" of the comments not their form. 600 F.3d at 225. Because Porath's statements were made for the purpose of "elicit[ing] inculpating statements by others present," and not "accusing," they are nontestimonial. *Id.* (expressly holding that such statements were nontestimonial "even to the extent that [the confidential informant] knew his statements could be used at a future trial").[4]

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every single requisition, everything. Guess who signed every one of those reqs." Porath: "Santo." Figueroa: "Who filled out every one of those reqs?" Porath: "Santo." Figueroa: "Every one of 'em.'").

[4] The *Burden* Court explained that the portion of *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004), relied on by Figueroa (Mot. 13) "was dictum" and not controlling. *Burden*, 600 F.3d at 223-24.

In any event, even if Porath's statements were testimonial, any error in admitting them clearly did not affect Figueroa's conviction or sentence. As the District Court explained, "[t]he incriminating part" of the recordings were not Porath's statements but Figueroa's. 5/17/12 Tr. 70. The rest was not "in dispute" and was "already in front of the jury" through other evidence. *See, e.g.*, Tr. 1714 (The Court: "Then Figueroa says, which is the significance of this exchange, if they find out, it's done. That's the import of the conversation, not whether there was an E.Tal-NEA connection or whether or not they were looking at the E.Tal-NEA connection or whether or not these individuals should be concerned about the disclosure of the E.Tal-NEA connection. Quite frankly I don't think any of that is in dispute. That's already in front of the jury."); *see also* Tr. 451-52, 514, 540, 680-83, 709-11, 714, 975. In addition, the tapes were only a small part of the "abundance of evidence" supporting the charges. June 28 Order at 10.

2. The Government did not use deception to prevent Porath's cross-examination.

Figueroa also argues (Mot. 13) that the Government "utilized deception to prevent the defendants from cross examining Porath." But there was no deception by the Government here. The Government told defendants and the District Court on January 4 that Porath "is no longer cooperating with the Government, and is now in Israel awaiting extradition to the United States to stand trial." Mem. in Supp. of Mot. In Limine Concerning Chain of Custody to Authenticate Consensual

Recordings (Doc. 128-1), at 3, McCahey Decl., Ex. I. That statement was true when made and throughout the duration of the trial here. Defendants never asked for additional information about Porath's extradition status or gave any indication that they wanted to call him as a defense witness until after their convictions, *see* 5/17/12 Tr. 19, 47,[5] so there was no reason for the Government to provide any updates. The District Court expressly found that there was no evidence of bad faith by the Government. June 28 Order at 9.

Moreover, Figueroa is also incorrect (Mot. 14) that Porath was "available" and could have been "cross examined had the court adjourned the trial just two weeks." Porath had been indicted and had a Fifth Amendment right against self-incrimination. *See United States v. Turkish*, 623 F.2d 769, 774 (2d Cir. 1980) (defendant's Sixth Amendment compulsory process right does not "displace" witness's privilege against self-incrimination). Figueroa provides no reason to believe that Porath would, in fact, have answered any questions on the stand.

While Figueroa speculates that, "had Porath been available to be cross examined, it would have been clear that he and Figueroa were not discussing the

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[5] The Government made clear before trial that it never intended to call Porath as its own witness, nor was it required to do so, since Porath's statements were nontestimonial. *See* 5/17/12 Tr. 6 ("The Court: "My ruling is based on the determination that even if Porath had been here in the courtroom at the time they offered the tapes, they had no responsibility, nor necessity, to call Porath in order to admit those tapes into evidence. They laid a proper foundation to admit those tapes into evidence through the agent.").

Artech payments at all, but a completely different arrangement," Mot. 5; 5/17/12 Tr. 24-25 (counsel for Yaron suggesting this), Figueroa does not explain what that "arrangement" is or why it would be exculpatory.[6] Thus, as the District Court found, Figueroa has failed to carry his burden to "proffer any specific testimony that Porath would have given that is exculpatory or favorable to the defense." June 28 Order at 10.[7]

3. Figueroa's statements were admitted against him as party admissions under Federal Rule of Evidence 801(d)(2)(A).

Figueroa challenges the admission of his own statements on the tapes because they "were not in furtherance of the conspiracy." Mot. 15-16 (capitalization altered). But the District Court admitted these statements against him as party admissions under Federal Rule of Evidence 801(d)(2)(A) – *not* as co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E), as they were admitted against the other defendants. Tr. 1747-48. Because his statements on the tapes

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[6] As discussed above (in note 2), the kickbacks were not limited to the Artech payments; Yaron and Buchnik also paid kickbacks to Saglimbeni on the asbestos removal and air monitoring contracts before then.

