IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 4:15-cr-300**
	)	
THEODORE E. SUHL	)	
	)	

UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

On July 21, 2016, a federal jury found the defendant guilty of four counts of corruption charges for paying numerous bribes to the second-highest ranking official at the largest state agency in Arkansas, all tied to millions of dollars in Medicaid payouts to the defendant's companies. On October 27, 2016, this Court sentenced the defendant to 84 months on each of counts two, four, and five and 60 months on count six, all to run concurrently, and ordered the defendant to report to serve his sentence on January 2, 2017. The defendant now moves for release pending appeal based on an assortment of alleged errors, all of which have been previously addressed and correctly decided by this Court and none of which present a substantial question of law. The defendant fails to overcome the presumption that he begin serving his sentence, and the Court should deny his motion.

I. RELEASE PENDING APPEAL IS APPROPRIATE ONLY IN LIMITED CIRCUMSTANCES.

The Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq.*, creates a statutory presumption that a convicted defendant who has been sentenced to a term of imprisonment should be detained pending appeal. Under the statute, bail pending appeal is the exception, not the rule. *See United States v. Powell*, 761 F.2d 1227, 1232 (8th Cir. 1985). Release is only appropriate where the defendant has carried his burden to demonstrate (1) by clear and convincing evidence, that he is

not likely to flee or pose a danger to the safety of another 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.[1] 18 U.S.C. § 3143(b).

A "substantial question" is one that is "'a close question'—not 'simply that reasonable judges could differ.'" *United States v. Marshall*, 78 F.3d 365, 366 (8th Cir. 1996) (quoting *Powell*, 761 F.2d at 1233-34). Moreover, the issue raised must be more than simply non-frivolous or "fairly debatable." *Powell*, 761 F.2d at 1234. If the defendant has demonstrated that his appeal raises a substantial question, he must then show that the issue is "so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor." *Id*. Reversal or a new trial must be more probable than not for every count for which the defendant received a sentence of imprisonment. *Powell*, 761 F.2d at 1233.

Although the defendant claims that every ground raised in his Motion for New Trial, ECF No. 132, warrants his continued release pending appeal, he primarily focuses on four issues: (1) the propriety of the jury instructions on the quid pro quo requirement of bribery; (2) the sufficiency of the "official act" allegations in the indictment; (3) the cross-examination of the government's cooperating witness, Phillip Carter; and (4) the exclusion of evidence of the defendant's and his family's charitable donations. None of these issues, or any others in the defendant's motion for a new trial, raise substantial issues likely to result in reversal or a new trial. Accordingly, the Court

[1] The statute also contemplates release where, if decided in favor of the defendant, the substantial question is likely to result in a sentence that does not include imprisonment or a reduced sentence of imprisonment less than the expected duration of the appeal. 18 U.S.C. § 3143(b)(2)(B)(iii) & (iv). Here, the defendant does not claim that any of the issues he anticipates raising on appeal is likely to result in either of these outcomes.

should deny the defendant's motion and he should begin serving his sentence on January 2, 2017, as ordered by the Court.

II. NONE OF THE ISSUES THAT THE DEFENDANT RAISES RENDER RELEASE PENDING APPEAL APPROPRIATE IN THIS CASE.

None of the defendant's arguments meaningfully address whether any of the issues that he raises present a "close question." Instead, the defendant merely argues the merits of each issue and then claims that, should his position prevail on appeal, he will be entitled to a new trial or acquittal. Not only is the defendant wrong on this latter point, but the defendant has not met his burden of showing that any issue he raises poses a close question. Accordingly, the defendant's motion for release pending appeal should be denied.

A. The Propriety of the Court's Bribery Instructions is Not a Close Question.

The defendant's challenge to the Court's instructions on honest services wire fraud and federal funds bribery is based entirely on the defendant's insistence that the exact phrase "in exchange for" be included in any instruction on the quid pro quo requirement. But the jury instructions did, in fact, reference an "exchange." *See* Jury Instructions at 18, ECF No. 123 ("The bribery scheme may involve a 'stream of benefits' offered or paid *in exchange for* some official action."); *id.* at 20 ("You may consider all the evidence . . . to determine whether Mr. Suhl intended or solicited *an exchange of* money for official acts."). In any event, the defendant fails to recognize that he "is not entitled to a particularly worded instruction." *United States v. Wright*, 246 F.3d 1123, 1128 (8th Cir. 2001). Instead, "[i]f the instructions, taken as a whole, fairly and adequately submitted the issues to the jury," the court of appeals will affirm. *United States v. Lalley*, 257 F.3d 751, 755 (8th Cir. 2001).

