
Petitioner's Appendix

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22-1242(L)

United States v. Avenatti

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of March, two thousand twenty-four.

PRESENT: Steven J. Menashi,
Eunice C. Lee,
Sarah A. L. Merriam,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

Nos. 22-1242(L), 22-2550(Con)

MICHAEL AVENATTI,

Defendant-Appellant.

For Appellee:

MATTHEW PODOLSKY, Assistant United States Attorney (Robert Sobelman, Andrew Rohrbach, Hagan Scotten, Assistant United States Attorneys, *on the brief*), for Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

For Defendant-Appellant:

KENDRA L. HUTCHINSON, Federal Defenders of New York, Inc., New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Furman, J.).

Upon due consideration, it is hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Michael Avenatti was convicted of wire fraud in violation of 18 U.S.C. § 1343 and of aggravated identity theft in violation of 18 U.S.C. § 1028A. On appeal, Avenatti advances four arguments. First, he argues that the district court erred by providing confusing and prejudicial jury instructions about the professional obligations of lawyers. Second, he argues that the district court wrongly pressured the jury into returning a verdict when it appeared deadlocked. Third, he argues that, following his conviction, the trial court unlawfully modified the sequence of his restitution payments. Fourth, he argues that the Supreme Court's recent decision in *Dubin v. United States*, 599 U.S. 110 (2023), mandates that his conviction for aggravated identity theft be vacated.¹

¹ Additionally, Avenatti previously argued that the district court wrongly calculated the loss amount for purposes of his sentencing, but he withdrew this argument. See Letter, *United States v. Avenatti*, No. 22-1242 (2d Cir. Apr. 21, 2023), ECF No. 88.

We assume the parties' familiarity with the facts, procedural history, and issues on appeal.

I

Prior to trial, the government requested that the district court instruct the jury on certain professional obligations of attorneys. In a pretrial order, the district court stated that it would provide that instruction if, after hearing the evidence, it determined that the instruction would be relevant. Based on the trial evidence, the district court determined that it was relevant and provided an instruction that began as follows:

Before we turn to the third and final element of wire fraud, I want to explain certain professional duties of lawyers that you may consider in connection with the first two elements of Count One. As you know, during most of the events relevant to this case, Mr. Avenatti served as Ms. Clifford's lawyer. During that time, the defendant was a member of the California Bar and therefore, under California law owed certain duties to Ms. Clifford as his client. In considering the first two elements of Count One, you may consider whether the defendant breached any of these professional obligations to Ms. Clifford. You should keep in mind that proof that the defendant violated one or more of his professional duties under California law does not, without more, mean that he committed wire fraud. Nevertheless, such proof may be considered by you in determining whether the defendant engaged in a scheme to defraud and whether he did so with knowledge and an intent to defraud.

S. App'x 6-7. The district court emphasized that the ethical duties of lawyers were relevant to the jury's decision only insofar as that background aided the jury in deciding whether Avenatti knowingly and intentionally engaged in a scheme to defraud:

Let me stress again: Proof that the defendant violated one or more of his professional duties under California law does not, without more, mean that he is guilty of any crime. That is, a lawyer can violate his

ethical duties under California law without having the intent required to commit a crime. The question you must decide with respect to the first two elements of Count One is whether the defendant knowingly, willfully, and with the intent to defraud, devised or participated in a scheme or artifice to defraud or obtain money or property by materially false and fraudulent pretenses, representations or promises as alleged in Count One of the indictment—not whether he violated his ethical obligations.

Id. at 10. Avenatti argues that the instruction was irrelevant in certain parts, confusing, and prejudicial. “A harmless error standard of review applies if the defendant objected to the instruction.” *United States v. Zhong*, 26 F.4th 536, 550 (2d Cir. 2022). Accordingly, we will affirm a judgment of conviction—even assuming that the jury was erroneously instructed—if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Reversal is not warranted if “the defendant suffered no prejudice as a result of the District Court’s instruction,” *United States v. Gansman*, 657 F.3d 85, 91-92 (2d Cir. 2011), making any claimed error harmless. *See* Fed. R. Crim. P. 52(a).

