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AFFIDAVIT

I David Kevin Lewis, being over 18 years of age
do swear all facts and statements herein are true
and correct under the penalty of perjury.

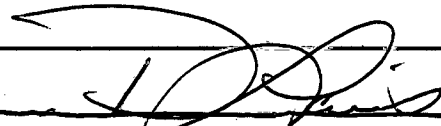
Date: Dec. 13, 2022


DAVID KEVIN LEWIS

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CERTIFICATE OF GOOD FAITH

The grounds herein are limited to an intervening circumstance of substantial and controlling effect in that a rule made by the Supreme Court must be enforced and a statute of the United States holds force under the Supremacy Clause. Thus this petition is presented in good faith and not for delay.



DAVID KEVIN LEWIS

II

APPENDIX

EXHIBIT F - (See Attachment)

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fraud and conspiracy to commit securities fraud was five years. *See* 18 U.S.C. § 3282 (establishing general five-year limitations period for noncapital criminal offenses). In 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), Pub. L. No. 111-203, tit. X, § 1079A(b)(1), 124 Stat. 2079 (2010), Congress extended the statute of limitations for securities fraud and conspiracy to commit securities fraud from five to six years. *See* 18 U.S.C. § 3301. This change took effect on July 22, 2010. *See* Pub. L. No. 111-203, § 4, 124 Stat. 1390. As of July 22, 2010, the five-year limitations period for Lewis’ conduct committed between June 13 and October 30, 2006 had not expired. But the grand jury did not hand up the indictment in this case until June 5, 2012—more than five years after the commission of the offenses, albeit within the six-year limitations period established by the Dodd-Frank Act.

Lewis argues that the six-year limitations period does not apply and the charges of which he was convicted are time-barred because the conduct for which he was charged occurred more than five years before the indictment was returned. The government maintains that Lewis waived this argument by not raising it before or during trial, and, alternatively, that the six-year limitations period applies because the Dodd-Frank Act took effect before the former five-year limitations period expired as to the conduct in question.

B

The court first considers whether Lewis has waived this argument. Relying on *United States v. Arky*, 938 F.2d 579 (5th Cir. 1991), the government contends that Lewis waived his limitations argument by failing to raise it before or during trial. In *Arky* the Fifth Circuit

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(S.D.N.Y. 2003). That reliance is misplaced. In that case the question was whether the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley Act”), 15 U.S.C. § 7201, *et seq.*, which extended the limitations period for private causes of action under the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*, revived previously time-barred claims. *In re Enterprise*, 295 F.Supp.2d at 309. The court held that it did not and granted the defendants’ motion to dismiss. *Id.* at 312-17. The court emphasized that, as of the Sarbanes-Oxley Act’s effective date, the plaintiffs’ claims were *already* time-barred. *Id.* at 312. Because Congress did not unambiguously provide that the new limitations period would apply retroactively to revive time-barred claims, the court concluded that the extended limitations period did not apply and that the action was therefore time-barred. *Id.* at 312-17.

Citing *In re Enterprise*, Lewis argues “that the increase to six years did not revive his time barred offenses.” D. Mot. 22-23. But Lewis overlooks a critical distinction: at the time the Dodd-Frank Act took effect on July 22, 2010, the five-year limitations period that applied to Lewis’ conduct had *not* run. The first security at issue in the indictment was purchased on June 13, 2006. The extended statute of limitations took effect fewer than five years after that first sale. Consequently, the Dodd-Frank Act did not revive a criminal claim for which prosecution was already time-barred. Instead, it simply extended an unexpired limitations period that otherwise would have expired before the indictment was returned.

