

17-2765

United States v. Thiam

1 In the
2 United States Court of Appeals
3 For the Second Circuit
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6 AUGUST TERM, 2018

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8 ARGUED: OCTOBER 9, 2018

9 DECIDED: AUGUST 5, 2019

10
11 No. 17-2765

12
13 UNITED STATES OF AMERICA,
14 *Appellee,*

15
16 *v.*

17
18 MAHMOUD THIAM,
19 *Defendant-Appellant.*
20

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22 Appeal from the United States District Court
23 for the Southern District of New York.
24 No. 17-cr-00047 (DLC) – Denise L. Cote, *Judge.*
25

26
27 Before: WALKER and LOHIER, *Circuit Judges*, and PAULEY, *District Judge*.
28

29
30 Defendant Mahmoud Thiam (“Thiam”) appeals from a judgment entered in
31 the United States District Court for the Southern District of New York following a

* Judge William H. Pauley III, United States District Judge for the Southern District of New York, sitting by designation.

1 jury trial before Denise L. Cote, *Judge*, convicting him of money laundering and
2 conducting transactions in property criminally derived through bribery in the
3 Republic of Guinea. On appeal, Thiam challenges his conviction, arguing (i) that
4 the district court's jury instructions were erroneous because they failed to include
5 the definition of "official act" relative to a bribery conviction, as set forth in
6 *McDonnell v. United States*, 136 S. Ct. 2355 (2016); (ii) that there was insufficient
7 evidence (a) to support a finding of a quid pro quo exchange necessary for his
8 conviction and (b) to support a finding that he committed an "official act" as
9 defined in *McDonnell*; and (iii) that several evidentiary rulings by the district court
10 were erroneous. For the reasons set forth below, we AFFIRM the judgment of the
11 district court.

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13 _____
14 ELISHA J. KOBRE (Christopher J. DiMase, Daniel B. Tehrani, *on*
15 *the brief*), Assistant United States Attorneys, Lorinda I. Laryea,
16 Trial Attorney, Fraud Section, Criminal Division, United States
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18 Attorney for the Southern District of New York, New York, NY,
for Appellee.

19 JONATHAN I. EDELSTEIN, Edelstein & Grossman, New York, NY,
20 *for Defendant-Appellant*.

21 _____
22 JOHN M. WALKER, JR., *Circuit Judge*:

23 Defendant Mahmoud Thiam ("Thiam") appeals from a judgment entered in
24 the United States District Court for the Southern District of New York following a
25 jury trial before Denise L. Cote, *Judge*, convicting him of money laundering and
26 conducting transactions in property criminally derived through bribery in the
27 Republic of Guinea. On appeal, Thiam challenges his conviction, arguing (i) that
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1 the definition of “official act” relative to a bribery conviction, as set forth in
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3 evidence (a) to support a finding of a quid pro quo exchange necessary for his
4 conviction and (b) to support a finding that he committed an “official act” as
5 defined in *McDonnell*; and (iii) that several evidentiary rulings by the district court
6 were erroneous. For the reasons set forth below, we AFFIRM the judgment of the
7 district court.

8 BACKGROUND

9 Thiam appeals from a judgment, after a jury trial, convicting him of money
10 laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B) and 1956(f) and of conducting
11 transactions in criminally derived property in violation of 18 U.S.C. § 1957. Both
12 statutes prohibit certain transactions involving proceeds of “specified unlawful
13 activity.”² In relevant part, both 18 U.S.C. §§ 1956(c)(7)(B)(iv) and 1957(f)(3) define
14 “specified unlawful activity” as “an offense against a foreign nation involving . . .
15 bribery of a public official,” in violation also of the laws of that foreign nation.

16 Thiam, a United States citizen, was Minister of Mines and Geology of the
17 Republic of Guinea in 2009 and 2010, in which capacity he received an \$8.5 million
18 bribe from a Chinese entity in return for supporting a Chinese joint venture with
19 Guinea. Specifically, in the spring of 2009, Guinea entered into negotiations with
20 the China International Fund (“CIF”), a Chinese company, to form a joint venture
21 that would invest in various projects in Guinea, including mining concessions. As
22 Guinea’s Minister of Mines and Geology, Thiam bore responsibility for
23 negotiating many of the terms of the joint venture, which was documented by a
24 Memorandum of Understanding, a Framework Agreement, and a Shareholder’s
25 Agreement.

² 18 U.S.C. §§ 1956(a) and 1957(a).

