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September 22, 2017

Hon. Joel H. Slomsky
Judge, U.S. District Court
5614 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: United States v. McKelvy, 15-cr-398-3

Dear Judge Slomsky:

Co-counsel William J. Murray, Jr., and I have today filed McKelvy's Supplemental Memorandum, concerning clarifications and corrections which need to be made as to one of the arguments I made in his Limitations Reply Memo (Doc. No. 121) and during the oral argument, as well as a limited concession on another argument.

McKelvy requests leave to file this Supplemental Memorandum, as reflected in the attached proposed Order. The government has authorized McKelvy to state that it has no opposition to his request to file this Supplemental Memo.

Sincerely,

Walter S. Batty, Jr.

cc: William J. Murray, Jr., Esq.
Robert Livermore

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL No. 15-398-3**
WAYDE MCKELVY,	**:**	
Defendant	**:**	

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS TWO MOTIONS TO DISMISS COUNTS OF THE INDICTMENT

Defendant Wayde McKelvy, by his attorneys, submits this Supplemental Memorandum in Support of his Motions to Dismiss Counts of the Indictment, and states as follows:

I. INTRODUCTION.

After oral argument on the defendant's two outstanding motions to dismiss, held on September 12, 2017, counsel realized that, as to the role of the "accept as true" requirement in deciding the limitations motion, he needed to modify McKelvy's prior position by using the original court filings to provide more accurate context for the Carollo, Ghavami, Ohle, and Kerik decisions. Counsel also realized that McKelvy's memoranda on the offense motion should have included two limited concessions.

II. LIMITATIONS MOTION CASES.

McKelvy's research after oral argument, primarily examining the original record in the four cases cited above, corrects his prior analysis of these cases, where he was relying primarily on what the opinions stated. In this Supplemental Memo, McKelvy utilizes the original filings to set out what the indictment charged in those cases, whether there was any recognition of the "accept as true" requirement by the parties or by the courts, and what the reasoning was in each of the cases for deciding to rule pre-trial on a limitations motion.

A. Carollo. In United States v. Carollo ("Carollo I"), 2011 WL 3875322 (S.D.N.Y. Aug. 25, 2011), and United States v. Carollo ("Carollo II"), 2011 WL 5023241 (S.D.N.Y. Oct. 20, 2011) (reconsideration denied), the court granted defendants' motions to dismiss counts 4, 5, and 7 pre-trial. In its Memo opposing the defendants' motions to dismiss ("Opp. Memo"), Doc. No. 45, the government summarized, at length, the allegations in the indictment relevant to section 3293(2) issue. Carollo, Crim. No. 10-cr-00654 (S.D.N.Y.), Doc. No. 45 (government's Opp. Memo) at 2-7, summarizing Doc. No. 35 (Indictment).[1]

In its Opp. Memo, The government cited one of the Second Circuit's formulations for the "accept as true" requirement[2]: the court "must accept an indictment's allegations as true and cannot consider contrary assertions of fact by the Defendants." United States v. Goldberg, 756 F.2d 949, 950 (2d Cir. 1985). Doc. No. 45 at 3. Although the Carollo court did not specifically reference Goldberg, it did say that it recognized that the indictment had to be considered "upon its face," citing the Supreme Court's decision in United States v. Cook, 17 Wall. 168, 84 U.S. 168 (1872), which was cited in our Amended Limitations Memo, Doc. No. 105, at 39. McKelvy reads the citation to Cook as being an implicit recognition of Goldberg.

In Carollo, the government argued that the allegations in the indictment, under the "accept as true" rationale of Goldberg, meant that: "Financial institutions, like Financial Institutions A and B here, that participated in the offense and thus were exposed to risk of loss [were] affected for Section 3293 purposes," because it was alleged in the indictment, as summarized in the Opp. Memo, that "Institutions A and B actively participated in Counts Four, Five, and Seven and were [implicitly] affected by those offenses." Doc. No. 45 at 5.

Despite the considerable detail provided by the government about the allegations in the indictment in its Opp. Memo, the Carollo

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[1] Although the indictment used "financial institution" multiple times, it did not use "affected," as used in in section 3293(2).