When comparing bribery and illegal gratuities, the Supreme Court in *Sun-Diamond*—the very case the defendant relies on to define the quid pro quo requirement of bribery, *see* Mot. at 5,

ECF No. 144—pointed out that "[t]he distinguishing feature of each crime is its intent element" and equated the "in exchange for" language with the "intent to influence" language used elsewhere in this Court's instructions. *See United States v. Sun-Diamond*, 526 U.S. 398, 405 (1999) ("Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act . . . . *In other words*, for bribery there must be a quid pro quo—a specific intent to give or receive something in exchange for an official act." (emphasis added)); *see also United States v. McDonnell*, 136 S.Ct. 2355, 2365 (2016) (defining bribery under 18 U.S.C. § 201(b) as "'a public official . . . corruptly' . . . agree[ing] 'to receive or accept anything of value' in return for *'being influenced* in the performance of any official act'"(quoting § 201) (emphasis added)).

The Court's instructions clearly articulated the quid pro quo requirement. The instructions described the charged scheme to defraud as follows: "Mr. Suhl made several payments or offered payments *with the intent that Mr. Jones . . . would take official actions* that would benefit Mr. Suhl and his businesses." Jury Instructions at 17, ECF No. 123 (emphasis added). The Court instructed the jury that "[i]t is sufficient if Mr. Suhl knew that the money was offered *with the intent to induce the performance of an official act* by Mr. Jones" and that "[t]he phrase 'scheme to defraud' as used in this instruction means any plan or course of action intended to deceive or cheat another out of the right to honest services where a bribe is paid *with the intent that Mr. Jones take official action* or an official act." *Id.* at 18 (emphasis added). In its instruction on official acts, the Court charged that "Counts 2, 3, and 4 require the Prosecution to prove beyond a reasonable doubt that Mr. Suhl gave Steven Jones something of value *with the intent to influence an official act.*" *Id.* at 20 (emphasis added). And in its instructions on federal funds bribery, 18 U.S.C. § 666, the Court informed the jury that "[i]t is sufficient for the Prosecution to allege *intent to influence* a general course of conduct" and defined "corruptly" as acting "*with the intent* that something of value be

given or offered *to influence* an agent of the state in connection with the agent's official duties." *Id.* at 21 (emphasis added). The instructions tracked the language of: (1) *Sun-Diamond*; (2) the Eighth Circuit Pattern Instructions, *compare* Jury Instructions 14 & 16, ECF No. 123 *with* Eighth Circuit Manual of Model Jury Instructions 6.18.201A, *cmt.*, 6.18.666(C), & 6.18.1346; and (3) the federal bribery statute, 18 U.S.C. § 201(b)—which also requires a quid pro quo, *see* 18 U.S.C. § 201(b) (criminalizing the corrupt giving, offering, or promise of things of value "with intent to influence any official act").[2]

The defendant identifies only one out-of-circuit case that he claims demonstrates the error of the instructions. *Id.* at 6 n.18 (citing *United States v. Jennings*, 160 F.3d 1006, 1021 (4th Cir. 1998)). Yet, he ignores a more recent case from that same circuit in which the court "emphasize[d] the material distinction between a bribery offense and an illegal gratuity offense," pointing out that "an illegal gratuity does not require an *intent to influence* or be influenced," while a bribery offense does. *United States v. Jefferson*, 674 F.3d 332, 358 (4th Cir. 2012) (emphasis added). The instructions in this case repeatedly informed the jury that it could convict only if it found the defendant paid Jones with the intent to influence his official acts. The defendant has not met his burden to demonstrate a close question as to any deficiency in the bribery instructions.

[2] Bribery instructions have been upheld frequently where, rather than contain the "in exchange for" language urged by the defendant, they instead contain the "intent to influence" language approved in *Sun-Diamond* and used by the Court in this case. *See, e.g., United States v. Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009) (finding a quid pro quo instruction that did not use "in exchange for" sufficient where it required a finding of "a corrupt agreement for [bribe payor] to provide the [public official] with things of value specifically with the *intent to influence* the action or judgment of the [public official]"); *United States v. Alfisi*, 308 F.3d 144, 149-50 (2d Cir. 2002) (finding instruction on quid pro quo element sufficient where court instructed that bribery required paying money "wilfully [sic], corruptly and with *intent to influence* an official act."); *United States v. Tomblin*, 46 F.3d 1369, 1379-80 (5th Cir. 1995) (finding the court properly instructed on the necessary intent where it instructed the jury to find the payor promised something of value "with *intent to influence* an official act").

