21-2486

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVEN R. DONZIGER,

Defendant-Appellant.

On Appeal from a Judgment of the
United States District Court for the Southern District of New York

APPELLANT'S MOTION FOR RELEASE PENDING APPEAL
OR, IN THE ALTERNATIVE,
TO STAY EXECUTION OF THE SENTENCE PENDING APPEAL

William W. Taylor, III*
David A. Reiser
Leila Bijan
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Ste. 1000
Washington, DC 20036
(202) 778-1800

Stephen I. Vladeck
Charles Alan Wright
Chair in Federal Courts
University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198

Ronald L. Kuby
119 W 23rd Street, Ste 900
New York, NY 10011
(212) 529-0233

Martin Garbus
OFFIT KURMAN
590 Madison Avenue, 6th Floor
New York, NY 10022
(212) 545-1900

* *Counsel of Record*

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INTRODUCTION

This appeal will present three serious and substantial questions about the appointment of a private special prosecutor to try Appellant on behalf of the United States for criminal contempt. First, whether the Special Prosecutor lacked constitutional authority to act as an inferior executive officer because she was not subject to any supervision and direction by a principal executive branch officer. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021). Second, regardless of the answer to the first question, whether the Special Prosecutor lacked constitutional authority as an inferior officer because Congress did not authorize the appointment. *See* U.S. Const. art. II, § 2 ("Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."). And third, whether the prosecution was inconsistent with the principles the U.S. Supreme Court articulated to protect the appearance of fairness in criminal contempt cases in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

These are consequential questions the Court should decide before Appellant serves the entirety of his six-month sentence, which is why he

now moves for release pending appeal or, in the alternative, a stay of the execution of his sentence pending appeal. Appellant presents no flight risk or danger, and is therefore entitled to the continuation of his current conditions of release under 18 U.S.C. § 3143(b). In the alternative, Appellant is entitled to a stay of the execution of his sentence pending appeal under the All Writs Act, 28 U.S.C. § 1651(a), because he is likely to succeed in his appeal—at which point he will be entitled to reversal of his conviction and sentence.

Appellant brought a timely challenge to the constitutional authority of a private attorney appointed as a special prosecutor to act on behalf (and in the name) of the United States in a criminal case when she was neither supervised nor directed by a principal officer accountable to the President. The court below agreed that a special prosecutor exercises Article II executive power, not Article III judicial power, and is therefore subject to the constitutional requirement of supervision and direction by a principal officer that the Supreme Court recently crystallized in *Arthrex*. Dist. Ct. Dkt. 346 ("FFCL") at 141–48. The Special Prosecutor claimed that this constitutional requirement was inapplicable to her as a judicial appointee, mistakenly equating judicial *appointment* of a

prosecutor with judicial *prosecution*. But even when Congress has statutorily authorized the interbranch appointment of a prosecutor by a court, *e.g.*, 28 U.S.C. § 546(d), the prosecutor must remain subject to an executive branch chain of command accountable to the President. The separation of prosecutorial authority and judicial authority to initiate a criminal contempt charge is *especially* vital when there are no other checks on the criminal contempt power.

Appellant's challenge to the Special Prosecutor's authority to prosecute a criminal case in the name of the United States was not only timely; it was borne out by the Special Prosecutor's denial that she was subject to an executive branch chain of command and the Justice Department's determination not to review a judicially initiated contempt as Appellant had requested.

The absence of supervision and direction, the absence of congressional authority for an interbranch appointment under the Appointments Clause, and the need for this Court's supervisory intervention described in section I.B.3 of the argument below each presents a substantial question warranting this Court's plenary review—and, indeed, demonstrates Appellant's likelihood of success on the merits,

thereby warranting a stay. It would discredit, rather than vindicate, judicial authority to require Appellant to serve his six-month sentence *before* that plenary review can occur.

The denial of release pending appeal cannot be based on the District Court's statement that it could not make the finding required by 18 U.S.C. § 3143(b)(1) that Appellant would not be likely to flee. The court noted that the legal standard had changed since it had originally imposed release conditions. But the applicable legal standard was the same as it was when the court found Appellant guilty and maintained his conditions of release pending sentencing. *Compare* 18 U.S.C. § 3143(a)(1) (requiring detention pending sentencing "unless the 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"), *with* 18 U.S.C. § 3143(b)(1) (requiring detention pending appeal "unless the judicial officer finds—(A) 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").

Nor did any new facts at the time of sentencing warrant detention. Appellant appeared for his sentence ready to "pay the piper,"

as the district court put it, fully expecting the District Court to impose the petty offense maximum. Appellant's appearance proved the District Court's implicit judgment that no further conditions were required between conviction and sentencing. These home confinement conditions were also more than enough to prevent flight when Appellant faced *years* of potential punishment for contempt, before the District Court decided to hold a non-jury trial, limiting the penalty to six months. When Appellant sought less restrictive conditions of release in light of the reduced penalty, this Court expressed some skepticism that Appellant would expose himself to "felony bail jumping charges carrying ten times the maximum sentence" by failing to appear, even if he did not have many other compelling reasons to do so. And were he to become a fugitive now, Appellant would also forfeit the opportunity for appellate review, which is a compelling incentive not to flee.

The District Court's summary denial of release was not based on a factual finding warranting deference and such a finding would be clearly erroneous. The substantial and important questions presented warrant meaningful appellate review before imposing imprisonment based on an

unconstitutional prosecution. Granting release pending appeal—or a stay of the execution of Appellant's sentence—is the only just outcome.

STATEMENT

This Court already has familiarity with the "long-running litigation" between Chevron and Appellant. *Chevron Corp. v. Donziger*, 990 F.3d 191, 196 (2d Cir. 2021). Relevant here, the story begins with Judge Kaplan's decision to initiate a criminal contempt prosecution of Appellant for alleged violations of the judgment entered and discovery orders issued in Chevron's civil RICO case against Appellant.

A. The order to show cause and the appointment of the Special Prosecutor

Judge Kaplan issued an order to show cause alleging six counts of criminal contempt. Counts I–III involved post-judgment discovery orders, including one that Appellant had already complied with. Appellant engaged in civil contempt of certain discovery orders expressly in order to be able to appeal his foundational objection to Chevron's motion to hold him in civil contempt—an objection this Court agreed was legitimate. *See id.* at 212.

Counts IV and V alleged violations of the civil RICO judgment by failing to transfer rights to Chevron under 2011 and 2017 retainer

agreements. But Appellant had already completed both transfers under coercion by civil contempt. Count VI alleged a violation of the civil RICO judgment by exchanging lessons from an executive life coach for a share of Appellant's interest in the judgment, a transaction the coach cancelled after learning it was barred. Thus, four of the violations had already ended before the District Court issued the order to show cause. Three of the charges, including the only two that were active violations, involved discovery orders that Appellant disobeyed in order to obtain appellate review.[1]

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[1] Appellant acknowledges that although he successfully appealed the foundational issue, he failed to ask the Court to apply that ruling to the scope of the discovery orders. 990 F.3d at 206. But that does not alter his lawful purpose in taking civil contempt to obtain review.