[2] In our circuit, this requirement is set out in United States v. Stock, 728 F.3d 287 (3d Cir. 2013). See Doc. No. 105, at 10.

court ruled that section 3293(2) was inapplicable because "the government has not alleged that the financial institutions suffered any actual loss or at most the risk of loss is de minimis." Carollo I, at *2.

McKelvy argued in his Limitations Reply Memo, at 7-8, that the "accept as true" requirement could not be used against him because this requirement did not apply to mixed "legal/factual" allegations and that the government was incorrect in so arguing. McKelvy maintains that the ruling in Carollo granting the motion to dismiss, in the face of all the details in the government's summary of the indictment there, is implicitly consistent with his mixed "legal/factual" argument.

On further reflection, however, it is just as likely that the Carollo court ruled against the government because, even assuming that the court "accepted as true" the government's representations as to what the indictment charged on the "affected" component of section 3293(2) were not a sufficiently detailed explanation of how the fraud directly caused the actual loss or risk of loss, or to show that any "risk of loss" was not "de minimis." See Carollo I, at *2.

The government's threadbare representations on the "affected" component,[3] in its case against McKelvy, suffer by comparison to the (failed) effort by the government in Carollo, even though spelled out extensively in its Opp. Memo, at 2-7.

B. Ghavami. When discussing the case of United States v. Ghavami, 2012 WL 2878126, *7-*10 (S.D.N.Y. 2012), in his Amended Limitations Memo (Doc. No. 105) and his Limitations Reply (Doc. No. 121), McKelvy had reviewed parts of the original record in that case, specifically: the government's response to the defendants' motion to dismiss counts for untimeliness (Doc. No. 484, unsealed on 12/01/14); and the defendants' reply to the government's response (Doc. No. 491, unsealed on 12/2/14). But McKelvy did not discuss the Ghavami indictment (Doc. No. 30),

[3] There is nothing in the indictment or in the government's Amended Limitations Memo (Doc. No. 113), which comes even close to satisfying the various tests McKelvy cites in his two Memos on the limitations issue.

which, in light of the government's singular reliance, in its case against McKelvy on its "accept as true" argument, needs to be done here.

The Ghavami indictment alleged that the fraud "affected a financial institution." Specifically, Count 1 (the wire fraud conspiracy count) alleged that:

> **The conduct alleged in this Count caused Financial Institutions A, C, and D to be susceptible to substantial risk of loss and caused actual loss to Financial Institutions A, C and D.**

Count 1, ¶ 12. This paragraph alleged what was missing in Carollo I, at *2 – that the fraud had caused specified financial institutions "to be susceptible to substantial risk of loss and caused actual loss" to those institutions.

After an extended explanation of how municipal bond trading is supposed to work, ¶¶ 13-22, Count 1 then provided the Description of the Offense, in which it alleged that it was "a part of … the conspiracy to commit wire fraud that:

> **[the] scheme to defraud affected a financial institution, namely, a scheme to defraud municipal issuers … by manipulating the bidding process for investment agreements and other municipal finance contracts by colluding with each other, and further to deprive the municipal issuers of … control [of] their assets by causing them to make … decisions based on misleading and false information, ….**

Count 1, ¶ 24. As such, the indictment repeated the earlier allegation that the fraud "affected a financial institution." Similar language appears in Count 2, ¶ 34; Count 3, ¶ 42; Count 4, ¶ 51; Count 5, ¶ 59.

The government cited, Doc. No. 484 at 19, United States v. Hitt, 249 F.3d 1010, 1015 (D.C. Cir. 2001), in a slightly different context for the proposition that, "[b]efore trial, … the court is bound by the language of the indictment." The court in Ghavami, however, did not mention the "accept as true" test in the Second Circuit's decision in Goldberg or elsewhere. Moreover, quite possibly for one or both of the two reasons

suggested in the last paragraph below on the Ghavami case, the court did not discuss the extensive allegations in the indictment in the context of the "affected" issue.

