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 9 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

No. CR 17-53-JLS

13 Plaintiff,

OPPOSITION TO MOTION FOR BAIL
PENDING APPEAL

14 v.

15 DAVID HOBART PAYNE,

16 Defendant.

17
 18 Plaintiff United States of America, by and through its counsel
 19 of record, the United States Attorney for the Central District of
 20 California and Assistant United States Attorney Rajesh R. Srinivasan,
 21 hereby files its opposition to defendant David Hobart Payne's motion
 22 for bail pending appeal (Dkt. 239 ("Mot.")).

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1 This opposition is based upon the attached memorandum of points
2 and authorities, the files and records in this case, and such further
3 evidence and argument as the Court may permit.

4 Dated: November 10, 2023

Respectfully submitted,

5 E. MARTIN ESTRADA
6 United States Attorney

7 MACK E. JENKINS
8 Assistant United States Attorney
9 Chief, Criminal Division

10 /s/ Rajesh R. Srinivasan
11 RAJESH R. SRINIVASAN
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14 UNITED STATES OF AMERICA

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Court should deny defendant's motion for bail pending
4 appeal. Defendant must establish substantial questions that would
5 result in reversal or a new trial on all counts of conviction. But
6 defendant has failed to identify a substantial question as to even
7 one of them. He is thus ineligible for bail.

8 **II. STATEMENT OF FACTS**

9 Defendant is an orthopedic surgeon who performed or referred
10 patients for surgeries at Pacific Hospital in exchange for bribes
11 totaling over \$300,000. (Dkt. 130 at 3, 194 at 2.) To avoid
12 detection, these bribes would often be disguised as legitimate
13 business transactions or contracts. (Dkt. 130 at 3, 194 at 2.)
14 Defendant was ultimately indicted for this conduct. (Dkt. 10.)

15 After granting nine trial continuances spanning four and a half
16 years, the Court set trial for January 3, 2023. (Dkt. 142 at 2.)
17 Defendant, however, could not proceed on that date because of a
18 medical condition. (Id.) So the Court continued trial to February
19 14, 2023. (Dkt. 134.)

20 Just weeks before the new trial date, defendant asked for
21 another continuance. He did not argue that he was physically unable
22 to stand trial but merely cited his surgeon's belief that he
23 "appear[ed] to have developed PTSD secondary to his physical ailment"
24 and that he should "postpon[e] . . . participation in any legal
25 proceeding until he has been cleared by a psychiatrist." (Dkt. 142
26 at 3.) The Court rejected these arguments but granted a continuance
27 to February 21 to accommodate defense counsel's schedule. (Id.)

1 Defendant then moved to reconsider, this time submitting
2 statements from a psychiatrist who cited defendant's "fatigue,
3 tiredness, and brain fogginess" and his belief that defendant "should
4 be excused from trial until June . . . due to reasonable medical
5 necessity. (Dkt. 154 at 2 (cleaned up).) But defendant conceded
6 that he was mentally competent to stand trial. (Id.) The Court
7 declined to grant a twelfth continuance. (Id. at 3.)

8 At trial, defendant testified that he never received bribes or
9 kickbacks and that an incriminating conversation with a potential
10 bribe payer was part of a secret effort to discover and root out
11 corruption in the healthcare industry. (Dkt. 194 at 2-3.) The jury
12 rejected defendant's testimony and convicted him of one count of
13 conspiracy, two counts of honest services fraud, and one count of use
14 of an interstate facility in aid of unlawful activity in violation of
15 the Travel Act. (Dkt. 176, 213.) The Court ordered concurrent
16 sentences of 33 months on each of the four counts. (Dkt. 213.)

17 **III. ARGUMENT**

18 **A. The Law Governing Bail Pending Appeal**

19 Congress enacted the Bail Reform Act of 1984, 18 U.S.C. § 3143,
20 to "toughen the law" and to "make[] it considerably more difficult
21 for a defendant to be released on bail pending appeal." United
22 States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985). The act
23 "establishes a presumption against the grant of such bail." United
24 States v. Williams, 822 F.2d 512, 517 (5th Cir. 1987).

25 To overcome this presumption, defendant bears the burden to show
26 "(1) that the defendant is not likely to flee or pose a danger to the
27 safety of any other person in the community if released; (2) that the
28 appeal is not for purpose of delay; (3) that the appeal raises a

1 substantial question of law or fact; and (4) that if that substantial
2 question is determined favorably to defendant on appeal, that
3 decision is likely to result in reversal or an order for a new trial
4 of all counts on which imprisonment has been imposed." Handy, 761
5 F.2d at 1283.