Chevron had sought discovery on two grounds: the invalid civil contempt theory and to locate assets to satisfy the $800,000 judgment for costs in the civil RICO case. The permissible scope of discovery for the latter was much more limited and would not have required disclosure of the communications that Appellant resisted. The District Court relied in its order on Fed. R. Civ. P. 69(e) and N.Y. CPLR § 5223. *Chevron Corp. v. Donziger*, No. 11-cv-691 (S.D.N.Y. Mar. 19, 2018), ECF No. 1968 at 4. However, discovery under the Federal Rule generally and the New York procedure it incorporates "is constrained principally in that it must be calculated to assist in collecting on a judgment." *EM Ltd. v. Republic of Argentina,* 695 F.3d 201, 207 (2d Cir. 2012). The New York law authorizes "investigation [of] any person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts." DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 509 (6th ed. 2021). *Compare id.*, *with* FFCL at 172 n.608 (emphasizing "any

The United States Attorney's Office declined the District Court's request to prosecute the criminal contempt charges because "the matter would require resources that we do not have readily available." *Chevron Corp. v. Donziger*, No. 11-cv-691 (S.D.N.Y. July 31, 2019), ECF No. 2277 ("Order of Appointment"). In response, the District Court invoked the authority in Fed. R. Crim. P. 42(a)(2) and its "inherent power" to appoint Rita M. Glavin and two colleagues—private attorneys then employed by the law firm Seward & Kissell LLP ("Seward")—to prosecute Appellant with the "same power to investigate, gather evidence and present it to the Court as could any other government prosecutor." Order of Appointment. The three lawyers entered notices of appearance for the

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person" or "any light to shed"). The important point is that the subject of discovery is the debtor's "assets or their whereabouts." SIEGEL & CONNORS, *supra*, § 509. When courts describe such post-judgment discovery as broad or permissive, *e.g.*, *EM Ltd.*, 695 F.3d at 207, they mean that the scope of *asset* discovery is broad, geographically and otherwise, not that discovery can be leveraged to pursue other objectives such as evidence of a violation of an injunction. All federal civil discovery must be "proportional to the needs of the case" in light of "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

United States. Dist. Ct. Dkt. 5–7. The docket designated Ms. Glavin as the "Assistant US Attorney."

The District Court designated Judge Preska to try the criminal charges. And yet the judge presiding over the civil case pointedly declined to recuse himself. *See* Response to Petition for a Writ of Mandamus at 18–19 n.54, *In re Donziger*, No. 20-464 (2d Cir. Mar. 11, 2020), Dkt. 28. The court also ordered all submissions in the criminal prosecution to be filed on the civil RICO docket as well. Dist. Ct. Dkt. 2.

B. Pretrial litigation

In a letter, Appellant's counsel asked the District Court to "inquire to determine the full extent of Seward's ties to Chevron" because the Special Prosecutor had declined to respond his own inquiry. Dist. Ct. Dkt. 49. The letter also asked the Court to clarify whether Judge Kaplan "has played or is playing a continuing role in this prosecution." *Id.* The Special Prosecutor responded by disputing any link between Seward and Chevron. But she did not disclose that Seward represented Chevron as recently as 2018. The Special Prosecutor said nothing about specific contacts with the Judge Kaplan but represented that "the prosecution

does not work for Judge Kaplan and makes its own decisions in the case." Dist. Ct. Dkt. 50.

Appellant's counsel provided the District Court with additional information connecting Seward and Chevron, and asked that the Special Prosecutor disclose "the full extent of Seward's relevant relationships." Dist. Ct. Dkt. 51. Counsel concluded the letter by highlighting Justice Scalia's concurring opinion in *Young*, 481 U.S. 787, which raises concerns of abuse in prosecutions for criminal contempt from the absence of structural restraints. Dist. Ct. Dkt. 51.

At a subsequent status hearing, the Special Prosecutor represented that neither she nor her colleagues nor their firm "have existing client relationships that would result in the three appointed prosecutors having conflicting loyalties or having anything that would cause the independence of our decision making on behalf of our client, the United States in this case, to be anything but impartial and objective." Dist. Ct. Dkt. 52 at 6. While this was true about "existing client relationships," it omitted important facts that came to light months later. Appellant's counsel continued to seek disclosure about private contacts between Seward and Chevron, which the District Court declined to order. *Id.* at

18.

In accordance with the deadline for pretrial motions, Appellant moved, *inter alia*, to disqualify the Special Prosecutors for their law firm's ties to the oil and gas industry and to dismiss the contempt charges for failing to exercise the "least possible power adequate to the end proposed." Dist. Ct. Dkt. 60. The motion extensively discussed the concerns Justice Scalia expressed about abuse of the contempt power in his *Young* concurrence. *Id.* at 6–7 (citing 481 U.S. 787). Appellant's counsel also submitted a legal ethics expert's declaration that concluded Seward's extensive practice in the oil and gas industry and representation of Chevron-related entities precluded the Special Prosecutor from being appropriately disinterested. Dist. Ct. Dkt. 60-2.

The Special Prosecutor subsequently submitted a declaration from a Seward partner disclosing for the first time that Seward had actually represented Chevron in a corporate matter from late 2016 to early 2018. Dist. Ct. Dkt. 62-1. While that was consistent with the Special Prosecutor's careful prior representation that neither she nor the firm had an "existing" relationship with Chevron, it confirmed that Chevron was familiar with the firm's work and that Chevron was within Seward's

area of practice. Seward's General Counsel refused to answer whether Seward had disclosed the prior representation of Chevron to the District Court before it appointed Ms. Glavin as Special Prosecutor. Dist. Ct. Dkt. 65-1. The General Counsel also declined to answer whether Seward had done other work for Chevron.

The District Court denied the motion to disqualify the Special Prosecutor, concluding that Seward's ties to Chevron through its work with related companies and its past representation of Chevron were too attenuated. Dist. Ct. Dkt. 68 at 12–20. The District Court also denied the motion to dismiss the charges. *Id.* at 20–25. It specifically rejected Appellant's argument that prosecution for violations of court orders with which he had already complied was inconsistent with the "least possible power" principle of restraint.[2]

C. Trial proceedings

On April 2, 2021, well in advance of Appellant's trial date of Monday, May 10, 2021, Appellant's counsel wrote a letter to then-Acting Deputy Attorney General John P. Carlin, requesting that the Justice

[2] This Court dismissed Appellant's appeal for lack of jurisdiction. Order, *United States v. Donziger*, No. 20-1529 (2d. Cir. Sept. 22, 2020), Dkt. 69.

Department review the prosecution and direct the Special Prosecutor to request an adjournment of the trial to allow time for the review, if necessary. Dist. Ct. Dkt. 362 at 2–3.