In this case, we conclude that any error in the jury instructions was harmless. The evidence against Avenatti was overwhelming. *See United States v. Dhinsa*, 243 F.3d 635, 650 (2d Cir. 2001) (“The strength of the government’s case against the defendant is probably the most critical factor in determining whether an error affected the verdict.”) (quoting *United States v. Colombo*, 909 F.2d 711, 714 (2d Cir. 1990)). The evidence showed that Avenatti diverted funds that were owed to his client to his own bank account, App’x 102-04, and then sought to prevent his client from learning of the diversion so that he could conceal his fraud, *id.* at 110-13. Avenatti “forceful[ly]” instructed his client’s literary agent not to speak with her, *id.* at 117-18, insisting that only he communicate with his client, *id.* at 386-88, 825-30. Avenatti diverted his client’s funds by instructing an employee to forge her signature, *id.* at 168-69, 818-19, and testimony confirmed that he never asked his client for permission to sign on her behalf, *id.* at 316. After he obtained his

client's funds, Avenatti spent those funds on his own expenses. *Id.* at 235-40. He then repeatedly lied to his client to conceal his fraud by, for example, falsely stating that the funds had not yet been disbursed, *id.* at 297-99, and falsely stating that he had threatened to sue the publisher for not making payments, *id.* at 714. Avenatti's conduct also demonstrated that he was aware that he was stealing client funds. He purchased a cashier's check, for example, to make it appear to his client that money he had borrowed from a friend had been paid by his client's publisher. *Id.* at 172-73. We conclude that any purported "error was harmless in light of the overwhelming evidence introduced." *United States v. Montague*, 67 F.4th 520, 525 (2d Cir. 2023). Because the evidence was overwhelming, "the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

II

Following trial, and after deliberating for approximately four hours, the jury sent a note to the district court that read: "We are unable to come to a consensus on Count 1. What are our next steps?" App'x 586. In response, the district court gave the jury a modified *Allen* charge and told the jury to continue its deliberations. *Id.* at 565-66. The following morning, the jury sent another note that stated:

We have one juror who is refusing to look at evidence and is acting on a feeling. We need assistance on moving forward. She does not believe she needs to prove her side using evidence and refuses to show us how she has come to her conclusion. *Please* help us move forward. Not going on any evidence, all emotions and does not understand this job of a jury.

Id. at 588. The district court then gave a supplemental jury instruction that emphasized the duty of jurors to deliberate but explained that jurors have the right to adhere to a minority position if they conclude it is correct:

At the beginning of this case, you each took an oath to well and truly try this issue and a true verdict give according to the law and the evidence. Pursuant to that oath, each of you has a duty to deliberate.

That entails a duty to consult with one another, to consider each other's views with an open mind, and to discuss the evidence with the objective of reaching a just verdict if you can do so. Under your oath as jurors, you are not to be swayed by sympathy or emotion. You should be guided solely by the evidence presented during the trial and the law as I gave it to you, without regard to the consequences of your decision. ... If you let sympathy or emotion interfere with your clear thinking, there is a risk that you will not arrive at a just verdict. ... I remind you the defendant has no burden to present any evidence. As I have told you many times, the burden of proof lies solely with the government. As you deliberate, you should examine the questions put to you with candor and with a proper regard and deference to the opinions of each other. If, after listening to your fellow jurors, and if, after stating your own view, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride to change your view. On the other hand, if you have honest convictions and beliefs based on the evidence presented at trial, you should not surrender those convictions and beliefs solely because of the opinions of your fellow jurors or because you are outnumbered.

Id. at 580-81. The jury resumed deliberations. A few hours later, the jury returned a unanimous verdict of guilty on both counts. *Id.* at 582, 593.

Avenatti argues that the district court's instruction "singled out [a] holdout juror and was impermissibly coercive." Appellant's Br. 48-49. But the challenged instruction was a "modified *Allen* charge," App'x 580, that "carries with it a lesser threat of coercing jurors to abandon their conscientious beliefs" than a traditional *Allen* charge, *United States v. Calderon*, 944 F.3d 72, 93 (2d Cir. 2019).² "[C]ritically, the district court's oral instruction included a caution to jurors that they did not

² The traditional *Allen* charge urges jurors in the minority to consider whether the majority might be correct, without a reciprocal suggestion to the majority. See *Allen v. United States*, 164 U.S. 492, 501 (1896). The district court's instruction, by contrast, urged all jurors to consider opposing views. App'x 580-81.

have to relinquish individual beliefs.” *United States v. Melhuish*, 6 F.4th 380, 392 (2d Cir. 2021). The district court expressly stated that “if you have honest convictions and beliefs based on the evidence presented at trial, you should not surrender those convictions and beliefs solely because of the opinions of your fellow jurors or because you are outnumbered.” App’x 581. This language resembles other jury instructions that we have judged permissible. *See, e.g., Spears v. Greiner*, 459 F.3d 200, 206 (2d Cir. 2006) (concluding that an instruction telling the jury “to continue deliberations ‘with a view toward arriving at a verdict *if that’s possible*’” was not coercive).

