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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	No. 11 Cr. 907 (JSR)
- against -	:	ECF Case
RAJAT K. GUPTA,	:	
Defendant.	:	

RAJAT K. GUPTA'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY

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Preliminary Statement

On July 2, 2015, the Court denied Mr. Gupta's motion for relief pursuant to 28 U.S.C. § 2255, concluding that he had procedurally forfeited his claim by failing to raise it on direct appeal. The Court found that Mr. Gupta had met neither the "cause and prejudice" nor the "actual innocence" exception permitting consideration of his § 2255 motion on the merits. To appeal this denial, Mr. Gupta is required to obtain a certificate of appealability, which should issue, pursuant to 28 U.S.C. § 2253(c), if he has "made a substantial showing of the denial of a constitutional right."[1]

The Supreme Court has explained that the "substantial showing" requirement is not onerous. "[O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Rather, he must show only "that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Id.* (quotation marks and alterations omitted). Where the district court denies the petition on procedural grounds, as here, a certificate should issue if the petitioner shows that both the procedural ruling and the underlying constitutional claim are "debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Mr. Gupta's claims satisfy this standard. As to the "cause" prong, Mr. Gupta demonstrated – and, in seeking *en banc* review of *Newman*, the government agreed – that *Newman* was an "unlikely development in [firmly ingrained] law," excusing his failure to raise it on direct appeal. *Gutierrez v. Smith*, 702 F.3d 103, 112 (2d Cir. 2012). Based solely on the government's statements cited in Mr. Gupta's Reply Memorandum – for example, that *Newman*

[1] As set forth at pp. 6-7 below, Mr. Gupta's petition asserted error of constitutional dimension.

"breaks with Supreme Court and Second Circuit precedent" and "represents one of the most significant developments in insider trading law in a generation" – the question whether Mr. Gupta has cause for failing to anticipate *Newman* is at the very least debatable.[2] Brief for Petitioner at 1, 22-23, *United States v. Newman*, 13-1837(L) (2d Cir. Jan. 23, 2015) (hereinafter, "*En Banc* Pet.").

Mr. Gupta also made a substantial showing that he was prejudiced at trial by jury instructions that were inconsistent with *Newman*. Although the Court expressed the view that "Gupta's argument misreads *Newman*," we respectfully submit that the Court should nevertheless agree that *Newman* is open to a different reading. (July 2, 2015 Op. at 4). As described by the government, *Newman* "redefine[d] a critical element of insider trading liability," "constrict[ing]" the definition of "personal benefit," by holding that an inference of personal benefit is impermissible where the evidence fails to pass an entirely "new test" requiring that the relationship between tipper and tippee generate an "exchange" – a *quid pro quo* – that is "consequential," "objective" and "represents at least a potential gain of a pecuniary or similarly valuable nature." (*En Banc* Pet. at 2, 9, 14). Mr. Gupta showed that the benefit instruction delivered by the Court failed to meet the requirements of *Newman*, and in view of the centrality of the "pure relationship" theory of benefit to the government's case, that the jury likely convicted Mr. Gupta without finding that his tips were part of an agreed upon exchange of tips for consequential benefits.

Finally, in addition to having asserted a fairly debatable claim on "cause and prejudice," Mr. Gupta has also made a substantial (certainly debatable) showing that, in light of

[2] As noted in our Reply Memorandum in support of Mr. Gupta's § 2255 petition, Mr. Newman himself did not challenge the law on benefit; instead, he made a conventional sufficiency argument, within the existing standard. And the issue was not raised at all by co-defendant Chiasson. (Gupta § 2255 Reply Br. at 9).

Newman, he is actually innocent because of the tenuous connection between the government's evidence of benefit and the tips of which he was convicted.

I. Whether Mr. Gupta Established Cause for his Procedural Default is Debatable

As set forth in our motion papers, Mr. Gupta's circumstances meet the cause and prejudice standard set forth in *Gutierrez v. Smith*, 702 F.3d 103, 111-12 (2d Cir. 2012) (applying *DiSimone v. Phillips*, 461 F.3d 181 (2d Cir. 2006), among other cases), thereby entitling him to a hearing of his *Newman*-based challenge on the merits, notwithstanding his failure to raise that challenge on direct appeal. *Gutierrez* makes clear that, if the governing legal rule was "firmly ingrained" at the time of trial or appeal, then a challenge to the law will be considered "futile," constituting "cause" for not raising the issue. *Gutierrez*, 702 F.3d at 112. Stated differently, where counsel would be challenging a conviction "based on what was then an unlikely development in [firmly ingrained] law," the grounds for such a challenge are "not reasonably available," for the settled law of the circuit is an "objective factor external to the defense" that "impede[s]" counsel from raising the issue, and amounts to "cause." *Id.* at 111-12.