6 A "substantial question" refers to a legal issue that is "fairly
7 debatable" or "fairly doubtful" and is "of more substance than would
8 be necessary to a finding that it was not frivolous." Id. at 1283
9 (cleaned up). "Fairly debatable" questions are those that are novel
10 or not readily answerable or that pose issues "debatable among
11 jurists of reason." Id. at 1281-82 (cleaned up). While the standard
12 does not require that reversal be more likely than not, id. at 1280-
13 81, it is not so toothless that it eviscerates Congress's intent to
14 "tighten[] the standards for bail pending appeal," id. at 1283.

15 **B. Defendant Has Not Identified Substantial Questions.**

16 While the government does not currently dispute that defendant
17 is not a flight risk or danger to the community, defendant has not
18 met his burden of presenting "substantial question[s]" that would
19 "result in reversal or an order for a new trial" for all four counts
20 on which the Court imposed imprisonment. Id. at 1283. Only one
21 issue--the Court's exercise of its discretion to deny another
22 continuance--applies to all counts. Neither that issue nor others
23 cited by defendant are substantial questions.

24
25 1. The Court Did Not Err in Instructing the Jury on
Fiduciary Duty for Count One.

26 On Count One, defendant appears to argue that his client was not
27 a fiduciary and that the government was required to prove economic
28 harm. (Mot. 6-8.) Neither argument is correct.

1 As an initial matter, the Ninth Circuit will review these issues
2 for plain error. Fed. R. Crim. P. 52(b). Because the argument that
3 a statute does not cover a defendant's conduct is a challenge to the
4 indictment, defendant needed to raise it in a pretrial motion. Fed.
5 R. Crim. P. 12(b)(3)(B)(v). Even if that were not true, defendant
6 failed to raise these issues when objecting to the jury
7 instructions.* Fed. R. Crim. P. 30(d). Defendant objected to the
8 instruction only because of its reference to "state law." (Dkt. 105
9 at 66.) He did not argue for a requirement of economic harm or
10 contend that he was not a fiduciary.

11 But even if defendant had preserved this issue, it is not a
12 substantial question. When "a defendant objects to an instruction at
13 trial," the Ninth Circuit reviews the "formulation of the
14 instruction[] for an abuse of discretion," and it considers only
15 whether the "instructions--taken as a whole and viewed in context of
16 the entire trial--were misleading or confusing, inadequately guided
17 the jury's deliberations, or improperly intruded on the fact finding
18 process." United States v. Warren, 25 F.3d 890, 898 (9th Cir. 1994).
19 Defendant admits the Court's instruction tracked United States v.
20 Milovanovic, 678 F.3d 713 (9th Cir. 2012) (en banc). (Mot. 6.) That
21 decision did not require proof of economic harm in honest-services
22 cases, and defendant does not cite any decision that does. That
23 makes sense: a requirement of tangible economic harm would conflict
24 with the text of the honest-services fraud statute, which broadly
25 covers any "scheme or artifice to deprive another of the intangible
26 right of honest services." 18 U.S.C. § 1346 (emphasis added);

27
28 * Defendant incorrectly cites the page where he raised his
objection. He raised it at Dkt. 105 at 64, not Dkt. 105 at 66.

1 Skilling v. United States, 561 U.S. 358, 400 (2010) (noting honest-
2 services fraud requires “no deprivation of money or property”).

3 Defendant is also incorrect that he cannot be prosecuted for
4 honest-services fraud as a matter of law. “[A] bribe-and-kickback
5 scheme to drum up business for . . . surgery centers appears
6 to fall squarely within the scope of § 1346.” United States v.
7 Nayak, 769 F.3d 978, 981 (7th Cir. 2014). Neither Milovanovic,
8 Percoco v. United States, 598 U.S. 319 (2023), nor Pegram v.
9 Herdrich, 530 U.S. 211 (2000), say otherwise. The Ninth Circuit
10 emphasized in Milovanovic that a “fiduciary relationship need not be
11 a formal, or classic, fiduciary relationship” and said that this
12 element “is for the jury to decide.” 678 F.3d at 724, 728. Percoco
13 concerned an erroneous instruction in an honest-services prosecution
14 against “a private citizen with influence over government decision-
15 making”--something not at issue here. 598 U.S. at 322. And Pegram
16 involved the specialized definition of “fiduciary” under ERISA; it
17 had nothing to do with honest-services fraud. 530 U.S. at 222-24.

18
19 2. The Court Properly Denied Defendant’s Motion Based on
the Unsealing of His Indictment.

20 Defendant’s statute-of-limitations argument applies only to
21 Counts Two through Four, but not Count One. (Mot. 8-10.)