Nor was there anything improper, in these circumstances, about the district court’s decision to instruct the jury twice. “[A] repeated *Allen* charge [is not] inevitably coercive.” *United States v. Ruggiero*, 928 F.2d 1289, 1299 (2d Cir. 1991); *see also United States v. Roman*, 870 F.2d 65, 77 (2d Cir. 1989) (noting that “even a second charge imploring a decision would not be *per se* error”); *United States v. O’Connor*, 580 F.2d 38, 44 (2d Cir. 1978) (“[W]e find no merit to the objection to the giving of two modified *Allen* charges.”); *United States v. Robinson*, 560 F.2d 507, 517-18 (2d Cir. 1977) (concluding that a district court did not abuse its discretion in giving a second *Allen*-type charge).

“[J]urors have a duty to deliberate. Jurors ‘should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other.’” *United States v. Baker*, 262 F.3d 124, 130 (2d Cir. 2001) (quoting *Allen*, 164 U.S. at 501). “It is their duty to decide the case if they can conscientiously do so, and thus they should listen, with a disposition to be convinced, to each other’s arguments.” *Id.* (internal quotation marks and alterations omitted). The district court did not abuse its discretion in this case by reminding the jury of those duties in response to the jury’s two notes.

III

At sentencing on June 2, 2022, the district court directed that Avenatti pay restitution to his client in the amount of \$148,750. *See* App’x 640. To avoid

simultaneous restitution obligations, the district court granted Avenatti's request that his repayment to his client begin after he had fulfilled a prior restitution obligation to Nike, Inc., which was related to a previous conviction. *See id.*

On September 22, 2022, the government proposed a restitution order that would require Avenatti to provide restitution to his client before he paid Nike. *See id.* at 652. Prior to proposing that order, the government conferred with Avenatti's counsel, who raised no objection.³ The district court issued the restitution order on September 23, 2022.

On appeal, Avenatti argues that we should vacate the restitution order because it directs restitution payments to be paid in this case before the previous one. Because the government consulted with Avenatti prior to proposing the restitution order, and because Avenatti's counsel "made a considered decision *not* to object," Avenatti has waived this objection. *United States v. Bodnar*, 37 F.4th 833, 844 (2d Cir. 2022). Even if he had not, the objection would be meritless. Though "a district court may not alter an imposed sentence," *United States v. Kyles*, 601 F.3d 78, 83 (2d Cir. 2010), a "modification of the terms of payment of restitution is not a modification in sentence," *United States v. Lochard*, 555 F. App'x 94, 96 (2d Cir. 2014) (citing *Kyles*, 601 F.3d at 83-84). To the contrary, "as long as [the] amount of restitution remains [the] same, alteration in terms of repayment does not alter [the] sentence." *Id.*⁴ For that reason, the change in the schedule of payments was not an impermissible alteration of the sentence.

³ *See* Letter Motion at 1, *United States v. Avenatti*, No. 19-CR-00374 (S.D.N.Y. Sept. 22, 2022), ECF No. 450.

⁴ "Although we decided [*Lochard*] by nonprecedential summary order, rather than by opinion, our '[d]enying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases.'" *United States v. Payne*, 591 F.3d 46, 58 (2d Cir. 2010) (quoting Order dated June 26, 2007, adopting 2d Cir. Local R. 32.1).

IV

Finally, Avenatti argues that his conviction for aggravated identity theft must be vacated in light of the Supreme Court’s recent decision in *Dubin v. United States*, 599 U.S. 110 (2023). In *Dubin*, the Supreme Court vacated a conviction for aggravated identity theft because identity theft did not play a “key role” in the criminal conduct. *Id.* at 129 (explaining that “§1028A(a)(1)’s enhancement is not indiscriminate, but targets situations where the means of identification itself plays a key role”).

In *Dubin*, the “crux” of the criminal conduct did not involve identity theft. *Id.* at 114. Here, by contrast, identity theft was an essential part of Avenatti’s criminal conduct. Avenatti initially sought to divert money from his client without forging her signature, but his client’s literary agent refused to allow the diversion unless the client authorized it. *See App’x* 103-04. Only then did Avenatti instruct an employee to forge his client’s signature for the purpose of wrongfully obtaining her money. *Id.* at 168-69, 818-19. Identity theft played a key role in Avenatti’s crime; it was not impermissibly “ancillary.” *Dubin*, 599 U.S. at 114. For that reason, *Dubin* does not require vacating Avenatti’s conviction.