Prior to *Newman*, the law on benefit to the tipper had been long established in this Circuit, at least since *SEC v. Warde*, 151 F.3d 42 (2d Cir. 1998), and there was no suggestion that it was up for reconsideration. *Compare Warde*, 151 F.3d at 48 ("the SEC need not show that the tipper expected or received a specific or tangible benefit in exchange for the tip"), *and SEC v. Obus*, 693 F.3d 276, 291 (2d Cir. 2012) (*Warde* held that "the 'close friendship' between the alleged tipper and tippee was sufficient to allow the jury to find that the tip benefitted the tipper"), *and id.* ("the undisputed fact that [tipper] and [tippee] were friends from college is sufficient to send to the jury the question of whether [tipper] received a benefit from tipping [the tippee]"), *with Newman*, 773 F.3d at 452 (the "inference of [personal benefit] is impermissible in

the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature"), *and id.* ("Government may [not] prove the receipt of a personal benefit by the mere fact of a friendship"). As the government stated in seeking rehearing *en banc*, the *Newman* panel's "redefin[ition]" of the benefit element unexpectedly "br[oke] with Supreme Court and Second Circuit precedent."[3] (*En Banc* Pet. at 1-2). Under the standard established by the Second Circuit in *Gutierrez,* it would be improper to penalize Mr. Gupta for failing to anticipate such an unlikely development.

The Court disagreed, reasoning that "Gupta's own actions belie" his futility argument because "[a]t trial, he objected to the Court's description of the benefit element in both the preliminary jury charge and the final jury instructions" and abandoned the issue on appeal. (July 2, 2015 Op. at 3). But it is at least debatable whether this was a proper ground upon which to find that Mr. Gupta should not be excused for his default.

Mr. Gupta's trial objection did not anticipate *Newman* or show that the intangible, pure relationship theory of benefit was open to challenge. Defense counsel's challenge to the use of the word "modest" in the context of the preliminary instruction (Tr. 676-78) (and preservation of the objection at the final charge conference (Tr. 3050), without further argument) demonstrates neither that Mr. Gupta was making an argument along the lines of *Newman*'s recasting of the benefit element, nor that such an argument was available to be made. Indeed, Mr. Gupta's objections were met with the Court's response that "modest" was "in the case law"

[3] As the government noted, "[i]n *Warde*, for example, this Court found adequate evidence of benefit to the tipper solely by virtue of a 'close friendship' with the tippee. The Court did not require an 'exchange' or 'gain of a pecuniary or similarly valuable nature' to the tipper, or even a potential for pecuniary gain by the tipper; to the contrary, it held that the Government 'need not show that the tipper expected or received a specific or tangible benefit in exchange for the tip.'" (*En Banc* Pet. at 13) (citations omitted)).

and was "the law of the circuit," far from signaling that the benefit element was open to redefinition. (Tr. 676-78). Put differently, the objection made at trial does not undermine the proposition that raising the issue on appeal would have been futile in light of the firmly engrained prior case law. At the very least, the futility point is debatable.

The Court's conclusion that Mr. Gupta's default should not be excused was also based on its view that "*Newman* did not open the door" to any substantially new argument; it only "arguably narrowed the range of evidence that would support an inference of 'benefit.'" (July 2, 2015 Op. at 3). This, too, is debatable. As noted, the government argued in the Court of Appeals that *Newman* "constricted" the definition of "personal benefit" – that is, *changed* it – by holding that an inference of personal benefit is impermissible where the evidence fails to pass an entirely "new test" requiring that the relationship between tipper and tippee generate an "exchange" (*i.e.*, a *quid pro quo*) that is "consequential," "objective" and "represents at least a potential gain of a pecuniary or similarly valuable nature." (*En Banc* Pet. at 9, 14). Although this Court disagrees with the government's understanding of *Newman*, it shows that reasonable jurists could well conclude that *Newman* unexpectedly "opened the door" widely to arguments the Circuit had previous rejected.

In addition, although this Court has suggested that *Newman* is largely irrelevant here because that case concerned *tippee* liability (July 2, 2015 Op. at 4), it is at least reasonable to read *Newman* a different way, as holding that "the potential pecuniary benefit must be to the *tipper*." (*Id.* at 6 (emphasis added)). Indeed, the government has read it exactly that way; the government's petition for rehearing in *Newman* expressly declined to raise the issue of the tippee's knowledge, and instead focused entirely on the issue of the benefit to the tipper. (*See En Banc* Pet. at 2 (arguing that the *Newman* decision "redefines a critical element of insider trading

liability – the requirement that *the insider-tipper* have acted for a 'personal benefit'" (emphasis added)).

II. Whether Mr. Gupta Established Prejudice as a Result of the Court's Jury Instructions is Debatable

Having denied Mr. Gupta's motion for failure to establish cause, the Court did not consider his argument that he was prejudiced by the Court's jury instructions. In fact, Mr. Gupta made a substantial showing of prejudice.