As we noted in our Amended Limitations Memo, Doc. No. 105 at 14-15, the government in Ghavami did not argue that the indictment had given a sufficient explanation of how the fraud had "affected" four financial institutions, but instead argued that that explanation was set out in its proffers, which were so extensive that it took five pages for the government to summarize them. Crim. No. 10-CR-1217 (S.D.N.Y), Doc. No. 484 at 9-14. The government also recognized, pursuant to United States v. Ohle, 678 F.Supp.2d 215, 229 (S.D.N.Y. 2010), that it had to show that the fraud directly caused actual loss to a financial institution or put such an institution at "substantial risk" of loss. Doc. No. 484 at 6-7.

The Ghavami court, in turn, took four pages in its opinion to discuss the government's proffers, 2012 WL 2878126 at *7-*10, before the court ruled that these proffers had shown that the government "has admissible and sufficient evidence to permit a jury to find that Defendants' conduct 'affect[ed] a financial institution.'" 2012 WL 2878126, at *10.

Because it is highly unlikely that government counsel were unfamiliar with Goldberg and because it is even more unlikely that a distinguished and experienced jurist, such as Hon. Kimba M. Wood, was unfamiliar with that precept, it can readily be inferred that either the court and counsel recognized that the "accept as true" requirement does not apply to mixed legal/factual allegations and/or that, even if it did, the court required, sub silentio, that the government go further, to provide the "detailed explanation" of a "direct cause," as set out in McKelvy's Amended Limitations Memo and Reply Limitations Memo. Under either rationale, the Ghavami court certainly was deliberate in its decision to rely on the proffers on the "affected" point, rather than on the extensive allegations in the indictment.

C. Ohle. In United States v. Ohle, 678 F.Supp.2d 215, 228–29 (S.D.N.Y. 2010), the court denied Ohle's motion to dismiss Count 1, as time-barred. Id. at 229-30. Count 1 charged Ohle and a co-defendant with conspiracy to commit mail fraud, wire fraud,

and tax fraud. Included in Count 1 was the allegation that the "scheme and artifice to defraud affected a financial institution." Crim. No. 1:08-cr-01109 (S.D.N.Y.), Doc. No. 66, at page 8. In its Omnibus Memo opposing this motion, the government argued, among other things, that "in deciding a motion to dismiss, a district court is required to assume the truth of the averments in an indictment, see Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 343 n.16 (1952)." Doc. No. 44.[4] At the outset of its opinion, the district court stated, using slightly different words than those in United States v. Velastegui, 199 F.3d 590, 592 n. 2 (2d Cir. 1999), that, "For the purposes of these motions, all of the allegations in the Indictment are accepted as true." Ohle, 678 F.Supp.2d at 220.

But even though, in theory, the court in Ohle, when considering the government's showing that a financial institution had been "affected," could have relied on what it said early on – "accept[ing] as true" the indictment's allegations – it did not refer to these allegations in its discussion of the "affected" issue. Rather, the court relied on the government's representations in its Omnibus Memo, where it (the government) gave an informal proffer of the facts supporting its position that the ("national," presumably federally-insured) Bank A[5] suffered "millions of dollars of actual losses" as a result of the fraud. Omnibus Memo (Doc. No. 44), at 16, cited in Ohle, 678 F.Supp.2d at 219, 229. Interestingly, the government's Omnibus Memo also cited two documents filed by defendant Ohle in support of his argument that the bank was not affected, "Decl., ¶ 7, and Exhibit E to Ohle Decl. (Bank A paying over $24,000,000 in settlements to HOMER clients, and over $4,200,000 more in attorneys' fees defending the suits)" Doc. No. 44, at 16.

The court in Ohle must be understood as having implicitly referred to these two proffered documents, because its summary of the facts concerning the actual loss, "Bank A paid over $24,000,000 in settlements to HOMER clients and over $4,200,000 in attorneys' fees defending the suits," 678 F.Supp.2d at 219,

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[4] Subsequently, the Second Circuit issued its opinion in Velastegui, supra, which specified that the "assume the truth" requirement applied to "the facts."