The Friday before trial, Mr. Carlin responded. Dkt. 303-1 ("Carlin Email"). Appellant's initial letter argued that the Special Prosecutor was exercising the executive power of the United States and therefore had to be subject to the supervision and direction of a principal officer, and offered additional reasons why the prosecution merited the Department's scrutiny. A follow-up letter[3] to Mr. Carlin on April 19, 2021 noted that FBI agents had been assisting the Special Prosecutor, reinforcing the conclusion that she was exercising Article II executive authority, not Article III judicial power. Dist. Ct. Dkt. 362 at 3; Dist. Ct. Dkt. 355-1. Mr. Carlin's brief May 7 reply email stated, in relevant part: "The Department has received your letters in the Donziger matter. Having reviewed the letters, the Department declines to intervene in the federal-court initiated contempt proceedings." Carlin Email.

Before the trial began, Appellant's counsel advised the Court that the Justice Department was "declining to exercise any supervision over

[3] The Special Prosecutor was copied on and received both letters.

the prosecutor in the case." May 10, 2021 Tr. at 37. Appellant's counsel urged that the absence of supervision "invalidates this entire proceeding," making it imprudent to proceed with the trial without first resolving the issue. *Id.* at 41. But the District Court decided to move trial forward as planned and await full briefing on the issue. *Id.* at 41–42. Later that day, Appellant filed a written motion to dismiss based on the Special Prosecutor's lack of the constitutionally required supervision and direction by a principal officer. Dist. Ct. Dkt. 302; FFCL at 131–32. At the District Court's direction, Appellant later filed a declaration attaching the Carlin Email. FFCL at 132 & n.479; Dist. Ct. Dkt. 303.

The District Court ruled that the Carlin Email was hearsay and not "direct admissible evidence of a policy or decision by the DOJ." May 17, 2021 Tr. at 852; FFCL 133 & n.482. The court then declined to permit any discovery into the matter. It also refused to even ask the Special Prosecutor whether she understood herself to be under a principal officer's supervision and direction. The District Court denied Appellant's motion to dismiss, reasoning that his "moving papers ha[d] given the Court absolutely no basis to conclude that the special prosecutors are not subject to any control or supervision whatsoever by the Executive

Branch." FFCL at 135 (quoting May 17, 2021 Tr. at 858–59).

Immediately following the Supreme Court's decision in *Arthrex*—which, among other things, reiterated the *requirement* that inferior executive officers be subject to the direct supervision of a principal executive officer—Appellant submitted a letter motion requesting dismissal on the basis of that decision. FFCL 135–36; Dist. Ct. Dkt. 330. In response, the Special Prosecutor did not assert that she was under this constitutionally mandated supervision and direction. Instead, she stated that *Arthrex* was inapplicable: "The initiation of criminal contempt charges, and the appointment of the special prosecutors by the District Court in this matter, reflect a vindication and use of the judicial power of the United States. It therefore follows that the decision in *Arthrex*, which dealt with the question of whether the authority of Administrative Patent Judges to issue decisions *on behalf of the Executive Branch* is consistent with the Appointments Clause of the Constitution, has no applicability to this matter." Dist. Ct. Dkt. 338 at 5 (emphasis in original).

The Special Prosecutor further asserted her role as a judicial officer independent from executive oversight. She described the United States'

declination to prosecute Appellant as a declination by "the Executive Branch," triggering an inherent judicial power to prosecute outside of the executive. *Id.* She claimed that *Arthrex* "has nothing to do with the exercise of the judiciary's inherent power as long recognized by Supreme Court precedent." *Id.* Appellant, the Special Prosecutor, and the Justice Department thus all agreed on one thing: the Special Prosecutor was not acting under an executive branch chain of command.

The District Court denied Appellant's motion to dismiss in its post-trial Findings and Conclusions. The Court agreed with Appellant that the Special Prosecutor was exercising executive authority and was therefore subject to supervision and direction according to *Arthrex*. FFCL 141–48. But the court denied relief on two grounds not advanced by the Special Prosecutor: untimeliness and the absence of any express prohibition of principal officer supervision in the text of Rule 42.

Appellant moved for a new trial and addressed the District Court's two new grounds. Dist. Ct. Dkt. 351. Appellant's motion explained that the absence of supervision and direction was distinct from the validity of the Special Prosecutor's appointment and that the challenge was not untimely either under Fed. R. Crim. P. 12 or applicable Supreme Court

decisions, including *Arthrex* itself. The motion also highlighted that the Special Prosecutor herself had already denied that she was subject to constitutionally required supervision and direction.

The Special Prosecutor's opposition to the new trial motion alluded to FBI participation in witness interviews as evidence of Justice Department involvement, but made no claim of supervision and direction by or accountability to any principal officer. Dist. Ct. Dkt. 355. The District Court also denied Appellant's request for discovery into how FBI agents had come to be assigned to assist the Special Prosecutor. Dist. Ct. Dkt. 359. The District Court denied the motion for new trial. Dist. Ct. Dkt. 362.

D. The conditions of home confinement

Originally, the District Court set Appellant's conditions of home confinement at the August 6, 2019 initial hearing where Appellant appeared pro se after returning from Canada to face what were then six charges of criminal contempt with no limit on punishment. Aug. 6, 2019 Tr.; Dist. Ct. Dkt. 4. The court later denied Appellant's request to eliminate the electronic monitoring condition. Dist. Ct. Dkt. 41. Even though the Special Prosecutor advised that she would not seek more than

six months' imprisonment, Dist. Ct. Dkt. 35; Nov. 25, 2019 Tr. at 7, the court nevertheless ruled that home confinement and electronic monitoring remained warranted because Appellant was "facing a criminal trial and facing the real prospects of incarceration," *id.* at 12. This Court upheld that home confinement order, finding no clear error. *United States v. Donziger*, No. 19-4155 (2d. Cir. Feb. 18, 2020), Dkt. 54.

The District Court later confirmed it would hold a non-jury trial and limit the maximum penalty to six months' imprisonment. May 18, 2020 Tr. at 5–6. Still, the District Court declined to modify conditions of release. *Id.* at 13–14 (explaining that "prison time is prison time."). The District Court denied Appellant's subsequent requests to modify the terms of home confinement in light of the significantly reduced maximum penalty. Dist. Ct. Dkt. 90, 237.

This Court affirmed one of those orders. *United States v. Donziger*, 853 F. App'x 687 (2d Cir. Apr. 26, 2021). Although this Court ultimately deferred to the District Court, it expressed skepticism that home confinement conditions imposed in light of unlimited criminal penalties would be necessary once the maximum sentence was slashed to six months: "Donziger's argument that it is not plausible that he would

expose himself to felony bail jumping charges carrying ten times the maximum sentence as he now faces, and effectively become a lifelong exile from the United States, in order to avoid a maximum of six months' incarceration give us some pause." *Id.* at 689. Indeed, were Appellant to flee now, he would lose his right to appeal the conviction through fugitive disentitlement, which is itself a compelling incentive not to do so.