22 The Court correctly denied defendant’s motion to dismiss based
23 on the statute of limitations. (Dkt. 76 at 3-8.) There is no
24 dispute that when the sealed indictment and sealed first superseding
25 indictment were returned in June 2017 and April 2018, the statute of
26 limitations for Counts Two through Four had not expired. (Id. at 3-
27 4.) Since the first superseding indictment was unsealed in May 2018,
28 the relevant sealing period was for less than a year. (Id. at 3.)

1 The sealing of an indictment tolls a statute of limitations if it is
2 done for "legitimate prosecutorial objectives," such as the "ongoing
3 nature of [the government's] investigation." United States v. Bracy,
4 67 F.3d 1421, 1426 (9th Cir. 1995). Since defendant has not argued
5 that he was prejudiced, the only way that defendant can prevail on
6 his argument is if he shows that the indictment was not sealed for
7 any "legitimate prosecutorial objective," which would mean that the
8 period from June 2017 to May 2018 counts against the limitations
9 period. (Dkt. 76 at 4.) See Bracy, 67 F.3d at 1426. The Ninth
10 Circuit reviews this issue for abuse of discretion. Id.

11 Especially based on this deferential standard of review, the
12 Court's ruling is not fairly debatable or doubtful. After examining
13 materials in camera, the Court found that the indictment's sealing
14 was justified by the government's ongoing criminal investigation into
15 defendant and his coconspirators. (Dkt. 76 at 6-8 & n.6.) See also
16 United States v. Rogers, 389 F. Supp. 3d 774, 780-84 (C.D. Cal. 2019)
17 (court's order on same issue in related case). Unsealing the
18 indictment before May 2018 would have alerted targets in this wide-
19 ranging conspiracy that they were under investigation and led to
20 possible obstruction. (Dkt. 76 at 6-8.) Knowledge of the
21 investigation also would have jeopardized the government's "continued
22 use of covert activity by cooperating witnesses," which was on an
23 "uptick during the seal period." (Dkt. 76 at 7-8.) Finally,
24 unsealing the indictment would have triggered discovery obligations,
25 including "disclosure of the statements of alleged co-conspirators
26 and witnesses regarding the matters still under investigation," which
27 would result in the "the danger associated with a witness's exposure
28 to others' statements." (Dkt. 76 at 7.) Given these findings, this

1 Court did not abuse its discretion in ruling that the indictment was
2 sealed for legitimate prosecutorial objectives.

3 3. The Travel Act Does Not Require a Categorical Approach
4 for State Bribery Offenses.

5 Defendant's argument that the categorical approach applies to
6 whether a state bribery statute is "unlawful activity" under the
7 Travel Act, 18 U.S.C. § 1952(a)(3), concerns only Count Four, not the
8 other counts of conviction. This Court's rejection of this argument
9 was correct and is not debatable or doubtful. (Dkt. 76 at 8-17.)

10 The Travel Act's definition of "unlawful activity" includes
11 "extortion [or] bribery . . . in violation of the laws of the State
12 in which committed or of the United States." 18 U.S.C. § 1952(b)(2).
13 This definition requires courts to examine a defendant's conduct,
14 rather than a crime's elements under a categorical approach. In its
15 order, this Court cited two Supreme Court decisions adopting a
16 conduct-specific approach. (Dkt. 76 at 8-12.) In Perrin v. United
17 States, the Supreme Court held that "bribery" under the Travel Act
18 referred to "generic definition" of bribery. 444 U.S. 37, 49 (1979).
19 Applying that definition, the Court concluded that the Travel Act
20 "encompass[es] conduct in violation of state commercial bribery
21 statutes." Id. at 50 (emphasis added). And in United States v.
22 Nardello, the Supreme Court applied the same approach to the term
23 "extortion" in the same Travel Act provision and held that it refers
24 to the generic definition of that crime. 393 U.S. 286, 295-96
25 (1969). The Supreme Court thus examined the "conduct for which [the
26 defendants] were indicted," which included attempts "to obtain money
27 from their victims by threats to expose alleged homosexual conduct."
28 Id. at 295-96. And it concluded that "the acts for which appellees

1 have been indicted fall within the generic term extortion as used in
2 the Travel Act.” Id. at 296 (emphasis added). These decisions
3 foreclose defendant’s argument.