B. The Supreme Court's Decision in *United States v. McDonnell* Does Not Raise a Substantial Question Likely to Result in a New Trial or Acquittal on All Counts.

The defendant makes two arguments with respect to "official acts" under *United States v. McDonnell*. First, he claims that the indictment's "official act" allegations did not meet the definition articulated by the Supreme Court in *McDonnell*. Mot. at 9-10, ECF No. 144. Second, he claims that the indictment was constructively amended to allow the jury to convict on a different theory of "official acts" than that which was charged. *Id.* at 8-9. The defendant fails to acknowledge that the exact language of *McDonnell* was incorporated into the "official act" instruction, and fails to identify how the instructions allowed for a finding of guilt on different elements than those charged.

As an initial matter, the defendant does not demonstrate that his claims as to "official acts" would entitle him to a new trial or acquittal on *all* counts for which he was sentenced to a term of imprisonment—a requirement for release pending appeal, *see Powell*, 761 F.2d at 1233. The defendant was sentenced to a term of imprisonment on two counts of honest services fraud, 18 U.S.C. § 1343, one count of federal funds bribery, 18 U.S.C. § 666, and one count of violating the Travel Act, 18 U.S.C. § 1952. In claiming that his conviction is based on some deficiency in the "official act" allegations of the indictment, the defendant fails to acknowledge that under Section 666, the government must establish only that: (1) the bribe recipient was an agent of a state agency; (2) the defendant corruptly gave something of value to the agent in connection with business; (3) the business involved something of value of $5,000 or more, and (4) the involved agency received benefits in excess of $10,000 under a federal program in the one-year period surrounding the bribe. *See* Jury Instructions at 21, ECF No. 123; Eighth Circuit Manual of Model Criminal Jury Instructions § 6.18.666C (2014); *see also*, *e.g.*, *United States v. Garrido*, 713 F.3d 985, 1001 (9th Cir. 2013) ("Section 666, on the other hand, makes no mention of an 'official act' or a requirement

that anything be given in exchange or return for an official act. Section 666 does not define or even use the term 'official act.'"). The defendant does not even mention Section 666, or his related conviction under Section 1952, in his arguments as to how *McDonnell* may affect the outcome of this case. *See* Mot. at 7-10, ECF No. 144. Assuming for the sake of argument that a court of appeals would grant the defendant relief on his "official act" claims, it would not affect his sentence on counts five and six. Thus, he is not entitled to release pending appeal.

As to the merits of the defendant's argument that the official acts alleged in the indictment do not constitute official acts as defined by the Supreme Court in *McDonnell*, the defendant entirely ignores this Court's "official acts" instruction. The instruction closely tracks the Supreme Court's opinion in *McDonnell* as well as the language requested by the defendant in his proposed instructions. *Compare* Jury Instructions at 20, ECF No. 123, *with McDonnell*, 136 S.Ct. at 2373-74 *and* Def. Proposed Jury Instructions at 32, ECF No. 97. The jury was properly instructed and the jury determined that the defendant sought to influence "official acts"; *McDonnell* requires nothing more. *See McDonnell*, 136 S.Ct. at 2371 ("It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*."). The defendant has not shown that there is any question at all, let alone a close question as to whether "official acts" were sufficiently pled, proven, and defined for the jury.[3]

[3] The case on which the defendant relies to argue a substantial question exists, *United States v. Silver*, is not on point. *See* Mot. at 10, ECF No. 144. The court in *Silver* found that the instruction on "official acts" in that case raised a substantial question under 18 U.S.C. § 3143(b). Crim. No. 15-cr-093, 2016 WL 4472929, at *8-10 (S.D.N.Y. Aug. 25, 2016). The defendant omits the critical fact, however, that the defendant in *Silver* was convicted in November 2015, almost eight months before the Supreme Court's decision in *McDonnell*. *Id.* at *1. The Court in that case found the jury instructions on official acts raised a substantial question because, unlike the instructions here, those instructions did not include the specific language endorsed in *McDonnell*. *Id.* at 8. Instead the instructions only defined "official action" as including "any action taken or to