E. The District Court's rulings regarding release pending appeal

On October 1, 2021, the District Court sentenced Appellant to six months' imprisonment and a special assessment of ten dollars. Ex. 2. Appellant then submitted a written motion seeking release setting forth substantial questions he intended to present on appeal. Dist. Ct. Dkt. 386.[4] The District Court denied the motion without any further briefing or argument. Its reasons for ordering Appellant detained pending appeal were the following:

> Because you have now been convicted and sentenced, the standard for bail has changed from when you made your application. Post-conviction bail applications are governed by 18 U.S.C. § 3143, which provides, in relevant part, that "the

[4] The motion assumed that the District Court had determined that Appellant was not a flight risk or a danger to the community pursuant to 18 U.S.C. § 3143(a)(1) since the court had maintained his conditions of release pending sentencing.

> judicial officer shall order that a person who has been found guilty of an offense and who is awaiting . . . execution of a sentence . . . be detained, unless the 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." 18 U.S.C. § 3143(a)(1). Now as we know, I have previously repeatedly found that Mr. Donziger presented a risk of flight prior to conviction. And that risk certainly is not diminished by the fact that he has now been convicted and sentenced to jail.

Ex. 1 at 62–63. The court went on to say:

> With respect to briefing and the like, the motion for bail pending appeal is denied. The reason for that is, under the statute, the Court is required to detain a defendant unless the Court finds by clear and convincing evidence that the defendant is not likely to flee. As I mentioned earlier, I have found repeatedly that Mr. Donziger is a flight risk. As I mentioned earlier today, that risk has increased now that he has been both convicted and sentenced to jail. So first of all, I do not find that and can't find that.

Id. at 66. The District Court declined to consider briefing in response to the motion for release pending appeal because "I cannot and do not find that [Mr. Donziger is not a flight risk]." *Id.* at 67.

The District Court did not address why conditions it had originally imposed when Appellant faced years of punishment for contempt (and had a much greater incentive to flee) were suddenly insufficient upon the imposition of the six-month maximum penalty for a petty offense. If Appellant fled now, he would face far heavier criminal penalties for

failing to appear and, as a fugitive, would likely lose his right to appellate review. The District Court, however, granted Appellant's request for a stay to allow an orderly process in this Court and allowed Appellant to remain on those home confinement conditions if he sought relief on an expedited basis in this Court by October 8. *Id.*[5]

ARGUMENT

I. THE COURT SHOULD ORDER RELEASE PENDING APPEAL OF APPELLANT'S SIX-MONTH SENTENCE

Before granting bail pending appeal, a district court must find:

> (1) that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released; (2) that the appeal is not for purpose of delay; (3) that the appeal raises a substantial question of law or fact; and (4) that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial on all counts on which imprisonment has been imposed.

United States v. Randell, 761 F.2d 122, 125 (2d Cir. 1985) (citation omitted).

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[5] As summarized on the docket, those conditions were: "$800,000 PRB CO-SIGNED BY TWO (2) FINANCIALLY RESPONSIBLE PERSONS AND SECURED BY $800,000 CASH/PROPERTY; TRAVEL RESTRICTED TO SDNY/EDNY (ANY TRAVEL MUST BE REQUESTED); SURRENDER TRAVEL DOCUMENTS & NO NEW APPLICATIONS; STRICT PRETRIAL SUPERVISION; HOME DETENTION (CONDITIONS SUFFICIENT TO ALLOW MR. DONZIGER TO COMPLETE FAMILY OBLIGATIONS & LEGAL MEETINGS); ELECTRONIC MONITORING)." Dist. Ct. Dkt. 4.

A. Mr. Donziger Is Not a Flight Risk or a Danger Under the Onerous Conditions of Release Imposed.

The District Court's stated inability to make the required finding is not a factual finding entitled to deference. Even if it were, it should be reversed for clear error. The District Court stated it would not release Appellant pending appeal because it could not find by clear and convincing evidence that he would not be a flight risk. That means, in all likelihood, that Appellant would serve the entire contempt sentence before this Court has an opportunity to address the reasons why his conviction is invalid.

The District Court did not refer to any new information other than the imposition of the expected maximum sentence or explain why home confinement with electronic monitoring would now be insufficient to justify release pending appeal. Nor did the court attempt to reconcile its ruling at sentencing with its earlier ruling that a significant *reduction* in the maximum penalty Appellant faced did not warrant any change in home confinement conditions.

At Appellant's initial appearance, when he faced potentially years of imprisonment for the contempt charges, the District Court imposed:

> (1) strict pretrial supervision with electronic monitoring and home confinement, including certain conditions sufficient to allow him to complete family obligations and attend legal meetings; (2) a secured $800,000 bond with two co-signors; (3) the surrender of all of his travel documents; (4) a prohibition against new applications for travel documents; and (5) restricted travel to the Southern and Eastern Districts of New York.

853 F. App'x at 688. Despite the significant eventual reduction in maximum potential punishment, the District Court declined to modify these conditions. The court also did not revisit Appellant's conditions of release after issuing a 241-page decision finding him guilty of all six counts of contempt and leaving little doubt about the sentence the court would impose. The District Court thereby implicitly found that Appellant met the statutory standard for release pending sentencing. *See* 18 U.S.C. § 3143(a)(1) (describing a finding of "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"). That is why Appellant's written motion to the District Court for release pending appeal did not further address those factors. And Appellant duly appeared for his sentencing, confirming he was not a flight risk.

The only change in circumstance the District Court cited to justify its summary refusal to maintain Appellant's conditions pending appeal

was that the court had finally imposed the maximum sentence. But Appellant fully expected the court to impose that sentence. And if the significant reduction in the maximum penalty had no effect on the conditions necessary to prevent flight, it is hard to see why the wholly predictable imposition of a six-month sentence would make the onerous conditions the court had imposed suddenly insufficient to ensure Appellant's appearance. Appellant has a wife and a school age child with lifelong ties to New York. He had returned to the United States from Canada to face the contempt charges when they carried far more serious penalties. Moreover, while Appellant regarded both his conviction and a maximum sentence as foreordained once the District Court decided to hold a non-jury trial for a petty offense, for the reasons set forth in section I.B and Part II below, Appellant is likely to prevail on his challenges to the validity of the conviction, giving him every reason not to forfeit his appeal as a fugitive.

In response to a previous appeal, this Court was skeptical that Appellant might "expose himself to felony bail jumping charges carrying ten times the maximum sentence as he now faces, and effectively become a lifelong exile from the United States, in order to avoid a maximum of

six months' incarceration." 853 F. App'x at 689. While that doubt was not enough to convince the Court to reduce Appellant's conditions of release just a few weeks before trial, it should be more than sufficient to reject the District Court's sudden about-face on whether it could make the clear and convincing findings called for by § 3143(a)(1) and § 3143(b)(1). Appellant had the same motive to flee—a six-month sentence—and the same compelling reasons not to do so before and after the District Court decided his guilt. Nothing changed except, seemingly, the District Court's determination that it was, in words the District Court repeated at sentencing, time to "pay the piper" for defying the District Judge in the civil case. FFCL at 240. Having deferred to the judgment that a significant reduction in the maximum penalty did not reduce the risk of flight, it would not be reasonable for this Court to now defer to the contrary judgment that the imposition of the known maximum penalty for a petty offense drastically *increases* the risk beyond what it was when Appellant faced much greater penalties.

