3/3/23

No. 22-852

In The
Supreme Court of the United States

DONALD V. WATKINS, SR.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit,
Case No. No. 19-12951

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a bank "insider" who acknowledged receiving tangible economic benefits from a $151,739.50 bank loan made to his business associate, committed bank fraud, within the meaning of Title 18 U.S.C. §§1344 and 2, in a case where: (a) the borrower (a cooperating government witness) never disclosed to the "insider" that the tangible economic benefits he received to satisfy a capital call obligation in a prior bona fide business relationship came from a loan made by the "insider's" bank, and (b) the "insider" played no role in the bank's lending decision, with respect to the $151,739.50 so-called "nominee" loan charged in Count Ten of the Indictment?

2. Whether a bank "insider" who acknowledged receiving tangible economic benefits from a $750,000 "nominee" bank loan made to his business associate, committed bank fraud, within the meaning of 18 U.S.C. §§1344 and 2, as a matter of law, in a case where: (a) 12 C.F.R. §215.3(f)(2) provided an express exception to Regulation O's $100,000 cap[1] on loans to the "insider," who timely and properly invoked his right to the §215.3(f)(2) exception as an

[1] Regulation O, 12 C.F.R. §215.5

affirmative defense to the bank fraud charges in Counts Nine and Ten of the Indictment; (b) the borrower timely disclosed the "insider's" financial interest in the $750,000 loan (charged in Count Nine of the Indictment) to the bank's lending officer, who was also a bank director; (c) no language in §215.3(f)(2) imposed a duty upon the "insider" to disclose his receipt of tangible benefits from the loan; (d) the borrower remitted a portion of the loan proceeds to the "insider" as his capital contribution in a bona fide business transaction in which the borrower acquired property, goods, or services from the "insider" prior to the loan transaction; (e) the bank's lending decision was based solely on the creditworthiness of the borrower; (f) the "insider" did not guarantee the loans; (g) the borrower bore the sole responsibility for repayment of the loans, with his assets (including his house) pledged as collateral; (h) the bank viewed the $750,000 loan as "good," the bank profited from the loans, and the loans did not jeopardize in any way the security and safety of the bank; and (i) there was no evidence that the "insider" provided any false information concerning the loans, or asked the borrower to provide false information to the bank, or participated in any discussion with bank loan officers and directors regarding their decision to make the loans, or voted to approve or ratify the loans?

3. Whether the Court of Appeals erred, as a matter of law, in sustaining a conviction for wire fraud conspiracy under 18 U.S.C. §1349 (in Count One of the Indictment) and convictions for wire fraud under 18 U.S.C. §§1343 and 2 (in Counts Two through Eight) in a case where: (a) the rights and obligations between the Petitioner and the investor/"victims" were codified in written contracts that incorporated longstanding corporate governance documents, pre-existing operating agreements, and a related-offering memorandum; (b) the "victims" were "accredited investors" who were represented in their investment transactions by financial advisors and/or lawyers of their choice; (c) the "victims" agreed in writing to honor all of the terms and conditions set forth in the applicable corporate governance documents, which were promulgated and adopted by Petitioner's corporate predecessors; (d) every category of expenditures cited by the government as "fraudulent" or "personal" was expressly authorized in the governing operating agreements to which the "victims" agreed to be bound; (e) the "risk factors" related to these investments were disclosed to the "victims" and acknowledged in their purchase agreements; (f) the businesses in which the "victims" invested were ongoing business enterprises at the time of their investment and the Indictment; (g) forward-looking statements

in the transactional documents and follow-on stakeholder reports were qualified by words like "expect," "may," and "believe;" (h) there was no evidence that Petitioner precluded, limited, or hindered the "victims" from conducting due diligence prior to or after their investments; and (i) there was no allegation or evidence that Petitioner engaged in a "Ponzi" scheme, or fraudulent financial accounting practices, or that he failed to grow the businesses in question?

LIST OF PARTIES

The parties in the District Court and Court of Appeals are:

1. Donald V. Watkins, Sr. ("Watkins, Sr.") Petitioner and Defendant-Appellant below.
2. Donald V. Watkins, Jr. ("Watkins, Jr.,") Petitioner and Defendant-Appellant below.
3. The United States of America, Respondent and Plaintiff below.

CORPORATE DISCLOSURE STATEMENT

Watkins, Sr., hereby certifies that there is no parent or publicly held company owning 10 percent or more of the corporation's stock for the corporate entities in this case.

