UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. **DAVID H. SAFAVIAN**, Defendant.	**Criminal No.** 05-370 (PLF)

DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

Defendant David H. Safavian, by and through undersigned counsel, respectfully moves this Court for release on conditions pending appeal pursuant to 18 U.S.C. § 3143(b)(1). Release pending appeal shall be granted where: (1) the defendant establishes by clear and convincing evidence that he is not likely to flee or pose a danger to any other person or to the community; (2) the appeal is not for purposes of delay; (3) the appeal will "raise[] a substantial question of law or fact"; and (4) that question, if resolved in defendant's favor, is "likely to result" in a reversal of the conviction or new trial. 18 U.S.C. § 3143(b)(1). All of those requirements are satisfied here.

First, it is beyond serious dispute that conditions short of incarceration are sufficient to ensure that Safavian will not flee. Safavian has consistently complied with every condition and made every appearance required of him. In addition, as Safavian's sentencing memorandum explains in detail, he is committed to his family and has significant ties to his community. He is married with, at present, one minor child for whom he serves as the primary caregiver, and he and his wife are expecting another child in March. He is active in his community and in his church. There is simply no basis to suggest that he would pose a risk of flight. Nor is there any basis on which to contend that he would present a danger to the public if released. Indeed, the

Court's release orders—including its recent order imposing a surrender date of June 18, 2010—recognize that he poses no flight risk or danger to society.

Moreover, Safavian's appeal is not for the purposes of delay, and it will raise questions that are plainly "substantial." As the D.C. Circuit has explained, a question is "substantial" if it is "close" or "one that very well could be decided the other way." *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1988) (*per curiam*). This standard is entirely distinct from the question whether the defendant is likely to succeed on the merits of the appeal. A question may be "close" even if it is one on which the Court has previously found the defendant's legal authority unpersuasive—and even if it suspects that an appellate court will, as well. Particularly in cases that raise challenging legal questions to which the answers are not immediately apparent, mere conjecture about an appellate court's ruling is an inadequate basis for finding those questions not "substantial." Therefore, "where a defendant challenges the Court's ruling on a novel question of law and provides a rationale for a contrary interpretation that is supported by arguably applicable legal authority[,] the Court cannot say that the question for appeal is insubstantial or not susceptible to a different answer." *United States v. Quinn*, 416 F. Supp. 2d 133, 136 (D.D.C. 2006).

Once the Court determines that there is a "substantial" question for appeal, it must then consider whether resolution of that question "likely" will result in reversal, an order for a new trial, or "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B). "[T]his requirement precludes release pending appeal only where the alleged error might be deemed merely harmless or unprejudicial." *Quinn*, 416 F. Supp. 2d at 136.

Safavian will raise at least three substantial questions on appeal, which, if resolved in his favor, would require reversal, a new trial, or a sufficiently reduced sentence to trigger application of 18 U.S.C. § 3143(b)(1).[1] As explained in detail below:

- Safavian will appeal the Court's rulings on the materiality of the statements alleged in Counts Two and Five. The D.C. Circuit has consistently held that a "material" statement is one that "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a particular determination." *In re Sealed Case*, 162 F.3d 670, 673 (D.C. Cir. 1998) (internal quotation marks and brackets omitted). The government did not sufficiently prove that Safavian's statements to the ethics officer and the FBI agent met that legal standard.

- Safavian will appeal the Court's decision that Counts Three and Five are not the product of vindictive prosecution. As to each, the Court found that Safavian had demonstrated a reasonable likelihood of vindictiveness. Consequently, it shifted the burden to the government to rebut a presumption of vindictiveness. The government failed to provide legitimate, objective evidence to justify the additional charges, and thus it did not overcome that presumption.

- Safavian will appeal the Court's ruling admitting evidence of the cost of the charter plane. The government failed to offer any legal authority that would govern the proper treatment of that evidence—or otherwise render it relevant to a valid theory by which the jury could measure the cost of Safavian's travel. Admission of that evidence was improper and highly prejudicial as to both Count One and Count Three.