[5] Doc. No. 44, at 48 n. 27.

almost exactly duplicates the informal proffer language in the government's Omnibus Memo quoted above.

In summary, there is nothing in the opinion to suggest that the court was "accept[ing] the truth" of the allegation in the indictment that a financial institution was "affected;" rather, the court relied on the government's informal proffer and to its reference to "declarations" filed by the defendant, to determine that the government had shown that the effect of the fraud on the financial institution was "'sufficiently direct.'" 678 F.Supp.2d at 229 (citation omitted).

D. Kerik. In his Amended Limitations Memo (Doc. No. 105), at 12-13, McKelvy cited the opinion in United States v. Kerik, 615 F.Supp.2d 256, 268 (S.D.N.Y. 2009), as the case from which the court in Carollo II, at *2, quoted a ruling on a different but related issue concerning the "general issue" provision in Rule 12(b)(2)(2002 version). Although Kerik does not directly relate to the more narrow issues discussed in Carollo, Ghavami, and Ohle, because it did not involve sections 3293(2), it does relate to the larger "accept as true" issue.

In Kerik, Count 3, ¶ 24, charged Kerik with wire fraud and that, as a part of this scheme, Kerik,

> **[F]or the purpose of executing such scheme … and attempting so to do would and did … transmit … by means of wire and radio communications in interstate … commerce, writings, signs, [and] signals, … to wit, interstate telephone calls, faxes and e-mails, [in violation of Title 18, United States Code, Sections 1343 and 1346].**

Crim. No. 7:07-cr-01027, Doc. No. 42 (p. 13). Under the government's theory in the McKelvy case, these allegations would have sufficed to make out the wiring element at this stage.

Although the district court in Kerik ruled that it must "assume[][the factual allegations in the superseding indictment] to be true," 615 F.Supp.2d at 260, relying on the Second Circuit's opinion in Velastegui, 199 F.3d at 592 n. 2, it went on to hold that consideration on the merits of the defendants' motion to dismiss Count 3 was "not premature." Id. at 268 n. 14.

In its Omnibus Memo, Doc. No. 43 (p. 7), the government construed part of Count 3 (quoted above) to allege that there had been wirings, including faxes and emails, during a seven year period, which would satisfy the wiring element of the alleged wire fraud and that the selected wiring, a fax, had taken place within the 5-year statute of limitations. The government also argued there that Count 3 was within the 5-year statute because the indictment alleged that it was in furtherance of the fraud and because, in its Bill of Particulars ("BOP"), the government had specified the date of the wiring as sent on a date within that 5-year period. Id. at 25-28.

The government here, in the case against McKelvy, argues, as the government initially did in Kerik, that the allegations in the indictment alone were enough to defeat a motion to dismiss, based on the statute of limitations. But in Kerik, after making a similar argument, as set out above, the government then gave an informal proffer, saying that, at trial, it would prove that the fax was a "lulling" letter, within the meaning of the case law. Doc. No. 43 at 28-33. The court, in turn, did not even mention the government's argument that the allegations in the indictment were sufficient to withstand a limitations motion, but sub silentio, rejected the government's argument that the indictment alone was enough to support its position, ruling that the particular fax was not, based on its contents, a "lulling" letter under the law. Kerik, 615 F.Supp.2d at 270.

Accordingly, when the court in Kerik granted the defendant's motion to dismiss Count 3, its action in doing so is authority for McKelvy's position in this Supplemental Memo, that the court most likely relied on the proffer for one or both of the two reasons suggested in the last paragraph on Ghavami.

Summary. All four of these cases recognize the "accept as true" requirement but all relied, not on this requirement, but rather on the sufficiency of the government's additional allegations.

III. OFFENSE MOTION CASES.

Concerning his Offense Memo (Doc. No. 111) and his Reply Offense Memo (Doc. No. 126), counsel realized, both during and after the oral argument, that his statement of McKelvy's position should have included two limited concessions regarding the

interpretation of the Third Circuit's decisions in United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005), and United States v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002).