PROCEEDINGS IN THE COURTS BELOW

Watkins, Sr., and co-defendant Watkins, Jr., were charged with one count of conspiracy to commit wire fraud and bank fraud, in violation of 18 U.S.C. §1349 (Count One), seven counts of wire fraud, in violation of 18 U.S.C. §§1343 and 2 (Counts Two through Eight), and two counts of bank fraud, in violation of 18 U.S.C. §§1344 and 2 (Counts Nine and Ten). (Doc. 4).[2]

Watkins, Sr., and Watkins, Jr., pleaded "Not Guilty" to the charges. (Doc. 223, 219)

The jury returned a verdict of guilty on all counts, as to Watkins, Sr. (Id.). Watkins, Jr., was found guilty of Counts One and Two, only. (Id.).

Watkins, Sr., raised the issue that he lacked the requisite intent to commit the conspiracy and wire and bank fraud crimes for which he was charged in his motions for acquittal at the close of the Government's evidence (Doc. 144) and at the close of all evidence (Doc. 151). These motions were denied by the District Court. (Doc. 153 and 155, respectively).

Watkins, Sr. raised this defense again in his motion for Judgment of Acquittal after the jury verdict, or alternatively for a New Trial (Doc. 164). Again, it was denied by the District Court. (Doc.

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[2] The 11th Court of Appeals erroneously found that Watkins, Sr. and Watkins, Jr., were convicted of violations of 18 U.S.C. §1342. Neither the Indictment (Doc. 4), nor the Judgments of Conviction (Doc. 223, 219), support this erroneous finding.

198).

With respect to the two "nominee" loans in Counts Nine and Ten, Watkins, Sr., presented 1st and 2nd Circuit cases in his requested jury instruction Nos. 23 holding that such a loan is not, in itself, illegal.[3] (Doc. 147, at 3-4). The Government, citing 3rd, 8th, 9th, and 10th Circuit cases, requested the imposition of strict liability on Watkins, Sr., for these loans. (Doc. 142,, at 28-29 and nn. 5-7). The trial judge gave the jury instruction requested by the Government. (Doc. 183, at 23-24).

Prior to Watkins' case, there was no 11th Circuit case with his analagous facts that addressed the legal arguments advanced by Watkins, Sr., on this point.

The issue of Watkins, Sr.'s lack of intent to defraud with respect to the wire and bank fraud charges was also raised on appeal in Watkins, Sr.'s Opening Appellate and Reply Briefs.[4] The Court of Appeals

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[3] As discussed in the Reasons for Granting the Petition section of this Petition, these cases hold that a nominee loan is illegal if it is made with the intent to defraud the lender, as where the loan is made with little likelihood or expectation that the named borrower would repay it. On the other hand, where the named borrower is both financially able to repay the loan and fully understands he or she is responsible for repaying the loan, and the lender looks to the named borrower for repayment, there is no intent to defraud the lender, even though the named borrower turned over the loan proceeds to a third party. .

[4] In his Appellate Briefs, Watkins, Sr. argued that, based upon the unique facts and circumstance in his case, there was no evidence of an intent to: (a) defraud Alamerica Bank, or obtain bank money by fraudulent means or false pretenses, or (b) an

ruled against Watkins on all counts and on all issues raised in his appeal.

Watkins, Sr., was sentenced to 60 months in prison.[5] Watkins, Jr., was sentenced to 27 months.[6]

Watkins, Sr., and Watkins, Jr., timely appealed their convictions to the Court of Appeals in *United States v. Donald V. Watkins, Jr., and Donald V. Watkins*, Sr., Case No. 19-12951.

On July 15, 2022, the Court of Appeals sustained Watkins, Sr.'s convictions on all counts in *United States v. Watkins*, 42 F.4th 1278 (11th Cir. 2022). It affirmed Watkins, Jr.'s convictions on Counts One and Two.

Watkins, Sr., and Watkins, Jr., timely filed a Petition for Rehearing En Banc. On December 8, 2022, their respective Petitions were denied.

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intent to defraud under the wire fraud statute, or (c) engage in a conspiracy to commit bank or wire fraud. Without the requisite statutory intent to defraud, there was no wire or bank fraud and no conspiracy to commit wire and bank fraud, as a matter of law. The Court of Appeals cited and misapplied *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016) in support of its rejection of these arguments. There is no precedent in this Court that mirrors *Takhalov*.