I. THE STATEMENTS ALLEGED IN COUNTS TWO AND FIVE WERE IMMATERIAL

Counts Two and Five charged that Safavian made false statements in violation of subsections (a)(1) and (a)(2) of 18 U.S.C. § 1001. Both of these subsections require that the statement at issue be *material*: Section 1001(a)(1) is violated only if a "material fact" has been

[1] Resolution of these questions, taken together, would require reversal or a new trial on each count of conviction. However, even if the Court found that only a subset of the questions on appeal were substantial, that too would meet the requirements for release pending appeal. For example, if the Court concluded that only the first and third questions, but not the second, were "close" ones, that determination would affect all of the counts of conviction, warranting either reversal or a new trial as to each. Alternatively, if the Court concluded that the substantial questions on appeal did *not* encompass all of the counts of conviction, release pending appeal would still be appropriate, because resolution of the legal questions at issue likely would result in a sentence including "a term of imprisonment less than . . . the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B)(iv).

concealed, and Section 1001(a)(2) is violated only by a "materially false, fictitious, or fraudulent statement or representation."

Consistent rulings by the United States Supreme Court and the Court of Appeals require that, to be material, a statement must be capable of influencing or otherwise affecting a particular decision made by a particular individual or tribunal. *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (to be material, a statement "must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed'" (alternation in original) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988))); *Kungys*, 485 U.S. at 771 (directing courts to consider "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision" under an analogous provision of 8 U.S.C. § 1451(a)); *In re Sealed Case*, 162 F.3d at 673 (a "material" statement is one that "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a *particular* determination" (emphasis added; internal quotation marks and brackets omitted)); *United States v. Barrett*, 111 F.3d 947, 953 (D.C. Cir. 1997) (same); *United States v. Dale*, 991 F.2d 819, 834 n.27 (D.C. Cir. 1983) (same); *United States v. Hansen*, 772 F.2d 940, 949 (D.C. Cir. 1985) (same); *United States v. Diggs*, 613 F.2d 988, 999 (D.C. Cir. 1979) (same). In short, the statement at issue must be both relevant to the decision and consequential to its outcome. Here, the government simply did not carry its burden of proof on this element, and it is therefore, at the very least, a "close" question whether Counts Two and Five will be sustained on appeal.

A. A False Statement In A Request For An Ethics Opinion Is Not Material Because An Ethics Opinion Itself Is Not Consequential

Count Two charged that, in seeking an ethics opinion regarding the acceptance of a gift of free air transportation, Safavian falsely told the GSA ethics officer that Jack Abramoff "did all

of his work on Capitol Hill." Shortly thereafter, the ethics officer issued an opinion responding to Safavian's request. Although she offered advice based on the information Safavian had provided her, her response was entirely advisory in nature; it did not "permit or forbid" Safavian's ensuing conduct. *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008). Because the ethics opinion had no ability to determine, or even influence, whether Safavian's conduct was lawful or unlawful, it was immaterial as a matter of law. And, if the ethics officer's conclusions were themselves immaterial, then it follows that the factual inputs that informed those conclusions were also immaterial, regardless of whether they influenced the officer's ultimate advice.

This reasoning is entirely consistent with—if not required by—the Court of Appeals' holding that Safavian had no duty to disclose information to the ethics officer. Indeed, if an ethics opinion in fact influenced or otherwise materially affected a governmental action, then it would seem to follow that one would have an obligation to disclose relevant information to that officer. But as the Court of Appeals recognized, the government has not required *any* disclosure in this context. *Id.* at 964-65. The absence of any legal authority imposing a disclosure obligation confirms that the *substance* of the ethics opinion is a matter of indifference to the government.

In denying post-trial relief, the Court held that the ethics officer's "preparation and issuance of the ethics opinion" was influenced by Safavian's conduct. Op. and Order (Dkt. No. 248) at 10. It is, however, at least a "close" question whether the Court of Appeals will find that sufficient. For one thing, there is no evidence that the officer's "official actions or activities" were in fact altered as a result of Safavian's statements. To be sure, had Safavian provided her with different information, the *content* of her opinion and advice might have changed, but there is no reason to think that she would have engaged in materially different *actions* or *activities* had

Safavian worded his request differently. And even if she had, in fact, acted differently, the resulting opinion would still have no legal effect, one way or the other, on whether Safavian was authorized to take the airfare as a gift.

What is more, we are aware of no authority holding that a false statement in a request for an advisory ethics opinion is material for purposes of Section 1001. Nor are we aware of any authority holding that a false statement in a request for an advisory opinion of *any* kind may provide the basis for a Section 1001 charge. Because the authority on this point is sparse, and the government was unable to identify case law compelling its position, this question is certainly one that the Court of Appeals "very well could . . . decide[] the other way." *See Perholtz*, 836 F.2d at 555.