A. First limited concession. McKelvy concedes that the Court was correct when it stated, at the oral argument, that the description of the offense contained in a charging paragraph can be read, under certain circumstances, to incorporate language from the body of the indictment, as was done in Panarella, 277 F.3d at 684-85 (allegation of honest services wire fraud in the charging paragraph can incorporate the specific facts alleged in the body concerning that offense, to determine whether conduct fell outside of the judicial definition of the offense). But, as counsel believes he stated at the oral argument, the question here is not the sufficiency of the facts to support a particular offense, but whether the charging paragraph, Count 1, ¶ 8, as a matter of pleading, properly charged a unitary offense, as required by the cases and Model Instructions cited in McKelvy's Offense Memo (Doc. No. 111), at 16-33, and his Offense Reply Memo (Doc. No. 126), at 5 ff.

B. Second limited concession. As counsel mentioned during the oral argument, when preparing for the argument, he looked again in the Third Circuit Model Jury Instructions, and found what he had missed before but expected should be there, 6.18.1341-1. But as he was reviewing this instruction, and its commentary, he realized he had come across a two-edged sword.

The first edge is contained in the following model instruction which, as the commentary makes clear, should include the word "overall" (or "overarching"), depending on what the evidence shows at trial. But, before the evidence is heard, this instruction should be understood as applying to "the scheme to defraud charged in the indictment." This instruction is set out in the last paragraph of 6.18.1341-1, and states:

> **If you find that the government has proved beyond a reasonable doubt that the *(overall)* scheme to defraud charged in the indictment did exist and that the defendant knowingly devised or participated in the *(overall)* scheme charged in the indictment, you should then consider the [other two] element[s][emphasis in original].**

McKelvy's point continues to be that there is nothing which could be considered "the scheme" charged in the charging paragraph of his indictment, which was not written in language which was factually oriented or which would be understandable to a jury, in contrast with the indictments in the four cases cited above, which do. If the government had wanted to, it certainly could have included language often found in fraud cases – again found in the four cases cited above - such as "It was a part of the scheme …" and "It was a further part of the scheme," using here ¶¶ 9-12 from the Manner and Means section.

The second edge of the sword, however, is that under the commentary[6] to this instruction, district courts are not expected to include the term "overall" until after the evidence has been heard. This instruction is a reflection of the Third Circuit's decision in Dobson. Accordingly, unless this Court were to agree with McKelvy's argument that it should take as undisputed his arguments that the government offered no proof to the grand jury that he had knowledge of the underlying Ponzi scheme and that, in fairness, the court should consider the defendant's proffer on this point as an indication that the government could not, at that time, charge McKelvy with involvement in the Ponzi scheme, then the Court should only rule that there is no way that a jury could decide that McKelvy and his two co-defendants

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[6] **The relevant commentary states: "The last paragraph of the instruction refocuses the jury on the question of the defendant's involvement in the scheme charged in the indictment as well as the existence of that scheme. If the evidence in the case on trial may lead the jury to convict a defendant for involvement in some lesser scheme rather than the scheme charged in the indictment, the court may insert the adjective "overall" to emphasize that the conviction cannot rest on involvement in some scheme other than the overall scheme charged."**

participated in the same, unitary scheme, and postpone until trial a ruling on the propriety of the "overall" language.

Respectfully submitted,

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Dated: September 22, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Supplemental Memorandum, upon Assistant U.S. Attorney Robert J. Livermore:

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/s/ Walter S. Batty, Jr.
Walter S. Batty, Jr.

Dated: September 22, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	**CRIMINAL No. 15-398-3**
WAYDE MCKELVY,	:	
Defendant	:	

ORDER

AND NOW, this day of , 2017, upon consideration of the request in a letter dated September 22, 2017 from Walter S. Batty Jr., Esquire, and William J. Murray, Jr., Esquire, counsel for Defendant Wayde McKelvy, it is ORDERED that counsels' uncontested request for leave to file a Supplemental Memorandum, after the oral argument on September 12, 2017, is GRANTED.

BY THE COURT:

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JOEL H. SLOMSKY, J.