1 a finding of a quid pro quo exchange necessary for his conviction and (b) to
2 support a finding that he committed an “official act” as defined in *McDonnell*; and
3 (iii) that several evidentiary rulings by the district court were erroneous. For the
4 reasons set forth below, none of these arguments has merit.

5 I. Jury Instructions

6 “Generally, the propriety of jury instructions is a matter of law that is
7 reviewed de novo,” under a harmless error standard if the defendant objected to
8 the jury instructions at trial and a plain error standard if he did not.³ On appeal,
9 Thiam argues that the jury instructions were erroneous because they failed to
10 apply *McDonnell*’s definition of “official act” to Articles 192 and 194 of Guinea’s
11 Penal Code, violations of which were the “specified unlawful activity” underlying
12 Thiam’s convictions. We reject this assertion and hold that *McDonnell* does not
13 apply to Articles 192 and 194 of Guinea’s Penal Code. Therefore, regardless of
14 whether our review is governed by the harmless error or plain error standard, the
15 jury instructions were not erroneous for failing to include *McDonnell*’s “official
16 act” language.

17 The defendant in *McDonnell*, a former Governor of Virginia, was indicted
18 on bribery charges stemming from his acceptance of gifts, loans, and other benefits
19 from a Virginia businessman in exchange for arranging for universities in Virginia
20 to conduct tests on a nutritional supplement produced by the businessman.⁴ To
21 obtain a conviction on the bribery charges—honest services fraud and Hobbs Act
22 extortion charges—the government was required “to show that Governor
23 McDonnell committed (or agreed to commit) an ‘official act’ in exchange for the
24 loans and gifts,”⁵ and the parties agreed to use the definition of “official act” found

³ *United States v. Botti*, 711 F.3d 299, 307–08 (2d Cir. 2013).

⁴ *McDonnell*, 136 S. Ct. at 2361.

⁵ *Id.*

1 in the federal bribery statute, 18 U.S.C. § 201(a)(3).⁶ On appeal, the Supreme Court
 2 focused on the definition of “official act,” and concluded that this term should be
 3 interpreted narrowly, such that “[s]etting up a meeting, talking to another official,
 4 or organizing an event (or agreeing to do so)—without more—does not fit [the]
 5 definition of ‘official act.’”⁷

6 Principles of international comity, however, counsel against applying the
 7 “official act” definition set forth in *McDonnell* to Articles 192 and 194 of Guinea’s
 8 Penal Code because this would require us to interpret Guinean law and, in doing
 9 so, limit conduct that Guinea has chosen to criminalize. The doctrine of
 10 international comity “is best understood as a guide where the issues to be resolved
 11 are entangled in international relations.”⁸ “Under the principles of international
 12 comity, United States courts ordinarily refuse to review acts of foreign
 13 governments and defer to proceedings taking place in foreign countries, allowing
 14 those acts and proceedings to have extraterritorial effect in the United States.”⁹
 15 Although Thiam was not prosecuted in Guinea for his actions, presumably he
 16 could have been, and our interpretation of the Guinean statutes at issue here
 17 should not vary depending on that event. We therefore decline to undertake any
 18 such interpretation.

19 Moreover, Thiam’s arguments to the contrary notwithstanding, Second
 20 Circuit precedent provides no support for applying *McDonnell* to Articles 192 and
 21 194 of Guinea’s Penal Code. Thiam claims support from *United States v. Silver*, a
 22 case in which the defendant was charged with honest services fraud and Hobbs

⁶ *Id.* at 2365.

⁷ *Id.* at 2372.

⁸ *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) (quoting *In re Maxwell Commc’n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996)).

⁹ *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l B.V.*, 809 F.3d 737, 742–43 (2d Cir. 2016) (internal quotation marks omitted).

1 Act extortion and to which we applied *McDonnell*'s limitations.¹⁰ Although the
 2 parties in *Silver* did not define "official act" by reference to 18 U.S.C. § 201(a)(3),¹¹
 3 the defendants in both *Silver* and *McDonnell* were charged with honest services
 4 fraud and Hobbs Act extortion, and the definition of "official act" at issue in
 5 *McDonnell* related to those charges.¹² *Silver* therefore provides no support for
 6 applying *McDonnell* beyond honest services fraud and Hobbs Act extortion
 7 charges. Likewise, in *United States v. Boyland*, we applied the *McDonnell* standard
 8 to honest services fraud and Hobbs Act extortion, but not to violations under the
 9 "more expansive" 18 U.S.C. § 666.¹³ Thiam also points us to *United States v. Skelos*.¹⁴
 10 But *Skelos* presents a straightforward application of *Silver* to convictions including
 11 honest services fraud conspiracy and Hobbs Act extortion.¹⁵ Therefore, none of
 12 these cases provides support for applying *McDonnell* to Articles 192 and 194 of
 13 Guinea's Penal Code.