* * *

We have considered Avenatti’s remaining arguments, which we conclude are without merit. For the foregoing reasons, we affirm the judgment of the district court.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

A handwritten signature in blue ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal of the United States Second Circuit Court of Appeals. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around its perimeter.

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of June two thousand twenty-four.

United States of America,

Appellee,

v.

Michael Avenatti,

Defendant - Appellant.

ORDER


Docket No: 22-1242(L)
22-2550 (Con)

Appellant Michael Avenatti, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

A handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written in a cursive style and is positioned over a circular official seal of the United States Court of Appeals for the Second Circuit.

1 MR. AVENATTI: I move for a judgment of acquittal
2 pursuant to Rule 29 on both counts based on the following, your
3 Honor:

4 The government has not submitted adequate evidence
5 necessary to satisfy each element of each of the two offenses,
6 both Count One and Count Two.

7 I want to focus the Court's attention on a few, not
8 all of the salient points. At least the Court has already
9 indicated it doesn't expect robust arguments, so I am going to
10 try to curtail my statements on the record.

11 First of all, your Honor, at all times I was acting as
12 the attorney or agent of Ms. Daniels. There is a question
13 relating to -- well, strike that. There's no evidence elicited
14 by the government related to the scope of that authority and
15 how that scope of authority changed over any period of time, if
16 at all.

17 In fact, on cross-examination Ms. Daniels testified
18 that my authority relating to the book deal and the
19 communications with Mr. Janklow never changed over the course
20 of the time period that I was representing Ms. Daniels.

21 THE COURT: All right. Mr. Avenatti I am going to cut
22 you off so you we can make efficient use of our time.

23 Ms. Daniels clearly testified that you did not have authority
24 to accept the second and third payments on her behalf, and she
25 never authorized you to redirect it to an account belonging to

1 you. The jury may or may not believe her testimony on that
2 score but I think that certainly makes clear, to the extent you
3 had authority, it did not extend to that, and that argument is
4 meritless.

5 Next argument.

6 MR. AVENATTI: Your Honor, Ms. Daniels testified that
7 she provided the wire instructions as related to the first
8 payment to me because she understood that I had the authority
9 to provide wire instructions to Mr. Janklow. That's number
10 one.

11 Number two, she then testified that my authority never
12 changed. So if I had authority to send the first set of wire
13 instructions, how was it that I no longer had authority to send
14 subsequent wire instructions?

15 THE COURT: Mr. Avenatti, I am not in a debate here
16 with you. There's ample evidence in the record for the jury to
17 find that you acted contrary to your authority as counsel.

18 I am not aware of any principle of agency law or
19 attorney-client law that permits an attorney to redirect money
20 that is owed to the client to himself for his own purposes
21 without the permission of the client, without the knowledge of
22 the client. It's just a frivolous argument.

23 You can maybe make the argument to the jury, we will
24 cross that bridge when we get to it, but it is certainly not a
25 basis for judgment as a matter of law, judgment of acquittal.

1 What's your next argument?

2 MR. AVENATTI: The next argument, your Honor, is
3 Ms. Daniels was impeached on the stand related to the fact that
4 she had told me the account was closed. She denied telling me
5 that the account was closed. Actually, denied it to your
6 Honor. Your Honor asked the cleaner question. She denied it.

7 She was impeached by ST 12, the text message showing
8 that in fact she had informed me that the account was closed.
9 Approximately two weeks later the letter was sent to
10 Mr. Janklow. That letter said exactly that, that the account
11 was closed.

12 The money then was transferred from Mr. Janklow to the
13 trust account. Under identity theft, the crime would have been
14 completed at that time. There's no evidence that in fact --
15 well, let me rephrase.

16 When the money was transferred to the trust account,
17 your Honor, the evidence is clear that I had been told the
18 account was closed. The evidence is also clear that
19 Ms. Daniels was undertaking efforts to hide money from her
20 husband at the time because of their ongoing divorce. So for
21 each of those reasons, I don't know how the elements relating
22 to identity theft have been met by the government in the case.

23 THE COURT: Okay. That argument is rejected as well.
24 Next?

25 MR. AVENATTI: Furthermore, your Honor, under the

1 contract and California law, I had an entitlement at all times
2 to a reasonable fee for my legal services, all of the legal
3 services that were done for Mr. Daniels, either under the
4 contract or under the clear law of California.