4 This Court also correctly found that neither United States v.
5 Davis, 139 S.Ct. 2319 (2019), nor Sessions v. Dimaya, 138 S.Ct. 1204
6 (2018), support defendant’s argument. (Dkt. 76 at 12-15.) Both
7 decisions concerned the term “crime of violence,” which the Supreme
8 Court has repeatedly held demands a categorical approach. See Davis,
9 139 S. Ct. at 2326; Dimaya, 138 S. Ct. at 1216. The definition of
10 “crime of violence” differs from the definition of “unlawful
11 activity” in the Travel Act. The former covers crimes that have as
12 “an element the use, attempted use, or threatened use of physical
13 force against the person or property of another” and (prior to its
14 invalidation for vagueness in Dimaya, 138 S. Ct. at 1223) any
15 “offense that is a felony and that, by its nature, involves a
16 substantial risk that physical force.” 18 U.S.C. § 16; see id.
17 § 924(c) (3) (using similar language). The Supreme Court concluded
18 that the definition’s use of “element” and “offense” requires courts
19 to apply a categorical approach examining the nature or elements of a
20 state crime, rather than a conduct-based approach. Davis, 139 S. Ct.
21 at 2328-29; Dimaya, 138 S. Ct. at 1216-18.

22 In contrast, the definition of “unlawful activity,” 18 U.S.C.
23 § 1952(b) (2), does not use the word “elements” or “offense.” To the
24 contrary, other parts of the definition specifically reference
25 factual circumstances, like an “act which is indictable.” See id.
26 § 1952(b) (3). These textual differences reinforce Perrin and
27 Nardello’s holdings: courts must examine conduct, rather than apply a
28 categorical approach, to apply the definition of “unlawful activity.”

1 4. The Court Acted Within Its Discretion in Denying a
2 Four-Month Continuance Request Weeks Before Trial.

3 The denial of defendant's continuance request in February 2023
4 is the only issue that applies to all counts of conviction. (Dkts.
5 142, 154.) This issue does not present a substantial question.

6 District courts have "broad discretion . . . on matters of
7 continuances," United States v. Garrett, 179 F.3d 1143, 1145 (9th
8 Cir. 1999) (en banc) (cleaned up), including those "based upon
9 physical disability," United States v. Silverthorne, 430 F.2d 675,
10 677 (9th Cir. 1970). This discretion is necessary given the
11 logistical burdens placed on the Court, which must "assembl[e] the
12 witnesses, lawyers, and jurors at the same place at the same time,"
13 Garrett, 179 F.3d at 1145 (cleaned up), in addition to disposing of
14 pretrial motions, preparing jury instructions, and adjusting their
15 calendars. Courts assess "[1] whether the continuance would
16 inconvenience witnesses, the court, counsel, or the parties; [2]
17 whether other continuances have been granted; [3] whether legitimate
18 reasons exist for the delay; [4] whether the delay is the defendant's
19 fault; and [5] whether a denial would prejudice the defendant."
20 United States v. Thompson, 587 F.3d 1165, 1174 (9th Cir. 2009).
21 Only an arbitrary or unreasonable denial warrants reversal. See
22 United States v. Audette, 923 F.3d 1227, 1240 (9th Cir. 2019).

23 The Court acted well within its discretion in denying the
24 continuance. It noted that an extended continuance would
25 inconvenience the Court and the government since "[p]reparations" for
26 the imminent trial were "already underway." (Dkt. 142 at 2.) The
27 Court also observed that trial had repeatedly continued for four and
28 a half years, a fact that "weigh[ed] heavily against a continuance."

1 (Id.) And the Court found that the last three factors, including
2 prejudice, did not "weigh in favor of a continuance" because "defense
3 counsel were ready to proceed" on January 3 and so there could be no
4 "prejudice to Defendant in terms of pretrial preparation." (Id.)

5 The Court also considered defendant's medical condition but
6 appropriately found that it did not outweigh the countervailing
7 considerations. Despite the observations offered by his surgeon and
8 psychiatrist, defendant could not show that he was either "physically
9 unable" or "mentally unfit" to proceed to trial. (Dkt. 142 at 2-3;
10 154 at 2.) The trial proved as much: despite the claims about his
11 health, defendant was able to exercise "his right to testify on his
12 own behalf." (Mot. 13; Dkt. 194 at 3.) Defendant has offered no
13 evidence showing that his medical condition impaired his testimony or
14 his defense, and he has waived the right to do so in reply. See
15 United States v. Montoya, 45 F.3d 1286, 1300 (9th Cir. 1995).

16 Finally, regardless of defendant's medical condition, the Court
17 weigh "Defendant's best medical interest" against "any competing
18 factors." (Dkt. 154 at 3.) Defendant does not challenge the Court's
19 analysis of any of the other factors. So even if defendant's medical
20 condition justified a continuance--and it did not--the balance of
21 considerations weighed strongly against one.

22 Given the deferential standard of review, the Court's careful
23 analysis, and defendant's failure to show prejudice to his defense,
24 the denial of a continuance does not raise a substantial question.

25 **IV. CONCLUSION**

26 For the foregoing reasons, the government respectfully requests
27 that this Court deny bail pending appeal.

28