14 Thiam's remaining arguments for applying the reasoning in *McDonnell* to
 15 Articles 192 and 194 of Guinea's Penal Code are also unavailing. Thiam argues
 16 that the texts of Articles 192 and 194 are sufficiently similar to the text of 18 U.S.C.
 17 § 201 so as to "favor[]" incorporation of the *McDonnell* limitations. Appellant's Br.
 18 at 35. Although the texts of Articles 192 and 194 bear some similarity to the text of
 19 18 U.S.C. § 201(a)(3), this is unremarkable, given that all three statutes relate to
 20 bribery. Nothing in *McDonnell* or in the language of Articles 192 and 194, which

¹⁰ 864 F.3d 102, 117–19 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018).

¹¹ *Id.* at 111.

¹² *McDonnell*, 136 S. Ct. at 2365.

¹³ 862 F.3d 279, 290–92 (2d Cir. 2017).

¹⁴ 707 F. App'x 733 (2d Cir. 2017) (summary order).

¹⁵ *Id.* at 736–37. While *Skelos* did apply *McDonnell*'s definition of "official act" to federal program bribery under 18 U.S.C. § 666, it was only because both the government's theory of the case and the jury instructions were based on "official acts." *Id.* at 738.

1 plainly cover more than official acts, compels us to apply the *McDonnell* official act
2 standard to those foreign provisions.

3 Thiam also argues that two of the reasons motivating the Supreme Court's
4 narrow reading of "official act" in *McDonnell* – a concern that a broad definition
5 would chill legitimate activities of government officials and a nod toward
6 federalism – apply in this case as well. We disagree. In *McDonnell*, the Supreme
7 Court focused on the nature of the relationship between government officials and
8 their constituents, pointing out that "conscientious public officials arrange
9 meetings for constituents, contact other officials on their behalf, and include them
10 in events all the time" and explaining that a broad interpretation of "official act"
11 could lead officials to "wonder whether they could respond to even the most
12 commonplace requests for assistance" and cause "citizens with legitimate
13 concerns [to] shrink from participating in democratic discourse."¹⁶ Putting aside
14 the fact that Thiam did not hold elected office, the nature of his relationship in
15 Guinea to the Chinese company – constituent or not – does not concern a United
16 States court. Also, there is obviously no concern for federalism here where the
17 conduct at issue is one that another country has chosen to criminalize and has no
18 bearing on state law.

19 For these reasons, we hold that *McDonnell* does not apply to Articles 192 and
20 194 of Guinea's Penal Code.¹⁷ As a result, Thiam's argument that the jury
21 instructions were improper necessarily fails.

22 II. Sufficiency of the Evidence

¹⁶ *McDonnell*, 136 S. Ct. at 2372.

¹⁷ Our holding in this case is limited to Articles 192 and 194 of Guinea's Penal Code. We do not address *McDonnell*'s application to prosecutions under other bribery statutes or reach any conclusions regarding whether *McDonnell* applies to all 18 U.S.C. § 201, honest services fraud, or Hobbs Act extortion prosecutions.

1 Thiam also argues that there was insufficient evidence (i) to support a
2 finding of a quid pro quo exchange and (ii) to support a finding that he committed
3 an “official act” as defined in *McDonnell*. We review challenges to the sufficiency
4 of evidence *de novo*, “but must uphold the conviction if *any* rational trier of fact
5 could have found the essential elements of the crime beyond a reasonable
6 doubt.”¹⁸ “Moreover, the jury’s verdict may be based on circumstantial evidence,
7 and the Government is not required to preclude every reasonable hypothesis
8 which is consistent with innocence.”¹⁹

9 Thiam argues that there was insufficient evidence to support a finding of a
10 quid pro quo exchange because there was no “advance agreement to trade things
11 of value for governmental action” and the “making of a gratuitous payment as an
12 after-the-fact reward for a job well done” is not a crime. Appellant’s Br. at 42. But
13 given (i) the timing of the payments, with the first coming just two weeks before
14 the Shareholder’s Agreement was executed and others following soon thereafter,
15 (ii) Thiam’s efforts to conceal both his true employment and the source of the
16 payments, and (iii) Thiam’s implausible explanation at trial that the payments
17 constituted an undocumented and interest-free personal loan, there is sufficient
18 evidence to support a finding by the jury of a quid pro quo exchange. And there
19 is no merit to Thiam’s argument that the evidence was insufficient to support a
20 finding that he committed an “official act” as defined in *McDonnell* in light of our
21 holding that this definition is inapplicable to the Guinean statutes at issue.