[7] Figueroa's claim here is more limited than that below – that the Government deliberately delayed Porath's return to the United States. The District Court found that there was no evidence supporting that claim and it was "entirely contravened by Petty's declaration." June 28 Order at 9; *see also* Declaration of Patricia L. Petty, Office of International Affairs, ¶¶ 8-12, 15, McCahey Decl., Ex. L (explaining that the extradition was timely and in accordance with standard DOJ procedures and that no one asked her to delay Porath's extradition).

clearly are admissible against him as party admissions, *see* Mem. in Opp. To Defs.' Mot. in Limine To Preclude The Admission of Consensual Recordings (Doc. 118), at 4, McCahey Decl., Ex. H – and indeed Figueroa never argues to the contrary – it is irrelevant to his appeal whether the statements also would qualify as co-conspirator statements.[8]

4. The District Court properly calculated Figueora's offense level.

In sentencing Yaron and Buchnik, the District Court found that the Hospital had a loss from the fraudulent kickback scheme, but its exact amount could not reasonably be determined from the record. 7/10/12 Tr. 26, 68-69. Accordingly, the District Court used "the gain that resulted from the offense [$2.4 million] as an alternative measure of loss" for purposes of calculating the offense level, as permitted by Application Note 3(B) to United States Sentencing Guideline § 2B1.1: "The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."

The District Court reaffirmed that conclusion with respect to Figueroa. Sent. Tr. 14 (The Court was "still convince[d] that given the nature of the case it's appropriate for guideline purposes to use the amount that was received as

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[8] The Government addressed why Figueroa's statements on the tapes were in furtherance of the conspiracy at pp. 17-19 of its opposition to Buchnik's motion for bail pending appeal.

payments to appropriately calculate a loss amount."). That led to a 16-level increase in Figueroa's offense level. U.S.S.G. § 2B1.1(b)(1).

Figueroa challenges this increase on the ground that "there simply was no evidence of loss." Mot. 24. But, as the District Court explained at Buchnik and Yaron's sentencing, this argument "ignore[s] three pieces of evidence." 7/10/12 Tr. 68-69. First, Saglimbeni "had an incentive to give [contracts] to these defendants without regard to the consideration of whether or not someone would do the same quality of work for a cheaper price." *Id.* at 69. Second, "there's direct evidence on at least one instance of opening a bid to see what the bid was so they could make sure and/or readjust their bid." *Id.* Third, "more importantly," there was "evidence that on at least one occasion, if not more than one occasion, that the defendant submitted a false [rigged] bid . . . in addition to the bid they made," which eliminated the opportunity for a lower bid. *Id.* Figueroa never explains why any of these determinations are clearly erroneous. *See United States v. Lacey*, 699 F.3d 710, 719 (2d Cir. 2012) ("As with any finding of fact, this Court reviews the district court's loss determination for clear error.").

Figueroa's reliance on U.S.S.G. § 2B1.1 n.3(A)(v)(II) is misplaced. Even if applicable, that Note merely provides that the loss "includes" the costs of repeating or correcting the procurement. *Id.* Loss also includes other reasonably foreseeable pecuniary harm, such as loss due to overpayment on a contract, which is what the

District Court found to be the loss here. Because its amount could not reasonably be calculated from the record, the District Court properly relied on Note 3(B) in using the $2.4 million in kickbacks as a reasonable alternative measure.[9]

5. The Government presented sufficient evidence of Figueroa's participation in the wire fraud conspiracy.

"A defendant challenging the sufficiency of the evidence supporting a conviction faces a 'heavy burden.'" *Glenn*, 312 F.3d at 63 (citation omitted). A court may overturn a conviction under Rule 29 "only if, after viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences in [the government's] favor," the court finds that "no rational trier of fact could have concluded that the Government met its burden of proof." *Id.* (citation and internal quotation marks omitted).

At trial, the government presented an "abundance of evidence" regarding the wire fraud conspiracy, June 28 Order at 10, and Figueroa does not dispute either that the conspiracy occurred or that the evidence was sufficient to convict some of his co-conspirators. *See* Figueroa's Mot. to File Oversize Mot. (Dkt. 86) at 1 (claiming that Yaron and Buchnik do not have a "realistic insufficiency of the

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[9] Figueroa is wrong that "[t]he District Court found that for the purposes of calculating restitution to [the Hospital], there was no sufficient basis to make any actual calculation of the loss to the hospital." Mot. 23. The District Court reached that conclusion at the Yaron-Buchnik sentencing. But the Hospital later supplemented the record with evidence of loss in the form of legal expenses and was awarded $603,982 in restitution from Saglimbeni and Figueroa (jointly).

evidence argument"). But Figueroa claims (Mot. 18) that there was insufficient evidence that he was a member of the conspiracy. His argument is unpersuasive.