The defendant also claims that the indictment was constructively amended. The defendant's argument does not raise a close question because it is based on an erroneous understanding of constructive amendments. *United States v. Narog*, the only case the defendant cites in which a court evaluated a constructive amendment, demonstrates why there is no close question here. In that case, the defendants were convicted of several controlled substance offenses in which the indictment specifically identified the controlled substance at issue as methamphetamine. *Narog*, 372 F.3d 1243, 1246 (11th Cir. 2004). The Eleventh Circuit found a constructive amendment where the court's instructions permitted the jury to find any controlled substance as a basis for conviction. *Id.* at 1248. The court emphasized that the inquiry, when faced with a constructive amendment claim, is whether "an indictment-containing *both* the broad language of the statutory crime and additional language seemingly narrowing the charged crime to a subset of the statutory crime-is unconstitutionally amended when that narrowing language is removed." *Id.* at 1248. Here, the jury instructions were consistent with the statutory elements alleged in the indictment—there was no discrepancy. If anything, given the defendant's claims that the "official acts" alleged in the indictment were overly broad, the Court's instructions narrowed the grounds on which the jury could convict by properly defining "official act," an instruction with which the defendant has offered no dispute. The defendant has failed to meet his burden of showing a close question.

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be taken under color of official authority." *Id.* at 7. *Silver* thus only affirms the correctness of the Court's "official act" instruction in this case, which did track *McDonnell*.

C. The Limitation on the Defendant's Cross-Examination of Carter Does Not Present a Close Question.

There is similarly no close question presented by the court's evidentiary rulings on the cross-examination of Phillip Carter.[4] The Court's ruling did not violate the defendant's rights under the Confrontation Clause. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original). The defendant's proposed cross-examination of the factual details underlying Carter's prior conviction was improper under the Federal Rules of Evidence. The Court's evidentiary rulings on this topic were correct and do not provide a basis for the Eighth Circuit to overturn the conviction.

The government filed a motion in limine to preclude any improper cross-examination of one of its witnesses, Phillip Carter, ECF No. 71, which the Court granted, ECF No. 94. The cross-examination that the defendant complains was improperly excluded would have been impermissible under Rules 608(b) and 609. Under Rule 609(a)(1)(A), the defendant could elicit that Carter was convicted for conspiracy to commit a Travel Act violation, however the defendant could not elicit the factual details surrounding the conviction. Although it is allowable to impeach a witness by inquiring about his prior convictions under Rule 609, "the scope of such examination is strictly limited in order to avoid the confusion resulting from the trial of collateral issues, and also to avoid unfairness to the witness." *United States v. Roenigk*, 810 F.2d 809, 814 (8th Cir.

[4] The defendant's attempt to use the Court's observation that the government was "taking a chance" because the Court "might be wrong on that" is misleading (Trial Tr. 197:1-7). This observation regarded the government's objection to the defendant's attempt to cross examine Special Agent Phillip Spainhour about Carter's prior conviction, not Carter himself—the matter about which the defendant complains in this motion. The defendant conflates two separate issues to manufacture a close question where none exists.

1987); *United States v. Street*, 548 F.3d 618, 627 (8th Cir. 2008) (holding that allowing a defendant to cross-examine the government's witness about whether the witness perjured himself during the trial that formed the basis of the witness's prior conviction would create a confusing, collateral re-litigation of the witness's prior conviction).

The defendant claims that the Court should not have enforced Rules 608 and 609 because his proposed cross-examination was necessary to show the full extent of the benefit that Carter received from his plea agreement and cooperation with the government and Carter's resulting bias in favor of the government. The defendant, however, was permitted to cross-examine Carter at length on his cooperation with the government in exchange for the possibility of a reduced sentence. Trial Tr. 412: 9-25 and 413: 1-20. This afforded the defendant a full and fair opportunity to convince the jury of Carter's potential bias and to impeach his credibility. Cross-examining Carter on additional factual details of his plea agreement and underlying sentence would have been cumulative to the thorough cross-examination for bias that the Court allowed the defendant to conduct. *See United States v. Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996) ("Not every limitation on cross-examination violates the Confrontation Clause. Rather violations are found primarily where defendants have been given *no* realistic opportunity to ferret out a potential source of bias and are not found so long as defense counsel is able to elicit enough information to allow a discriminating appraisal of the witness's motives and bias." (internal quotation marks and citations omitted (emphasis in original))). Thus, the exclusion of the additional impeachment evidence was proper, and the defendant has failed to demonstrate that this issue presents a close question.