B. The Statement In Count Five Was Immaterial Because It Did Not Influence And Was Incapable Of Influencing Agent Reising, Who Knew When The Statement Was Made That It Was Inaccurate

The jury convicted Safavian on Specification C of Count Five, which charged that he falsely stated to FBI Agent Reising that he "would not have been able to help Abramoff with GSA-related activities if he wanted to since [he] was new at GSA." Superseding Indictment ¶ 53(C). Again, the government failed to prove that Safavian's statement was material.

Here, the only testimony that could have established the materiality of Safavian's statement in the Reising interview was Reising's. And Reising's testimony on this point was unequivocal—at the time Safavian made the statement, Reising already knew that it was inaccurate. 12/10/08 Tr. (a.m.) at 123 ("Q. Now, sir, it is a fact, is it not, that as you asked each question and elicited each of these statements, you already knew that Mr. Safavian was at least inaccurate, it will be for the jury to decide whether it was deliberate or not, but you already knew at each moment that he said those things that he was mistaken? A. Correct. Q. Based on what you already knew, right on the spot. A. From the e-mails, yes. Q. From the e-mails you went

over yesterday, which you read before you even went there? A. Yes.); *id*. at 22-23 ("Q. [W]hen you went into the interview you had already read all of the e-mails that you testified about yesterday? A. Yes. Q. And so you knew precisely what the back and forth had been between these two men leading up to the August trip; is that right? A. I knew what it said in the e-mails."). As this testimony makes clear, even if Safavian's statement was false, Reising did not believe it, and the statement did not influence, *nor was it capable of influencing*, his decisions.

The Court rejected Safavian's materiality challenge to this Count "for two reasons." Op. and Order at 12. First, the Court found that the jury "could have found that Mr. Safavian's statement to Agent Reising was material because it raised suspicions in Agent Reising's mind as to whether Mr. Safavian was lying about other matters . . . and thereby actually or potentially influenced Agent Reising's decisions" regarding the investigation. *Id.* at 12-13. But it is at least a "close" question whether a reviewing court will agree with that analysis. Suppose, for example, Safavian had lied about the contents of his lunch that day, or the color of his socks; those statements too might have "raised suspicions in Agent Reising's mind as to whether Mr. Safavian was lying about other matters." *Id.* But, surely, such statements would have been immaterial under Section 1001. The statute is not intended to punish every falsehood—it reserves criminal sanctions only for conduct that has, or is capable of having, consequences that matter to the federal Government. Thus, the statute cannot be held to criminalize *any* false statement made to the Government on the theory such statements, even if entirely irrelevant to the federal decision-maker, might be indicative of the speaker's propensity to lie in other contexts.

The Court next reasoned that Safavian's statement fell within the scope of Section 1001 because it might have influenced "*an* FBI agent's decisions," even if not Agent Reising's decisions. *Id.* at 13 (emphasis added). The Court observed that materiality cannot turn on "such

an arbitrary distinction" as whether an agent has prepared for an upcoming interview by reviewing the interviewee's prior statements. *Id.* at 13-14. It rejected Safavian's argument to the contrary by concluding that it "reads too much into a single bracketed word in a single sentence from a single court of appeals decision." *Id.* at 13.

The Court of Appeals could well conclude, however, that this Court's decision reads critical language *out* of governing case law. The D.C. Circuit has made clear that "[m]ateriality must be judged by the facts and circumstances in the *particular* case." *Weinstock v. United States*, 231 F.2d 699, 702 (D.C. Cir. 1956) (emphasis added); *In re Sealed Case*, 162 F.3d at 673. Indeed, it has included language to this effect in far more than "a single . . . decision." *See* Op. and Order at 13. That court has consistently and repeatedly explained that materiality rests on a statement's "natural tendency" or ability to influence "the decision of the tribunal in making a *particular* determination." *In re Sealed Case*, 162 F.3d at 673 (internal quotation marks and brackets omitted; emphasis added); *Barrett*, 111 F.3d at 953 (same); *Dale*, 991 F.2d at 834 n.27 (same); *Hansen*, 772 F.2d at 949 (same); *Diggs*, 613 F.2d at 999 (same).

This Court's conclusion about how some *other* FBI agent might have acted simply does not account for the facts of *this* case. As noted above, Reising made it quite clear in his testimony that he knew Safavian's statement was inaccurate the moment he heard it. 12/10/08 Tr. (a.m.) at 123; *id*. at 22-23. Thus, *regardless* of whether the same statement might have been material in other, hypothetical circumstances, it was not material in "the facts and circumstances in th[is] particular case." *Weinstock*, 231 F.2d at 702. Moreover, even if it *were* appropriate to consider how Safavian's statement might have affected other listeners, and even if the statement *might* have been material if made to another FBI agent under different circumstances, the government never offered any proof on this issue at trial, *see* 12/09/08 Tr. (p.m.) at 33-117 (Reising direct examination); 12/10/08 Tr. (a.m.) at 1-18 (same); 12/10/08 Tr. (p.m.) at 8-15

(Reising re-direct examination), and the jury would not have been free to draw such inferences absent this necessary factual predicate.