He demonstrated that in *Newman* the Second Circuit held that the government cannot make out the benefit element of the crime of insider trading merely by showing that a tipper and tippee maintained a mutually beneficial personal relationship. Here, the Court's benefit instruction permitted the jury to convict Mr. Gupta based on such a legally insufficient showing. The instruction did not communicate that the benefit to the tipper must be "consequential;" it stated that the benefit "[did] not need to be financial or to be tangible in nature;" it did not communicate that the evidence was required to show that the alleged tips were intended to be part of an agreed upon exchange of tips for consequential benefits; and it provided that the government could satisfy the benefit element in either of two ways, one of which – "maintaining a good relationship with a frequent business partner" – is now invalid. Moreover, Mr. Gupta demonstrated that the pure relationship theory validated by the jury instructions was central to the government's case against him, repeatedly emphasized by the prosecutors in opening and closing statements to the jury, and indeed that the Court's instruction itself was incorporated into the government's rebuttal summation. Altogether, Mr. Gupta made a substantial showing, or in any event a debatable one, that he was prejudiced by the inconsistencies between the Court's jury instructions and *Newman*, constituting constitutional error. *See Peck v. United States*, 106 F.3d 450, 457 (2d Cir. 1997) (jury instruction's omission or

misdescription of an element of a crime is constitutional error); *United States v. Garrido*, 713 F.3d 985, 994 (9th Cir. 2013) ("Any omission or misstatement of an element of an offense in the jury instructions is constitutional error."); *Miller v. United States*, 735 F.3d 141, 144 (4th Cir. 2013) ("A conviction for engaging in conduct that the law does not make criminal is a denial of due process for which a COA [certificate of appealability] is appropriate.") (quotation marks and alterations omitted).

The Court expressed the view that Mr. Gupta misreads *Newman* by "suggest[ing] that the potential pecuniary benefit *must* be to the tipper." (July 2, 2015 Op. at 6) (emphasis added)). But even assuming, as the Court further stated, that "a tipper's intention to benefit the tippee is sufficient to satisfy the benefit requirement so far as the tipper is concerned" (*id.* at 5), this does not answer whether Mr. Gupta was prejudiced by the Court's jury instruction. As Mr. Gupta noted in his petition, the "gift" theory of benefit was no part of his case. The government did not prosecute on the basis that the benefit element could be satisfied by showing Mr. Gupta's intention to benefit Mr. Rajaratnam, and the jury was not instructed to that effect. The jury was instructed, rather, that Mr. Gupta was guilty if he tipped "in anticipation of receiving at least some modest benefit in return." (Tr. 3370-71). And post-*Newman*, it is at least debatable whether that instruction should have required the government to show beyond a reasonable doubt that the Gupta-Rajaratnam relationship generated a *quid pro quo*, that is, an agreement whereby Mr. Gupta would provide material nonpublic information to Mr. Rajaratnam in exchange for "consequential," generally pecuniary, gain.

In sum, in an insider trading case where, in the government's own formulation, "the focus . . . was on benefit" (Tr. 590), where the pure relationship theory – maintaining a good relationship with Mr. Rajaratnam – was central to the government's case, and where there was a

dearth of evidence showing the existence of a *quid pro quo* agreement between Messrs. Gupta and Rajaratnam, it is at least debatable whether Mr. Gupta was prejudiced by the Court's erroneous jury instruction, and "the questions are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n.4.

III. Whether Mr. Gupta Established Actual Innocence is Debatable

Mr. Gupta's motion papers also demonstrated that a reasonable juror, instructed consistent with *Newman*, would have had a reasonable doubt whether the Gupta-Rajaratnam relationship generated a *quid pro quo* involving the tips for which Mr. Gupta was convicted. The evidence at trial showed that the Gupta-Rajaratnam business ventures emphasized by the government were no part of a *quid pro quo* exchange of tips for benefits, as these ventures either preceded the transactions of which Mr. Gupta was convicted by years or had been abandoned by the time of the tips. Moreover, the undisputed evidence showed that, at the time of the September and October 2008 tips, the Gupta-Rajaratnam relationship was at an all-time low. In light of *Newman* – in which the Second Circuit held that the supposed benefits received by the tipper were so tenuously connected with the tips that "it would not be possible under the circumstances for a jury in a criminal trial to find beyond a reasonable doubt" that the tips were part of a *quid pro quo*, *Newman*, 773 F.3d at 453 – it is debatable whether any reasonable, properly instructed juror would have convicted Mr. Gupta.

Conclusion

In light of the foregoing, we respectfully submit that the Court should issue a certificate of appealability on the following three issues:

(1) Whether, in light of *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), defendant's conviction should be vacated because the jury in his case was erroneously

instructed on the benefit element of his alleged insider trading offenses, thereby permitting the jury to convict defendant of conduct that is not a crime.

(2) Whether, in light of *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), defendant satisfied the "cause and prejudice" standard so as to excuse his failure to raise this issue on direct appeal.

(3) Whether, in light of *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), defendant satisfied the "actual innocence" standard, because there was insufficient evidence on the benefit element of his alleged insider trading offenses, so as to excuse his failure to raise this issue on direct appeal.

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July 24, 2015

Respectfully submitted,

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