In addition, the excluded evidence that the defendant cites as critical to the impeachment of Carter was the asserted benefit to Carter of pleading guilty to only one charge for his election offense when he potentially faced multiple charges. Mot. at 11, ECF No. 144. But the

government's motion in limine only sought to preclude admission of the facts underlying Carter's conviction. See Mot. in Limine 2-3, ECF No. 71 ("Thus, although the defendant can elicit from Mr. Carter that he was convicted for conspiracy to commit a Travel Act violation, the defendant should not be permitted to go into the factual details of Mr. Carter's crime."). The defense noted that the number of potential charges was relevant to Carter's bias in its response to the government's motion in limine, Response at 3, ECF No. 87, but the defense never sought to elicit from Carter the number of charges that he potentially faced, and the Court's order on the motion in limine did not address that specific issue. Order at 1, ECF No. 94. By failing to either cross-examine Carter on the issue or raise the issue with the Court, the defendant waived his claim that such evidence was improperly excluded.

Further, allowing the defendant to elicit the number of violations that underpinned Carter's conviction for violating the Travel Act would have caused confusion and misled the jury. While it may sound impressive to state that the government allowed Carter to plead to only one count of a Travel Act violation when he had committed an additional fourteen violations, in reality the Sentencing Guidelines accounted for all of Carter's relevant conduct regardless of the number of counts to which Carter pleaded guilty. *See* U.S.S.G. § 1B1.3(a)(1)(A). The nuances of federal sentencing could easily confuse and mislead a jury, and therefore the Court properly limited this line of questioning. *See United States v. Rosa*, 11 F.3d 315, 336 (2d Cir. 1993) ("The court permitted cross-examination of those witnesses as to their plea agreements, the statutory maximum sentences they faced, and the benefits they hoped to gain from cooperation. The court was well within its discretion in ruling that the vagaries of Guidelines calculations were not a proper subject for cross-examination."). The Court's exclusion of the additional cross-examination was proper under Rule 403 and well within its discretion given all of the impeachment evidence that was

admitted. *United States v. Schropp*, 829 F.3d 998, 1004 (8th Cir. 2016) (stating that rulings on the admissibility of evidence are reviewed on appeal "for a clear and prejudicial abuse of discretion").

Even assuming for the sake of argument that the limitation on this line of cross-examination affected the defendant's rights under the Confrontation Clause, the defendant does not demonstrate why a new trial is probable, thus failing to meet his burden under Section 3143. Although an appellate court reviews Confrontation Clause objections to the admission of evidence *de novo*, *United States v. Dale*, 614 F.3d 942, 955 (8th Cir. 2010), a violation of the Confrontation Clause is subject to *Chapman* harmless error analysis. *Barrett v. Acevedo*, 169 F.3d 1155, 1164 (8th Cir. 1999) ("In the context of a Confrontation Clause violation, to determine whether error is harmless beyond a reasonable doubt, we must examine the other evidence adduced at trial."). The defendant does not even cite this standard, let alone attempt to demonstrate why any error under the Confrontation Clause was not harmless beyond a reasonable doubt.

Even if the defendant had engaged with the requisite standard, he still would have been unable to meet his burden. The Eighth Circuit has outlined factors to be considered in analyzing whether a Confrontation Clause violation error is harmless beyond a reasonable doubt: (1) the importance of the witness's testimony to the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradicting testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *See Barrett* 169 F.3d at 1164. A key factor in determining whether a defendant's right of confrontation has been violated is whether the defendant had other means at his disposal to obtain the effect that the excluded examination would have allegedly established. *See United States v. Campbell*, 845 F.2d 782, 788 (8th Cir.), *cert. denied*, 488 U.S. 965 (1988).

Starting with the last two *Barrett* factors first—the presence of corroborating testimony of the witness on material points and the strength of the overall case—reveals that the modest limitation on the cross-examination of Carter was harmless. The defendant in this case was caught on a wiretap arranging the final solicitation of Steven Jones with Phillip Carter. The jury heard the defendant on recorded phone calls request that Carter have Jones take official actions. The jury observed the surveillance photographs and video recordings that showed the defendant meet with Carter and Jones at a restaurant. And the jury had the opportunity to see firsthand the secretive manner in which the defendant passed Carter the bribe payment. This unimpeachable audio and video evidence corroborated Carter's testimony. The strength of this evidence renders harmless the limit placed on the defendant's cross-examination of Carter as to additional facts underlying his conviction.