For the foregoing reasons, the Court of Appeals could "very well could" determine that the government failed to prove that Safavian's statement to Agent Reising was "material" within the meaning of Section 1001. *See Perholtz*, 836 F.2d at 555.

II. COUNTS THREE AND FIVE ARE THE PRODUCT OF VINDICTIVE PROSECUTION

Count Three charged that Safavian made a false statement by failing to disclose the Scotland trip as a gift on his 2002 financial disclosure form. Count Five charged a series of false statements to FBI Agent Reising. The Court concluded that Safavian had "said enough for the Court to invoke the presumption of vindictiveness" with respect to both counts. Op. and Order at 16; *see also United States v. Goodwin*, 457 U.S. 368, 384 (1982); *Maddox v. Elzie*, 238 F.3d 437, 446 (D.C. Cir. 2001). Accordingly, it shifted the burden to the government to rebut the presumption with "objective information in the record justifying" the new charges. Op. and Order at 16; *see also United States v. Gary*, 291 F.3d 30, 34 (D.C. Cir. 2002). The Court then found that the government had demonstrated that it relied on new evidence when adding Count Three, and that it had proffered a "legitimate" and "reasonable" basis for adding the statement in Specification C of Count Five on which Safavian was ultimately convicted. Op. and Order at 19, 23.

Although the Court ultimately was not persuaded by Safavian's arguments that the government failed to provide objective evidence supporting the new charges, it nevertheless acknowledged that Safavian had demonstrated "a reasonable likelihood of vindictiveness" on the part of the prosecutors. *Id.* at 15. This conclusion strongly suggests that the question of

vindictive prosecution is a "close" one, on which the Court of Appeals might reach a different conclusion.

A. Count Three

The government attempted to justify the addition of Count Three on the ground that, since the first trial, it "obtained additional evidence . . . necessary to prove that the defendant's expenses for the August 2002 Trip were grossly in excess of his $3,100 payment (thereby requiring Safavian to disclose the unpaid portion as a gift on his disclosure form)." Gov't Opp. to Def. Mot. for a Judgment of Acquittal and for a New Trial (Dkt. No. 241) at 12-13. The Court found "no reason to disbelieve government counsel's representations" that it was only after the first trial that it secured the testimony of Scottish travel agent Laura Van Zyl, as well as some of the records to which she referred during her testimony. Op. and Order at 17-18. The Court also found relevant the addition of the testimony of Will Heaton, who was unavailable at the time of the first trial. *Id.* at 18-19.

Even assuming that both witnesses became available only after the first trial, the facts underlying both charges were well known to the government during the original proceeding. Indeed, prosecutors charged Safavian with obstruction and obtained a conviction at the first trial based on his allegedly false representations about the cost of the trip. The Court of Appeals also explicitly held that there was "sufficient evidence for the jury to conclude that Safavian knew the true cost of his share was greater than $3,100." *Safavian*, 528 F.3d at 968. Clearly, therefore, the government's "additional" evidence was not necessary to prove Count Three.

It would render meaningless the protections afforded by the doctrine of prosecutorial vindictiveness if, to add a new charge following a successful appeal (or other exercise of a constitutional right), the prosecution needed only to produce *additional* evidence—no matter how duplicative of existing testimony or other materials already in evidence—to fortify an

already sufficient case. Under such a rule, for example, because of the length of time often required to obtain evidence via a Mutual Legal Assistance Treaty (MLAT) request, in every case in which such a request is pending, there would be no stopping the government from adding charge after charge each time the "defendant successfully exercised a constitutional right or pursued a statutory right of appeal or collateral attack," *Gary*, 291 F.3d at 384 (quoting *Maddox*, 238 F.3d at 446). Prosecutors would need only to identify just one additional witness willing and able to testify, or to produce just a single additional document—and such evidence would suffice to "justify" the new charges, even if it bore only tangential relevance to those charges and was entirely superfluous given existing testimony or materials in evidence.