5 So if the contract is voided, then I rely on, I think
6 it's 6147 and 6148 of the Business and Professions Code in
7 California. That's the law that I was entitled to a reasonable
8 amount for the legal work that I had done. She was not
9 entitled to a windfall.

10 If the contract is not voided as a matter of law, then
11 the clear language of the contract would control. I asked
12 Ms. Daniels if the contract was ever modified. She admitted
13 that it was not. The government appears to be relying on
14 Ms. Daniels' statements that on -- I believe she said on two or
15 three or three or four occasions I informed her that I would
16 not accept any money from the book deal.

17 As a matter of law, your Honor, that's irrelevant for
18 the following reason:

19 The fee agreement is a written contract. Under
20 California law, it may be amended orally with one requirement:
21 There has to be consideration on both sides for the amendment.
22 The government has placed no evidence before the Court that
23 there was any consideration provided by Ms. Daniels to me in
24 connection with any amendment of the contract during these
25 alleged oral conversations.

1 Therefore, as a matter of law, there was no amendment
2 to the contract. If there was no amendment to the contract,
3 and the contract is not void on other grounds, I was entitled
4 at all times to a reasonable fee. I cannot be convicted of a
5 crime for stealing money I was entitled to or money that
6 belonged to me.

7 The government's position is further weakened by the
8 following, your Honor: There's no evidence in the record
9 relating to the fact that the amount of money kept from the
10 book deal was "unreasonable," an unreasonable fee. The
11 government has offered no evidence relating to the
12 reasonableness or lack thereof of the money that was kept.
13 There's been no legal expert to talk about a percentage under
14 such circumstances. There's been no effort to have any witness
15 come in and testify that approximately 18 and a half percent,
16 which is \$149,000 divided by \$800,000, is somehow improper or
17 unreasonable or outside the custom and practice. The
18 government has elicited no testimony relating to the
19 reasonableness of the fee. The government ignores the plain
20 language of the contract and ignores California law.

21 For that reason, your Honor, I am entitled to a
22 judgment of acquittal on both counts.

23 THE COURT: All right. Any other arguments?

24 MR. AVENATTI: One moment, your Honor.

25 Your Honor, one other point I would like to make on

1 the record.

2 On the agg. ID count, whether the money left the trust
3 account after being transferred or not is irrelevant to the
4 analysis on the agg. ID count.

5 It cannot be said that if the money was simply
6 deposited into the trust account and never left there would be
7 no crime, but because the money left there's a crime under agg.
8 ID.

9 THE COURT: I'm not even -- forgive me. I don't even
10 understand the point.

11 What does that have to do with the sufficiency of the
12 evidence on Count Two? It's the use of a means of
13 identification in furtherance of wire fraud. So if there is
14 scheme to defraud, if you committed wire fraud and you used
15 Ms. Daniels' name and signature in furtherance of that without
16 lawful authority, it has nothing to do with whether money was
17 or wasn't transferred. That's it. No?

18 MR. AVENATTI: Your Honor, my argument is, is that the
19 use of the authority to transfer the money into the trust
20 account was not in furtherance of any scheme to defraud, and
21 there's insufficient evidence that it was in furtherance of any
22 scheme to defraud.

23 THE COURT: All right. Anything else?

24 MR. AVENATTI: Nothing further, your Honor.

25 THE COURT: All right. The motion is denied. I am

1 MR. SOBELMAN: We double checked last night and also
2 shared with the defense and they had an opportunity to check as
3 well.

4 THE COURT: Mr. Avenatti?

5 MR. AVENATTI: Your Honor, the only thing I would add
6 to that is, just so the record is clear, I am objecting to I
7 believe it's 804 going back to the jury. That is the document
8 that I previously submitted the letter brief on. We have had
9 considerable discussion on the record.

10 THE COURT: Stop. I understand you have preserved
11 that, but any objections -- sorry. You've confirmed that they
12 are accurate, subject to that objection?

13 MR. AVENATTI: Yes, sir.

14 THE COURT: Okay. Good. If you can make sure that my
15 deputy gets them at some point this morning, if she hasn't
16 already -- I will certainly check with her as well -- that will
17 be great. We will load them for the jury to have in the jury
18 room. All right.

19 We will let you know when the jury is about to arrive
20 and we'll get going.

21 MR. AVENATTI: Your Honor, before the jury comes in, I
22 just want to state for the record that I am renewing my Rule 29
23 that was made at the end of the government's case now that I
24 have rested my case.

25 THE COURT: Fair enough. I'm renewing my ruling.