22 **III. Evidentiary Challenges**

23 Finally, Thiam challenges evidentiary rulings made by the district court that
24 (i) precluded him at trial from playing certain excerpts of his post-arrest interview
25 with the FBI; (ii) admitted into evidence a summary chart showing his luxury

¹⁸ *Silver*, 864 F.3d at 113 (quoting *United States v. Vernace*, 811 F.3d 609, 615 (2d Cir. 2016)).

¹⁹ *United States v. Ogando*, 547 F.3d 102, 107 (2d Cir. 2008) (internal quotation marks and citations omitted).

1 purchases and a text exchange between Thiam and a third party regarding Pa's
2 incarceration; and (iii) permitted government cross-examination based on Thiam's
3 noncompliance with foreign reporting requirements, his knowledge of Pa's other
4 bribes, and his knowledge of corruption in Africa. We find no error with respect
5 to these rulings, all of which are reviewable under an abuse of discretion
6 standard.²⁰

7 Thiam argues that the district court should have admitted certain excerpts
8 of his post-arrest interview under the "rule of completeness." The "rule of
9 completeness" doctrine under Rule 106 of the Federal Rules of Evidence provides
10 that an "omitted portion of a statement must be placed in evidence if necessary to
11 explain the admitted portion, to place the admitted portion in context, to avoid
12 misleading the jury, or to ensure fair and impartial understanding of the admitted
13 portion."²¹ But it does not "require introduction of portions of a statement that are
14 neither explanatory of nor relevant to the admitted passages."²² Thiam argues that
15 the district court erred when it precluded statements he made in the interview
16 about the role that other members of the Guinean government played in the
17 negotiations with CIF and about personal loans he received from other third
18 parties. Because the rule of completeness "is violated only where admission of the
19 statement in redacted form distorts its meaning or excludes information
20 substantially exculpatory of the declarant,"²³ it was within the district court's
21 discretion to exclude these statements. In any event, Thiam testified at trial about

²⁰ *United States v. Dupre*, 462 F.3d 131, 136 (2d Cir. 2006).

²¹ *United States v. Castro*, 813 F.2d 571, 575–76 (2d Cir. 1987), *cert. denied*, 484 U.S. 844 (1987).

²² *U.S. v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982); *see also United States v. Williams*, No. 17-3741-cr, 2019 WL 2932436, at *8–10 (2d Cir. July 9, 2019).

²³ *United States v. Benitez*, 920 F.2d 1080, 1086–87 (2d Cir. 1990) (internal quotation marks omitted).

1 both matters, so the jury had before it the information Thiam claims was
2 improperly excluded. Therefore, any potential error was harmless.

3 Thiam next challenges the admission into evidence of the summary chart
4 showing his luxury purchases and of the text exchange regarding Pa's
5 incarceration, arguing that the district court erred in finding this evidence to be
6 more probative than prejudicial.²⁴ "[O]n review of a district court decision to
7 admit evidence, we generally maximize its probative value and minimize its
8 prejudicial effect."²⁵ Because this evidence was useful to the jury in understanding
9 Thiam's motivation for accepting bribes and his consciousness of guilt
10 respectively, the district court did not abuse its discretion in admitting it.

11 Finally, Thiam argues that the district court erred in permitting cross-
12 examination that pertained to his noncompliance with foreign reporting
13 requirements, knowledge of Pa's other bribes, and general knowledge of
14 corruption in Africa. Because each of these lines of questioning related to Thiam's
15 state of mind, the district court did not abuse its discretion in permitting this cross-
16 examination.

17 CONCLUSION

18 We have considered Thiam's other arguments and conclude that they are without
19 merit. For these reasons, we AFFIRM the judgment of the district court.

²⁴ See Fed. R. Evid. 403.

²⁵ *United States v. Coppola*, 671 F.3d 220, 245 (2d Cir. 2012) (internal quotation marks omitted).