It simply cannot be that such evidence, even if entirely unnecessary to the government's case, could "justify[] the prosecutor's action." *See Goodwin*, 457 U.S. at 376 n.8 (1982). Such a rule would be entirely inconsistent with governing precedent, not to mention the purpose of the doctrine. *See id.*; *Gary*, 291 F.3d at 34-35 ("[O]ur concerns over alleged vindictiveness . . . relate to . . . whether a prosecutor's actions are designed to punish a defendant for asserting her legal rights."). Therefore, the question whether the government has adequately rebutted the presumption of vindictiveness with respect to Count Three is, without a doubt, "one that very well could be decided the other way." *See Perholtz*, 836 F.2d at 555.

B. Count Five

The government asserted that the "objective" basis for adding Count Five to the Superseding Indictment "was that the testimony needed to support it would also undermine the prospective testimony of Mr. Safavian's expert witness." Op. and Order at 21-22. The Court found that that justification reflected "'a reasonable reevaluation of trial strategy in light of the court of appeals' decision.'" *Id.* at 22 (quoting *United States v. Poole*, 407 F.3d 767, 777 (6th Cir. 2005)). The Court acknowledged, however, that although the government's proffered

justification applied to Specifications A and B of Count Five, Specification C "has nothing to do with the expert's anticipated testimony and therefore its addition is not independently justified by the prosecution's change in trial strategy." *Id.* The Court also observed that overcoming "the presumption of vindictiveness with regard to certain additional charges does not permit" the government to add "*wholly unrelated* charges." *Id.* at 23 (emphasis added). It nevertheless concluded that because the statement charged in Specification C was made "at the same time" as statements charged Specifications A and B—and because the latter statements *were* relevant to the expert's expected testimony—Specification C was sufficiently "closely related" to the valid specifications, and thus the government was justified in charging it, as well. *Id.*

The Court has held, in effect, that once the presumption of vindictiveness applies, the government need not present objective evidence to justify an additional charge so long as that additional charge arises from statements made in close temporal proximity to charges that *are* justified. The Court of Appeals may well disagree. For one thing, we are aware of no case law to support the legal proposition that an otherwise vindictive charge can be justified because it is closely tied to charges that are not vindictive. It is hard to see how such a conclusion can be reconciled with the fundamental purpose of the vindictive prosecution doctrine, which requires the government to present "objective evidence justifying the prosecutor's action" with respect to any—and every—additional charge. *Goodwin*, 457 U.S. at 376 n.8.

Because this issue is, at minimum, one of first impression, and the government has failed to offer legal authority compelling application of its suggested standard, it is at least a "close" question whether the Court of Appeals would conclude that the government has adequately rebutted the presumption of vindictiveness with respect to Count Five. *See Perholtz*, 836 F.2d at 555.

III. THE ADMISSION OF EVIDENCE ABOUT THE COST OF THE CHARTER PLANE CONSTITUTED PREJUDICIAL LEGAL ERROR

Count One alleged that Safavian obstructed justice by making false statements to the GSA Office of the Inspector General (OIG). Count Three charged that he made a false statement by failing to disclose the Scotland trip as a gift on his financial disclosure form. Over Safavian's repeated objections, the Court permitted the jury to consider evidence regarding the cost of the $90,000 charter flight when deliberating on each of these counts. In his post-trial motion, Safavian argued once again that the charter cost evidence was inadmissible, because the government had failed present legal authority directing the jury how to consider that evidence. Furthermore, because the charter evidence was unfairly prejudicial to his defense, Safavian asserted that he should be granted a new trial on Counts One and Three.

Nevertheless, in its post-trial opinion, the Court identified a number of reasons why the charter evidence was properly admitted. First, it found that the government did present "*some evidence* . . . to the jury" that Safavian should have accounted for his *pro rata* share of the cost of the charter when paying for the trip. Op. and Order at 30. That evidence consisted of an ethics training material stating that government employees must report the "market value" of a putative gift, where "market value" means the "retail cost" of that gift, as well as the testimony of the GSA ethics officer, describing the manual. *Id.* at 28-30.

The government's evidence is woefully inadequate to support its burden of demonstrating that the charter evidence was relevant to a valid theory of valuation. Nothing about the "fair market value" and "retail cost" standards—or the regulations in which those standards are articulated—indicates that either "market value" or "retail cost" is equivalent to *pro rata* share. Indeed, the Court recognized as much in a pre-trial motions hearing, when it questioned whether the government had presented a sufficient legal basis for offering its valuation theory to the jury.