The District Court's change of position is not a finding of historical fact or a predominantly factual resolution of a mixed question of fact and

law warranting deference on appeal.[6] Rather, the court seemed to be relying on solely on the change in the statutory standard. But that change in the statutory standard is tied to the presumption of innocence and changes upon conviction, not between conviction and appeal. The District Court's ruling denying release pending appeal was purely arbitrary and would effectively nullify this Court's ability to grant meaningful appellate relief on the substantial constitutional questions

[6] As this Court stated in its decision on Appellant's application to eliminate some of his home confinement conditions in light of the reduced penalty he faced, the "district court's ultimate finding as to whether there are conditions or a combination of conditions which reasonably will assure the appearance of the defendant at trial is a mixed question of law and fact." 853 F. App'x at 688–89 (cleaned up) (citation omitted). In the typical case, this Court "review[s] a district court's finding that a defendant poses a flight risk for clear error" because "[s]uch determinations are essentially factual and require little, if any, legal interpretation." *Id.* at 688–89 (citation omitted). Even in the context of the bail statute, this Court has stated that "the court's ultimate finding may be subject to plenary review if it rests on a predicate finding which reflects a misperception of a legal rule applicable to the particular factor involved." *United States v. Shakur*, 817 F.2d 189, 197 (2d Cir. 1987). That standard of review is consistent with the Supreme Court's recent decisions regarding review of mixed questions. *Google LLC v. Oracle Am.*, 141 S. Ct. 1183, 1199 (2021); *U.S. Bank Nat'l Assoc. v. Village at Lakeridge LLC,* 138 S. Ct. 960, 967 (2018) (holding that "the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work"); *cf. United States v. Kourani*, 6 F.4th 345 (2d Cir. 2021) (applying de novo review to mixed questions); *United States v. Lucas*, 2021 WL 3700944, *1 (2d Cir. Aug. 20, 2021) (same).

about the validity of the conviction that this appeal will raise and to exercise its supervisory power over criminal contempts.

Appellant's request that this Court at a minimum continue his release on the onerous home confinement conditions originally imposed on what were then potential felony offenses should not be understood as a concession that those conditions were necessary or appropriate to assure his appearance in a petty offense prosecution. The $800,000 personal appearance bond should be more than enough, given the criminal penalties Appellant would face for failing to appear and the potential loss of his right to appellate review if he became a fugitive.

B. Mr. Donziger's Appeal Is Not Taken for Purposes of Delay and Will Present at Least Three Substantial Questions That Would Require Reversal of His Conviction if Resolved in His Favor.

A substantial question "is a 'close' question that could very well be decided the other way." *Randell*, 761 F.2d at 125 (citation omitted). An appeal that presents such a close question, *i.e.*, one that could be decided in favor of the appellant, is not taken for purposes of delay. Appellant's appeal raises three distinct questions of law, each of which is indisputably "substantial" and would, if successful, require reversal of his conviction.

1. The Special Prosecutor Exercised Article II Executive Power Without Supervision and Direction by a Principal Officer.

The District Court rightly concluded that, in prosecuting Appellant, the Special Prosecutor wielded Article II executive power to enforce the law, not Article III judicial power to adjudicate cases and controversies. FFCL at 141–48. The court therefore rejected the Special Prosecutor's contention that she was not subject to the constitutional requirement—recently crystallized in *Arthrex*, 141 S. Ct. 1970—that inferior executive officers be in a chain of command under the ongoing supervision and direction of a principal officer directly accountable to the President.

The Special Prosecutor's argument that she was not subject to supervision and direction as a judicial appointee necessarily conceded a violation of that constitutional requirement. No inferior officer who is subject to supervision and direction by a principal officer would contend (or be permitted to contend) that she was exempt.

Moreover, the Special Prosecutor's own understanding of her independence aligns with the Department of Justice's "declin[ation] to intervene in the federal-court initiated contempt proceedings." Carlin Email. The Special Prosecutor's legal position reflected her

understanding of the Department's position—that she was on her own. Both the Special Prosecutor's and the Department's positions reflect what the District Court correctly described as a misunderstanding of dicta in *Young* and *Providence Journal* "that seemingly equates the appointment of a special prosecutor with judicial prosecution." FFCL at 144 (citing *Young*, 481 U.S. 787; *United States v. Providence J. Co.*, 485 U.S. 693 (1988)).

Yet despite its correct framing of the constitutional question, the District Court rejected Appellant's constitutional claim based on two purported legal errors never raised by the Special Prosecutor. First, the court deemed untimely Appellant's challenge to the Special Prosecutor's lack of principal officer supervision and direction. But Appellant made this challenge before trial began, as soon as the Justice Department responded to his request that it conduct a review, and without any timeliness objection from the Special Prosecutor. The District Court cited *Lucia v. SEC*, 138 S. Ct. 2044 (2018), for the proposition that challenges to the authority of an officer must be timely. FFCL at 138 n.496.

Appellant's challenge was timely. It came at an earlier stage in the proceedings than did the challenges in *Lucia* itself, in *Ryder v. United*

States, 515 U.S. 177 (1995), which *Lucia* cites, and in *Arthrex*. *See* Dist. Ct. Dkt. 362 at 10 (referring to *Lucia* and *Ryder* as "both cases where the Appointment Clause challenges were raised after the initial adjudication"); *Arthrex,* 141 S. Ct. at 1978 (explaining "Arthrex raised for the first time an argument premised on the Appointments Clause of the Constitution" on appeal to the Federal Circuit). The very fact that the District Court had the opportunity to *rule* on Appellant's Appointments Clause objection proves why, under *Ryder*, *Lucia*, and *Arthrex*, it was timely made.

The District Court also relied on Fed. R. Crim. P. 12(b)(3). But the Special Prosecutor never advanced an untimeliness argument, thereby waiving any claim of procedural forfeiture. *United States v. Quiroz*, 22 F.3d 489, 490–91 (2d Cir. 1994). Moreover, the motion to dismiss was based on the violation of a constitutional requirement of supervision and direction—which the Justice Department *could* have cured before trial by intervening as Appellant had requested. The constitutional violation was not a defect in "instituting the prosecution" by the order of appointment. *Arthrex*, 141 S. Ct. at 1988 (plurality opinion) ("[T]he source of the constitutional violation is the restraint on the review

authority of the Director, rather than the appointment of APJs by the Secretary."); *id.* at 2003 (Thomas, J., dissenting) ("The majority's new Appointments Clause doctrine, though, has nothing to do with the validity of an officer's appointment. Instead, it polices the dispersion of executive power among officers."). In its order denying the new trial motion, the District Court did not address the distinction between supervision and appointment drawn in *Arthrex*, even though Appellant quoted the language in his motion.