Lewis suggests that there is a possible retroactivity problem¹⁶ with applying the six-

¹⁶Although Lewis does not cite a case other than *In re Enterprise*, he states: “Defendant has found [no] authority as to whether or not Congress intended the cha[n]ge to

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for which the limitations period had not run as of its enactment.” *Id.* at 1113 n.10 (citing the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961(l)(3), 103 Stat. 501 (1989)). By contrast, the effective-date provision governing 18 U.S.C. § 3301 merely states: “Except as otherwise specifically provided in this Act or the amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act.”¹⁸ Pub. L. No. 111-203, § 4, 124 Stat. 1390. Unlike the statute in *Brechtel*, Congress did not expressly clarify whether the extended limitations period applies to offenses committed before and for which the prior limitations period had not run as of its enactment. Accordingly, *Brechtel* suggests that there would be no Ex Post Facto Clause problem with applying the six-year limitations period in this case, but it does not address the question whether Congress intended the six-year limitations period to apply to conduct occurring before the statute’s effective date (i.e., pre-amendment conduct). In other words, *Brechtel* provides guidance on the *constitutional question* of whether there is a violation of the Ex Post Facto Clause; it does not guide the *statutory question* of which limitations period applies in this case.

Lewis posits that, absent an express instruction by Congress, the court cannot apply the six-year limitations period to conduct that occurred before the Dodd-Frank Act’s effective date. The court disagrees. Although the Fifth Circuit has not addressed this

¹⁸The date of enactment was July 21, 2010, and since 18 U.S.C. § 3301 does not specifically provide for a different effective date, the pertinent effective date here is July 22, 2010.

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regardless when the claim accrued. *Id.* Although the court noted that its conclusion was supported by the retroactivity analysis of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), it concluded that *Landgraf* was not controlling. *See id.* at 45-46. The court explained:

[A]lthough the defendant frames the issue as one of retroactivity, the issue is not technically one of retroactivity, where a change in the law overturns a judicial adjudication of rights that has already become final. In this case, the statute of limitations is applied to conduct that occurred after the statute's enactment—the plaintiff's filing of the complaint—not to the allegedly discriminatory acts of the defendant. The only issue is which law to apply to the plaintiff's acts.

Id. at 46 (footnote omitted). Other courts have reached the same conclusion. *See, e.g., Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886, 889-91 (2d Cir. 1995); *Steven I. v. Cent. Bucks Sch. Dist.*, 618 F.3d 411, 414 & n.7 (3d Cir. 2010).

The reasoning of the Fifth Circuit in *St. Louis* does not appear limited to civil statutes of limitations. Other courts have taken the same approach in criminal cases. For example, in *United States v. Leo Sure Chief*, 438 F.3d 920 (9th Cir. 2006), the court considered the issue as it relates to 18 U.S.C. § 3283. *Id.* at 922-25. Much like Congress' decision to enact a separate statute of limitations for securities fraud offenses, Congress enacted a separate statute of limitations extending the limitations period for the prosecution of crimes involving sexual abuse against children.²⁰ *See id.* at 922. The 2003 version of the statute provided that

²⁰In 1994 the text of the statute was re-codified at 18 U.S.C. § 3283 and amended in 2003. *Leo Sure Chief*, 438 F.3d at 922.

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amendment conduct); *United States v. Mayfield*, 999 F.2d 1497, 1501-02 (11th Cir. 1993) (same); *United States v. Coleman*, 2010 WL 750101, at *4-5 (E.D. Mo. Mar. 2, 2010) (collecting cases).

The government is not relying on the Dodd-Frank Act to revive a previously time-barred claim. The five-year limitations period had not expired as to Lewis' criminal conduct on the date the Dodd-Frank Act took effect to enlarge the limitations period to six years. This is a critical distinction. When claims are already time-barred at the time the limitations period is enlarged, a clear statement from Congress *is* required before a court will apply an amendment retroactively to revive the claim. *See, e.g., Singleton v. Clash*, ___ F.Supp.2d ___, 2013 WL 3285096, at *10 (S.D.N.Y. July 1, 2013). But a clear statement from Congress is generally not required when an amendment is applied to pre-amendment conduct and the amendment merely extends the limitations period for unexpired claims but does not revive expired claims. *See Landgraf*, 511 U.S. at 273 ("Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations."); *accord Stogner v. California*, 539 U.S. 607, 613-14, 618 (2003) (distinguishing cases where courts have upheld extensions of unexpired statutes of limitations from those where limitations periods have expired). Lewis does not cite any authority indicating that Congress did not intend for the extended limitations period of the Dodd-Frank Act to apply to conduct that occurred before its effective date, and the court has found none. The court therefore holds that the six-year limitations period applies. Because there is no Ex Post Facto Clause problem with applying the six-year limitations period, the court concludes