12/02/09 Tr. (p.m.) at 35 ("I don't know what we tell the jury, what the standard is for them to apply the evidence you want to introduce. . . . You're going to argue that it's first class -- that it's 10 percent of the charter flight, and they're going to argue that it's comparables, and there's no law, there's no standards."); *id.* at 38-39 ("I don't know how we're going to explain this to the jury. . . . So the jury will be left to its own devices without any instruction or guidance."). The government's support for its *pro rata* approach is no more compelling now than it was then.

The Court next reasoned that the jury did not "*necessarily* rely[] on the theory that the market value meant the pro rata share of the charter flight" when reaching its verdicts on Counts One and Three. Op. and Order at 32 (emphasis added). But to prevail on appeal, Safavian will not have to show that the jury "necessarily" applied the government's *pro rata* valuation theory. Rather, under *Kotteakos v. United States*, 328 U.S. 750 (1946), the *government* (not Safavian) will have to show that the wrongful admission of evidence did not have a "substantial and injurious effect or influence in determining the jury's verdict," *id.* at 776; *see also United States v. Johnson*, 519 F.3d 478, 483 (D.C. Cir. 2008). Here, the government has provided no such proof. It has failed to explain how any rational juror could have disregarded evidence of the charter flight—an item that was far and away the most costly element of the trip—when considering the conduct charged in Counts One and Three. That evidence certainly could have had a "substantial and injurious effect or influence" on the jury's deliberations, *Kotteakos*, 328 U.S. at 776, regardless of whether the jury applied the government's *pro rata* theory.

Finally, the Court concluded that "even if it was error to admit [the charter cost] evidence, the error was harmless," Op. and Order at 34, because "there was sufficient evidence for the jury to disregard any and all evidence relating to the value of the airfare and still convict the defendant on Count One and Count Three" *id.* at 32. This statement too overlooks the applicable legal standard. The proper inquiry is not whether the jury *might* have relied on other

evidence to conclude that Safavian knew that his check did not cover the full cost of his trip. Rather, the relevant question is whether the improperly admitted evidence inappropriately strengthened the government's case and was unfairly prejudicial to the defense. *See, e.g.*, *United States v. Cunningham*, 462 F.3d 708, 712-15 (7th Cir. 2006); *Bean v. Calderon*, 163 F.3d 1073, 1083 (9th Cir. 1998). Here, it would seem beyond dispute that the charter evidence did strengthen the government's case as to Counts One and Three and unfairly prejudiced the defense.

In its post-trial opinion, the Court also addressed Safavian's argument that *Yates v. United States*, 354 U.S. 298 (1957), and the D.C. Circuit's prior decision in this case required that the general verdict on Count One be vacated. In *Yates*, the Supreme Court explained that when the jury is given two possible grounds for conviction, but one of those grounds is legally invalid, "and it is impossible to tell which ground the jury selected," then "the proper rule to be applied is that which requires a verdict to be set aside." *Id.* at 312. Here, the government submitted two different theories to support conviction on Count One: the jury could have convicted *either* because Safavian falsely stated that he had paid the full cost of the trip *or* because he falsely characterized Abramoff's business before GSA. The former theory was legally invalid because of the erroneous admission of evidence regarding the cost of the charter flight. In fact, it was on strikingly similar grounds that the Court of Appeals vacated Safavian's conviction on Count One of the initial Indictment. It held that Safavian should have been allowed to call an expert to explain the phrase "doing business" before the General Services Administration. *Safavian*, 528 F.3d at 967. Citing *Yates*, the Court of Appeals then explained that even though this evidentiary error "related to only one of" two alternative predicates in Count One, "reversal is still required unless the [district] court's ruling constituted harmless

error." *Id.* That ruling is equally dispositive of Safavian's challenge to Count One this time around.

For all of these reasons, "the question for appeal"—whether admission of the charter evidence constituted prejudicial legal error—is certainly "susceptible to a different answer." *Quinn*, 416 F. Supp. 2d at 136.

* * *

Each of the questions outlined above is, at minimum, "close" or "one that very well could be decided the other way." *Perholtz*, 836 F.2d at 555. Thus, each presents a "substantial" question within the meaning of 18 U.S.C. § 3143(b)(1). Moreover, when taken together, these questions, if decided in Safavian's favor, would likely result in reversal, a new trial order, or a reduced sentence, including a term of imprisonment less than the expected duration of the appeal process. Accordingly, Safavian should be released on conditions pending appeal.

CONCLUSION

For the reasons stated above, defendant David H. Safavian respectfully requests that the Court grant his motion for release on conditions pending appeal.

Dated: November 10, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

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