Second, in advancing the argument that the requirement of principal officer supervision and direction was satisfied by the absence of an overt restraint in Rule 42, the District Court disregarded the Special Prosecutor's own disavowal of the existence a chain of command. And Rule 42 does not address principal officer oversight *at all*. The record establishes a complete lack of supervision and direction of the Special Prosecutor by a principal officer accountable to the President—not just the absence of oversight of particular actions.

The Special Prosecutor's self-described unsupervised exercise of executive power to prosecute Appellant violated the Constitution. At the

very least, it raises a "substantial question" justifying Appellant's release pending appeal.

2. Congress Did Not Enact Legislation Authorizing the Interbranch Appointment of Special Prosecutors Under the Appointments Clause.

As the District Court correctly explained, criminal prosecution is exclusively an Article II executive function, so the court's authority to appoint a special prosecutor *cannot* be based on an inherent judicial power. The Supreme Court has held that *Congress* can authorize "interbranch" appointments of inferior executive officers by a court, including prosecutors. *Morrison v. Olson*, 487 U.S. 654, 659–60, 676–77 (1988) (describing the permissible appointment of independent counsels under the former Ethics in Government Act and that of interim United States Attorneys under 28 U.S.C. § 546(d)). But even assuming, against all the above analysis, that the Special Prosecutor *was* an "inferior" officer, no statute provided for her appointment.

Again, as with the question of whether the Special Prosecutor was an inferior officer in the first place, the constitutionality of the District Court's power to appoint her without statutory authorization also

presents a "substantial question" warranting Appellant's release pending appeal.

3. This Court's Supervisory Power of Intervention is Warranted to Prevent the Use of Criminal Contempt Power in a Manner that Undermines the Authority of the Judiciary.

Finally, the facts of this case present their own reasons to doubt the propriety of the Special Prosecutor's authority to prosecute this case—and to find it *inconsistent* with the authority courts have previously exercised in such cases *without* reaching the constitutional questions described above—just as the Supreme Court ruled in *Young*. 481 U.S. at 808–09. It would be enough in this case to hold that under all of the circumstances, the appearance of "basic notions of fairness" required a prosecutor independent of the judiciary and accountable to an executive branch chain of command—at least when the United States Attorney's Office declines to prosecute on grounds other than a conflict between the interests of the judiciary and the executive branch.

It is unusual for Nobel laureates, members of Congress, and the United Nations working group on arbitrary detention to speak out in condemnation of a federal criminal prosecution. Even if this Court heavily discounts those protests, they reflect a real challenge to the

perceived legitimacy of federal judicial proceedings, and hence weaken rather than vindicate judicial authority. That is why this Court has a special responsibility to rein in criminal contempts through its supervisory power.

As the Supreme Court stated in *Young* in adopting a per se prohibition against the appointment of an interested private prosecutor:

> [S]upervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness. The exercise of supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the Judiciary.

Id. (citations omitted). This Court's supervisory authority to oversee criminal contempt prosecutions within the Circuit is not limited to enforcing the *Young* per se rule. This Court's intervention is warranted both to protect "basic notions of fairness" and to ensure that the contempt power is exercised in a way that enhances respect for the judiciary and vindicates its authority rather than bringing it into disrepute. It would be perverse to prosecute a person for criminal contempt in the name of protecting judicial authority, yet to do so in such a way that the prosecution itself undermines the rule of law.

Checks on governmental power are central to our constitutional scheme. Yet the record of this case is an example of governmental power in its most elemental form—punishment by imprisonment—without any check except intervention by this Court. A court's power to charge criminal contempt is subject to a rule of restraint articulated in *Young* and *Shillitani*. *Young*, 481 U.S. at 801 (1987) ("While a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by the principle that 'only [t]he least possible power adequate to the end proposed should be used in contempt cases.'" (citation omitted)); *Shillitani v. United States*, 384 U.S. 364, 371 n.9 (1966) ("The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate.").

While Appellant could not challenge the validity of the discovery orders in his contempt trial because of the collateral bar rule, the principle of restraint instructs against charging criminal contempt for permissibly taking civil contempt of the same orders to obtain appellate review of his "foundational objection" to discovery premised on an invalid civil contempt theory, as Appellant did in this case. The principle of

restraint also precludes charging criminal contempt after civil contempt sanctions *have already produced compliance* with an order.

The lone two (of 241) pages of the District Court's Findings and Conclusions addressing whether the criminal contempt charges were an exercise of "the least possible power adequate to the end proposed" fail to engage seriously with the legal principle. For example, for the "hornbook" proposition "that the same contemptuous act can subject a contemnor to both civil and criminal sanctions," the District Court cites dicta in a series of pre-*Young* decisions, none of which actually involves imposing both criminal and civil contempt for the same act, much less—as the District Court did in the civil case here—filing criminal contempt charges even after achieving compliance through civil contempt. FFCL at 239 & n.830. The language quoted from *In re Grand Jury Witness* traces back to a discussion of whether civil and criminal contempt for the same act is barred by double jeopardy, not by the principle of restraint. 835 F.2d 437, 440 (2d Cir. 1987) (citing *Yates v. United States*, 355 U.S. 66, 74 (1957)). The District Court made no mention of the Supreme Court's illustration of the principle of restraint in *Young*: "[A] trial judge should first consider the feasibility of prompting testimony through the

imposition of civil contempt, utilizing criminal sanctions only if the civil remedy is deemed inadequate." 481 U.S. at 801 (citing *Shillitani*, 384 U.S. at 371 n.9). That is not consistent with heaping criminal punishment on someone who has already yielded to civil contempt sanctions.

The District Court also failed to explain how the principle of restraint advanced in *Young* was consistent with criminally prosecuting Appellant for violating discovery orders when Appellant's explicit basis for doing so was to challenge the civil contempt theory on which the scope of discovery was based. Unfortunately, through his own ineptitude as a pro se litigant, Appellant failed to call this Court's attention to the reasons why the discovery orders depended on the contempt theory this Court ultimately rejected. But that does not change the fact that Appellant had a proper purpose in taking civil contempt to obtain appellate review. Chevron could not have justified discovery of Appellant's electronic devices if discovery had been limited to finding assets to satisfy the cost judgment, which is all New York law allows. The only basis for the intrusive discovery the District Court ordered was Chevron's invalid theory that Appellant could be held in contempt for

selling the interests of third parties in the judgment to finance the litigation that formed. Appellant's noncompliance in order to appeal this "foundational objection" did not warrant prosecution for criminal contempt.

If, as explained above, a special prosecutor must be subject to supervision and direction by a principal officer accountable to the President, then even a court-appointed prosecutor can be a check of sorts on criminal contempt power. As the District Court recognized in its Findings and Conclusions after trial, it is not reasonable to interpret Rule 42 as shifting the prosecution function from the executive branch to the judiciary if the United States Attorney declines to prosecute. FFCL at 142, 145–46. The United States Attorney's Office's declination to prosecute for lack of resources must be understood to mean that the resources necessary were disproportionate to the public interest that would be served by such a prosecution, not that the Office could not staff the case. The former is the kind of determination that falls within the province of the Article II executive branch.[7] In the absence of other

[7] According to the Department of Justice Criminal Resource Manual: "In the great majority of cases the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance

checks—like independent review by a prosecutor accountable to the executive branch—this Court should exercise its supervisory power to vacate Appellant's conviction.