"To sustain a conspiracy conviction, the government must present some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States v. Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2004) (internal quotation marks omitted). Figueroa's admissions on the tapes directly establish that he knew about the illegal kickback scheme and its hierarchy. *See, e.g.*, GX 1702-01, at 103 (Figueroa: "[Saglimbeni] was writing them req[uisitions] so they could write him checks"); GX 1701-01, at 63 (Figueroa: Yaron said to him "'Tony, I'll give you some advice. Never bite the hand that feeds you.'").

Moreover, the Government presented substantial evidence that Figueroa was deeply involved with the wire fraud conspiracy. In particular, the Government presented evidence that, during the course of the conspiracy, Figueroa was a Building Manager, then a Project Manager, and later, on the recommendation of Saglimbeni, promoted to Director despite weak qualifications for the position. Tr. 922-28. The evidence further showed that Figueroa used these positions to assist Saglimbeni in directing work to his co-conspirators. For example, with respect to the contract to renovate the office space within Saglimbeni's uptown facilities

department – the first job awarded to Oxford after the kickback scheme expanded to include construction contracts in 2002 – Oxford's proposal was addressed to Figueroa, Tr. 999; GX 147-01, Figueroa requested the purchase order, Tr. 999-1000; GX 147-05, and approved Oxford's invoice for payment, Tr. 1003-05; GX 147-08. Additionally, Figueroa, reporting directly to Saglimbeni, acted as the project manager on this and other Oxford jobs. Tr. 1271. The evidence further showed that Figueroa initiated other Oxford requisitions and other approved invoices. Tr. 1005-15; GX 147-07, 147-12, 147-13, 147-14, 147-18. Likewise, he received bills and signed off on invoices submitted by NEA, Tr. 1240-41, and E.Tal, Tr. 1237-38, 1241. These acts are sufficient to establish Figueroa's knowing participation in the conspiracy. *See United States v. Vanwort*, 887 F.2d 375, 386 (2d Cir. 1989) ("A defendant's participation in a single transaction can suffice to sustain a charge of knowing participation in an existing conspiracy.") (citation omitted).

Figueroa notes that "there was absolutely no evidence that Figueroa received a single dollar as a result of *this scheme*." Mot. 18 (emphasis added).[10] Direct benefit, however, is not an element of wire fraud conspiracy. In any event, it was a

[10] Figueroa admitted to accepting kickbacks on the HVAC contracts as part of the pleaded mail fraud counts. Plea Tr. 16-22.

reasonable inference from the evidence here that Figueroa did personally benefit in terms of promotions.

Figueroa suggests (Mot. 20) that he was convicted merely by "association." But the District Court specifically instructed the jury that it could not convict any defendant, including Figueroa, unless it found that the Government had proved beyond a reasonable doubt that each defendant participated in the conspiracy with knowledge of its unlawful purpose and with the specific intent in furthering its objective, Tr. 2518, and that "mere knowledge or acquiescence without participation in the unlawful plan [was] not sufficient," Tr. 2520. This Court "must presume that the jury followed the court's instructions." *United States v. Joyner*, 201 F.3d 61, 69 (2d Cir. 2000).

Finally, Figueroa makes various efforts to explain away his own admissions on the tapes and the other evidence against him. Mot. 18-22. But his arguments are unconvincing and inconsistent with the standard of review on a Rule 29 motion. *See Glenn*, 312 F.3d at 63 (the Court should "draw[] all reasonable inferences in [the Government's] favor"); *see also United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011) (the Court should defer to the determination of the jury if there are any conflicts of testimony). Figueroa should not be released on bail pending appeal.

CONCLUSION

The Court should deny Figueroa's motion for release pending appeal.

Respectfully submitted,

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March 21, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point Times New Roman font.

March 21, 2013 /s/ Nickolai G. Levin
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CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on March 21, 2013, I electronically filed the foregoing OPPOSITION OF APPELLEE UNITED STATES OF AMERICA TO EMILIO A/K/A "TONY" FIGUEROA'S MOTION FOR RELEASE PENDING APPEAL with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I also sent three copies to the Clerk of the Court by FedEx Overnight Delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

March 21, 2013

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