The other *Barrett* factors also demonstrate that the exclusion of additional cross-examination of Carter does not constitute a close question. While Carter's testimony was an important part of the government's case, the testimony merely amplified the defendant's own recorded statements, which demonstrated his corrupt intent. Moreover, because Carter was impeached as to his vote buying conviction, any additional cross-examination on this subject would have been cumulative. The jury heard, despite the court's order *in limine*, that Carter's conviction under the Travel Act involved a "conspiracy to bribe absentee voters," and that Carter was "an election vulture."[5] The defendant cited the facts underlying Carter's Travel Act conviction in closing, Trial Tr. 945:4-11, and argued that Carter was not credible because of the benefits that

[5] Jones went on to state that Carter was "one of the guys who would come to people like me who were in public office and try to get us to pay him money to get votes. And I never hired him because I knew that he always worked for both candidates in the race, opposing candidates, and so I didn't really care for that. And he would also say that he could guarantee absentee votes." (Trial Tr. 500: 6-12).

he was seeking from the government: "his hope is that he will be released from jail immediately for his testimony in this case," Trial Tr. 945: 15-18. The defendant cross-examined Carter fully about his hope to get a sentencing reduction for his cooperation. Trial Tr. 412:9-25 & 413:1-20. Thus, the defendant was able to cross-examine Carter on the exact basis of bias that the defendant now argues he was prevented from addressing—bias in favor of the government due to leniency. The Court's limiting of Carter's cross-examination does not present a close question and even if the Eighth Circuit ruled that additional cross-examination was improperly excluded, any error would be harmless beyond a reasonable doubt.

D. The Exclusion of Charitable Giving Evidence Does Not Present a Close Question: Some Such Evidence was Admitted; Any Additional Evidence was not Relevant.

The defendant claims that it was error to exclude evidence that "Suhl and his family had been donating to the [15th St. COGIC] for years, and those donations were typical of the Suhls' charitable habits, reflected in over 250 donations to charitable Christian causes." Mot. at 15, ECF No. 144. Defendant contends that the evidence of his and his family's history of charitable giving was relevant to the issue of intent—whether he intended the checks charged in the Indictment to be bona fide donations or bribes. This argument fails to demonstrate a substantial question of law. First, much evidence of the defendant's and his family's donations to 15th St. COGIC and other ministries was admitted and the defendant argued that such evidence proved his good faith—any additional evidence was cumulative and was properly excluded. Second, evidence of donations made by anyone other than the defendant, including his family members, is not relevant to the defendant's own intent in making purported donations.

Rulings on the admissibility of evidence are reviewed on appeal "for a clear and prejudicial abuse of discretion." *United States v. Schropp*, 829 F.3d 998, 1004 (8th Cir. 2016). To be admissible, evidence must be relevant. Fed. R. Evid. 402. Evidence is relevant if "it has any

tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401. Even where relevant evidence is incorrectly excluded, the exclusion is harmless if the defendant "had an adequate opportunity to present [his] theory of the case." *Vulcan Hart Corp. v. N.L.R.B.*, 718 F.2d 269, 274 (8th Cir. 1983).

The Court admitted evidence of approximately seventy payments and donations from the defendant and his family to 15th St. COGIC and Pastor Bennett, spanning roughly five years leading up to the charged scheme. *See* Gov. Trial Exs. 54 & 55. The Court also allowed the defendant to testify that his "family g[a]ve money to the [15th St. COGIC]," and "to Pastor John Bennett," and that his family's "mission . . . was to identify other ministries that needed help around the country and in a couple other countries at the time." Trial Tr. 710:9-11, 25; 711:1-7; 715:23-25. This evidence allowed the defendant to argue the exact defense that he now claims he was precluded from presenting: "that Ted Suhl was a generous man who gave a lot of money to Christian causes, and these were donations to the 15th St. Church of God in Christ, which they supported for years, and not bribe payments. . . . [The Suhl Family] supported the church with undisputed charitable donations that are exactly that, charitable donations." Trial Tr. 922:25–923:3; 924:1, 16-17. Because the defendant did present evidence of his and his family's donations to 15th St. COGIC and other Christian causes, any conceivable error in the exclusion of additional charitable-donation evidence is harmless. *See Hill v. Equitable Trust Co.*, 851 F.2d 691, 699-700 (3d Cir. 1988) ("Even if it were established that the plaintiffs' additional evidence had been improperly excluded, we believe that the district court's refusal to admit the evidence would have been harmless error in light of the other testimony of record establishing much the same factual scenario."). The Court's exclusion of additional charitable acts evidence does not present a substantial question of law.