II. IN THE ALTERNATIVE, THE COURT SHOULD STAY EXECUTION OF MR. DONZIGER'S SIX-MONTH CRIMINAL CONEMPT SENTENCE TO PRESERVE ITS JURISDICION TO GRANT MEANINGFUL APPELLATE RELIEF.

This is the unusual case in which the need to preserve the Court's jurisdiction to provide meaningful appellate relief warrants issuance of an order staying execution of Appellant's six-month sentence, even if this Court were to deny release pursuant to 18 U.S.C. § 3143(b). In determining whether to stay the enforcement of a judgment pending appeal, courts consider four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)

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by the United States Attorney of the court's request to prosecute a mere formality; however, there may be sound reasons in a given case for the United States Attorney to decline participation in the proceedings and for the prosecution to be conducted on behalf of the court by private counsel appointed by the court for this purpose. On a case-by-case basis, the United States Attorney should evaluate not only the propriety of his participation in 18 U.S.C. § 401 proceedings, but also the interest of the government as a litigant vis-a-vis the clear duty of the United States Attorney to preserve respect for the authority of the federal court upon which successful law enforcement relies." U.S. DEP'T JUST., CRIMINAL RESOURCE MANUAL, https://www.justice.gov/archives/jm/criminal-resource-manual-768-indirect-criminal-contempt-role-prosecutor.

> whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 425–26 (2009) (citation omitted). The first two factors "are the most critical." *Id.* at 434 (citation omitted). As the Supreme Court further explained in *Nken*, authority to stay an order pending appeal derives from inherent and statutory power:

> An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as "inherent," preserved in the grant of authority to federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," All Writs Act, 28 U.S.C. § 1651(a). *See In re McKenzie*, 180 U.S. 536, 551, 21 S. Ct. 468, 45 L.Ed. 657 (1901). The Court highlighted the historic pedigree and importance of the power in *Scripps–Howard*, 316 U.S. 4, 62 S. Ct. 875, 86 L.Ed. 1229, holding in that case that Congress's failure expressly to confer the authority in a statute allowing appellate review should not be taken as an implicit denial of that power.
>
> The Court in *Scripps–Howard* did not decide what "criteria ... should govern the Court in exercising th[e] power" to grant a stay. *Id.*, at 17, 62 S. Ct. 875. Nor did the Court consider under what circumstances Congress could deny that authority. See *ibid.* The power to grant a stay pending review, however, was described as part of a court's "traditional equipment for the administration of justice." *Id.*, at 9–10, 62 S. Ct. 875. That authority was "firmly imbedded in our judicial system," "consonant with the historic procedures of federal appellate courts," and "a power as old as the judicial system of the nation." *Id.*, at 13, 17, 62 S. Ct. 875."

Id. at 426–27. Unlike an injunction, "[a] stay "simply suspend[s] judicial alteration of the status quo." *Id.* at 429.

Appellant can make a strong showing that, not only does he present substantial questions on appeal, but he is likely to succeed on the merits. The District Court's ruling that the Special Prosecutor is an executive branch officer who must be in a chain of command supervised and directed by a principal officer is clearly right. And its *sua sponte* rejection of Appellant's motion to dismiss on untimeliness grounds is clearly wrong. So is the District Court's conclusion that the only thing that matters is the absence of express limits on principal officer supervision and direction from Fed. R. Crim. P. 42, when both the Special Prosecutor and the Department of Justice expressed the same erroneous understanding that special prosecutors in contempt cases are exempt from principal officer oversight as judicial appointees.

Appellant will be irreparably injured absent a stay because he is nearly certain to serve his entire sentence before this Court can resolve his appeal. Similarly, the Supreme Court, pursuant to 28 U.S.C. § 2101, stayed the Fourth Circuit's mandate in Governor Robert McDonnell's two-year fraud sentence before granting review of his conviction because

of the improbability that the petition for certiorari would be resolved before he had served all or nearly all of the sentence. *McDonnell v. United States*, 576 U.S. 1091 (2015).

Appellant easily satisfies the two "most critical" stay factors identified *Nken*: the public interest favors the appearance of fairness and deliberation in review of criminal contempt cases and the enforcement of the constitutional rule the Special Prosecutor violated; and a stay would not injure any other party.

CONCLUSION

Appellant should be released pending appeal or the execution of the six-month sentence of imprisonment should be stayed.

DATED: October 8, 2021

Respectful submitted,

/s/ William W. Taylor, III

William W. Taylor, III
David A. Reiser
Leila Bijan
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Suite 1000
Washington, DC 20036
Ph: (202) 778-1800
wtaylor@zuckerman.com
dreiser@zuckerman.com
lbijan@zuckerman.com

Stephen I. Vladeck
Charles Alan Wright
Chair in Federal Courts
University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198

Ronald L. Kuby
119 W 23rd Street, Suite 900
New York, NY 10011
(212) 529-0233

Martin Garbus
OFFIT KURMAN
590 Madison Avenue, 6th Floor
New York, NY 10022
(212) 545-1900

Counsel for Appellant Steven Donziger

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d), the undersigned counsel certifies as follows:

1. Subject to the Court's disposition of Appellant's motion to file an oversized of motion of not more than 10,000 words (Dkt. 17), this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A), as modified, because, as measured by the word processing system used to prepare this document, there are 8,958 words in this motion.

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word software in Century Schoolbook 14-point font in the text and footnotes.

/s/ William W. Taylor, III
William W. Taylor, III

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 19 Cr. 561 (LAP)
11 Civ. 691 (LAK)

STEVEN DONZIGER,

Defendant. Sentencing
----------x

New York, N.Y.
October 1, 2021
10:05 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

RITA M. GLAVIN, ESQ.
BRIAN P. MALONEY, ESQ.
SAREEN K. ARMANI, ESQ.
Special Prosecutors for the United States

LAW OFFICE OF RONALD L. KUBY
Attorneys for Defendant
BY: RONALD L. KUBY, ESQ.
RHIDAYA S. TRIVEDI, ESQ.

OFFIT KURMAN PA
Attorneys for Defendant
BY: MARTIN GARBUS, ESQ.

period of supervised release, as I mentioned, but you are also sentenced to pay a special assessment of $10, and that should be paid promptly.

It is my duty to inform you that unless you've waived it, you have the right to appeal this sentence. Pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A), any notice of appeal must be filed in this court "within 14 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal."

Depending on your financial circumstances, you may also have the right to appeal *in forma pauperis*, which means as a poor person, with the waiver of certain fees and expenses.

Now, Mr. Donziger, I'm aware that you recently submitted a bail application, at Dkt. No. 339. In response to your application, I stated that the Special Prosecutors could respond, and they did so, at Dkt. No. 342. That order also instructed you to inform the Court if you would reply and, if so, when. Also at Dkt. No. 342. Despite that directive, neither you nor counsel ever filed anything further.

Because you have now been convicted and sentenced, the standard for bail has changed from when you made your application. Post-conviction bail applications are governed by 18 U.S.C. § 3143, which provides, in relevant part, that "the judicial officer shall order that a person who has been found

guilty of an offense and who is awaiting . . . execution of a sentence . . . be detained, unless the 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." 18 U.S.C. § 3143(a)(1).

Now as we know, I have previously repeatedly found that Mr. Donziger presented a risk of flight prior to conviction. And that risk certainly is not diminished by the fact that he has now been convicted and sentenced to jail.

Mr. Kuby, Mr. Garbus, will either of you be addressing the bail issue?

MR. KUBY: Yes, Judge.

THE COURT: Yes, sir.

MR. KUBY: Okay. Good afternoon, Judge, once again.

THE COURT: Good afternoon.

MR. KUBY: First of all, I suppose I should thank the Court for at least vindicating my own judgments about what is going to happen and how it's going to happen. You know, one of the great things about getting old that I've discovered is that you usually have a pretty good sense -- no matter how well things seem to be going -- a pretty good sense how they're going to turn out. So yes, indeed, I won the office pool with the guess of six months, something that Mr. Donziger knew quite well before he came into this courtroom today.

In anticipation of that, we are submitting a motion, a

fairly lengthy motion, for bail pending appeal, pointing out, of course, the applicable legal standard of substantial question, as well as talking about the conditions he's currently under being sufficient to prevent any risk of flight, even now, when the Court has done what we knew the Court indeed was going to do.

I would start out by requesting -- and I have a series of requests that have a similar ending. The similar ending, by the way, Judge, is that we do not hear the jail door slam behind Mr. Donziger today.

So the first request is that the Court allow Mr. Donziger to maintain his liberty pending a decision on this motion. I think the special prosecutor may or may not wish to respond, but indeed, it is a substantive motion, it's not just -- that's all. I mean, so that's the first request: May we set a schedule for decision on the motion and thereafter you will set a surrender date for Mr. Donziger.

THE COURT: Okay. Why don't you give me your list. Go down the list of requests, would you, sir.

MR. KUBY: Okay. So that's the first one.

If the Court decides to deny the motion for bail pending appeal from the bench or decides to remand Mr. -- well, if the Court decides to deny bail pending appeal from the bench, I would request, at a -- well, I had a minimum. My next request would simply be that Mr. Donziger remain at liberty

pending voluntary surrender to his institution of designation. I know that ordinarily he would go to the MCC because of the shortness of the sentence. Given the fact that the MCC, finally, has been closed down, *sine die*, everybody's been transferred to the MDC. There are certainly minimal security camps -- like I know that Otisville has a satellite minimum camp -- but I think Mr. Donziger's sentence may be too short even for that, because usually, when you're within six months of your release date, that's when you go to a halfway house. So I have no idea what the Bureau of Prisons will do with somebody with Mr. Donziger's staggeringly low custody and security classification, combined with a six-month sentence, but I would request that he be permitted, as so many others have who were convicted of offenses far more egregious than Mr. Donziger's, to voluntarily surrender at the date of his designation.

Failing that, failing that, I would request a period of, say, two weeks for Mr. Donziger to put his affairs in order and for us to go to the Second Circuit in the hands of new counsel who will be taking over, who will be the show runner for the next season of this, and proceed in just an orderly fashion to the Second Circuit rather than, you know, the door slamming shut at 12:30 and new counsel trying to get everything heard by 4:00 this afternoon. I've had preliminary discussions with the special prosecutor about that last request, but I will

not speak for her and I will ask her to speak for herself.

THE COURT: Did you wish to be heard?

MS. GLAVIN: Yes, your Honor.

I don't have an objection to a surrender date for Mr. Donziger. And yes, I would like an opportunity to respond to the motion that Mr. Kuby just handed to me.

THE COURT: All right. Anything else?

MR. KUBY: I'll just go sit down and see if I've won something yet, Judge.

THE COURT: With respect to briefing and the like, the motion for bail pending appeal is denied. The reason for that is, under the statute, the Court is required to detain a defendant unless the Court finds by clear and convincing evidence that the defendant is not likely to flee. As I mentioned earlier, I have found repeatedly that Mr. Donziger is a flight risk. As I mentioned earlier today, that risk has increased now that he has been both convicted and sentenced to jail. So first of all, I do not find that and can't find that.

I note that your very substantial motion -- as in lots of pages -- is directed toward the substantial question of law that you wish to raise on appeal. I take no position as to whether it's a substantial question or not, but the point is that the bail statute relating to bail pending appeal requires the Court to find by clear and convincing evidence that Mr. Donziger is not a flight risk. I cannot and do not find

that and therefore bail pending appeal is denied.

In the interim, however, I will permit Mr. Donziger to continue on the current terms and conditions of pretrial release on the condition that expedited relief be sought from the Court of Appeals within a week.

Is there anything further today, counsel?

MR. KUBY: No. I better get to work on that appellate counsel business right now.

And I note that we have provided Mr. Donziger with the $10 so he can at least comply with that in an expedited fashion.

THE COURT: Yes, sir.

MR. KUBY: Thank you, Judge.

THE COURT: Thank you, Mr. Kuby.

Good afternoon, ladies and gentlemen. Thank you for your attention.

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Exhibit 2

AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
STEVEN DONZIGER

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:19CR00561-01 (LAP)

USM Number: 87103-054

Ronald Kuby
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) One, Two, Three, Four, Five, and Six after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18USC401(3)	Criminal Contempt - Forensic Inspection Protocol	5/28/2019	One
18USC401(3)	Criminal Contempt - Forensic Inspection Protocol	5/28/2019	Two
18USC401(3)	Criminal Contempt - Passport Surrender Order	6/12/2019	Three

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 10-1-2021

10/1/2021
Date of Imposition of Judgment

Loretta A. Preska
Signature of Judge

Loretta A. Preska, Senior U.S.D.J.
Name and Title of Judge

October 1, 2021
Date

DEFENDANT: STEVEN DONZIGER
CASE NUMBER: 1:19CR00561-01 (LAP)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18USC401(3)	Criminal Contempt - Retainer Agreement	9/3/2018	Four
18USC401(3)	Criminal Contempt - ADF Continent Fee Grant	5/27/2019	Five
18USC401(3)	Criminal Contempt - Personal Interest	12/23/2016	Six

DEFENDANT: STEVEN DONZIGER
CASE NUMBER: 1:19CR00561-01 (LAP)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
6 MONTHS

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: STEVEN DONZIGER
CASE NUMBER: 1:19CR00561-01 (LAP)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 10.00	$	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: STEVEN DONZIGER
CASE NUMBER: 1:19CR00561-01 (LAP)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 10.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.