Even assuming that the admission of some evidence of the defendant's and his family's charitable donations does not render the exclusion of additional evidence harmless, the defendant's parents' past charitable contributions have no bearing on the defendant's intent. Any argument to the contrary is analogous to arguing that the defendant intended the charged payments as bribes because his father paid bribes. Such evidence—of a family member's prior acts—is not relevant to the defendant's intent. The actions of a friend, family member, or other third party are simply not admissible to show a defendant's intent when taking a similar, but wholly separate action. It was not error, much less an abuse of discretion, to exclude the evidence of the defendant's family's prior donations. This asserted evidentiary error is not a close question.

As to the defendant's own prior donations to organizations other than 15th St. COGIC, the only purpose of presenting such evidence would have been to prove his propensity for making charitable contributions, which is improper and was properly prohibited. The defendant's prior charitable giving to entities other than 15th Street COGIC were made under entirely different circumstances than those charged in this case: there was no evidence proffered suggesting that the defendant's past contributions to charities were hand delivered to a third party at a meeting between the defendant and a public official during which the defendant requested official acts to benefit his business. Evidence that the defendant made charitable contributions to other entities, under different circumstances, is nothing more than properly excluded character and propensity evidence. *See United States v. Dimora*, 750 F.3d 619, 630 (6th Cir. 2014) (holding evidence that defendant occasionally helped constituents *without* receiving bribes was properly excluded because conduct "in situations unrelated to the charges" was not probative of intent, and "prior 'good acts' generally may not be used to show a predisposition not to commit crimes"); *United States v. Ellisor*, 522 F.3d 1255, 1270 (11th Cir. 2008) (holding evidence of defendant's

"purportedly legitimate business activities" was properly excluded because "evidence of good conduct is not admissible to negate criminal intent"). The evidence was properly excluded.

The defendant also claims that evidence of his and his family's charitable donations was admissible habit evidence under Federal Rule of Evidence 406. Mtn. for Release Pending Appeal at 17, ECF No. 144-1. Past charitable donations, especially those of family members, cannot seriously be construed as evidence of the defendant's "semi-automatic conduct in response to a particular kind of situation." *United States v. Al Kassar*, 582 F. Supp. 2d 498, 501 (S.D.N.Y. 2008). "The defense's argument to the contrary flies in the face of both common sense and well-established evidentiary rules of admissibility." *Id.* The exclusion of additional charitable giving evidence does not present a close question.

E. None of the Other Issues Raised in the Defendant's Motion for a New Trial Raise Substantial Questions.

Finally, the defendant argues that "[e]ach of the errors identified in [the Motion for New Trial] individually or cumulatively requires the granting of a new trial." Mtn. for Release Pending Appeal at 19, ECF No. 144. In addition to the arguments addressed above, in his Motion for New Trial the defendant: (1) claims that it was error to exclude evidence that Carter allegedly solicited prostitution and discussed illegal conduct on recorded calls; (2) claims that the Court's instructions on corrupt intent and official acts were erroneous; (3) argues that references to the defendant's overall wealth prejudiced him; (4) contends that the Court erred in excluding expert testimony on the Arkansas Freedom of Information Act; (5) and alleges additional error for failure to provide requested defense instructions to the jury. These additional claims fail to present substantial questions of law and demonstrate no error, much less error that would warrant reversal on all counts. The defendant's motion for release pending appeal should be denied.

III. Conclusion

The defendant's motion for release pending appeal raises a host of issues that have all been previously addressed and correctly decided. The defendant alleges numerous errors and strives to portray them as constitutionally significant under *McDonnell* or otherwise. At bottom, the defendant's claims are attempts to re-litigate basic evidentiary and instructional rulings that were correctly decided in the first instance. The defendant fails to demonstrate close questions or a likelihood of reversal on appeal. The government respectfully requests that the Court deny the defendant's Motion for Release Pending Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on today's date I electronically filed the foregoing using the CM/ECF system which will send notification of the filing to counsel of record for the defendant.

/s/ John D. Keller
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