[5] On August 25, 2022, the Federal Bureau of Prisons transferred Watkins, Sr., to home confinement. On January 10, 2023, the Bureau of Prisons discharged Watkins, Sr., from its custody.

[6] Watkins, Jr., was discharged from Bureau of Prisons' custody on August 16, 2021.

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PETITION FOR WRIT OF CERTIORARI

Watkins, Sr., petitions this Court for a Writ of Certiorari to review the Order of the Court of Appeals in *United States v. Watkins*, 42 F.4th 1278 (11th Cir. 2022) affirming his conviction on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. §1349, seven counts of wire fraud, in violation of 18 U.S.C. §§1343 and 2, and two counts of bank fraud, in violation of 18 U.S.C. §§1344 and 2.

This Petition presents three important questions of first impression in this Court. Additionally, the Petition presents a conflict between the 1st and 2nd Circuit Courts of Appeal and 11th Circuit on the issue of whether strict liability can be imposed on what the Government characterizes as "nominee" bank loans in Counts Nine and Ten of the Indictment.

OPINIONS BELOW

The Court of Appeals Opinions are set forth in the Appendix. Appendix A is the Court of Appeals July 15, 2022 Opinion in *United States v. Watkins*, 42 F.4th 1278 (11th Cir. 2022) affirming Watkins, Sr.'s and Watkins, Jr.'s respective convictions. Appendix B is the Court of Appeals December 8, 2022 Order denying Watkins, Sr.'s and Watkins, Jr.'s respective Petitions for Rehearing En Banc.

STATEMENT ON JURISDICTION

This Court's jurisdiction to review Watkins, Sr.'s Petition for a Writ of Certiorari in this case rests on 28 U.S.C. §1254(1), and 28 U.S.C. §2101(c).

The date of the Orders sought to be reviewed are dated **July 15, 2022**, for the published Court of Appeals Panel Opinion, and **December 8, 2022**, for the Court of Appeals' denial of Watkins, Sr.'s Petition for Rehearing En Banc.

STATUTES INVOLVED

The statutes involved in Watkins, Sr.'s case are: 18 U.S.C. §2, 18 U.S.C. §1343, 18 U.S.C. §1344, and 18 U.S.C. §1349. They are presented in Appendix C.

STATEMENT OF THE CASE

As discussed more fully below, the Government's prosecution team in Watkins, Sr.'s case devised a novel theory for creating criminal liability in a wire fraud conspiracy case that is not supported in any existing U.S. Supreme Court case authority.

With respect to the bank fraud charges in Counts Nine and Ten, the Government successfully persuaded the trial judge and 11th Circuit Court of Appeals to impose strict liability on Watkins, Sr., for what the prosecution characterized as two "nominee" bank loans. In doing so, these courts totally

disregarded Watkins, Sr.'s right under 12 C.F.R. §215.3(f)(2) to receive the tangible economic benefits from each loan, which he invoked as an affirmative defense throughout the case. Additionally, the Court of Appeals affirmance of the bank fraud charges conflicts with decisions of the 1st and 2nd Circuit Courts of Appeal on this issue.

What is worse, the Government effectively used a criminal prosecution to interpret and nullify a bank "insider's" right to receive tangible economic benefits under 12 C.F.R. §215.3(f)(2).

This conspiracy, wire fraud, and bank fraud case arises from a fully documented business relationship between Watkins, Sr., and several "accredited investors" who purchased economic participation interests in Watkins, Sr.'s waste-to-energy business (i.e., "Watkins-Pencor, LLC"), which said business enjoyed Class A membership status in various affiliates under the Masada Resource Group, LLC ("Masada"), family of businesses. (See, DX 5).

The economic participation purchase agreements in Watkins-Pencor, all of which were government exhibits, are short, clear, and concise. (See, GX 7, 15, 55, 78, 142, 156, 169, and 205).

The economic participations at issue in this case were sold between January 2007 and September 2010. (Doc. 254, at 2496-97).

Under the plain language of the purchase agreements, all of the economic participations were subject to the express terms and conditions set forth

in the applicable Masada-related Operating Agreements (DX 3 and 5) that were written and adopted by Masada principals prior to Watkins, Sr. becoming a Class A member of these Masada affiliates and becoming their designated "Manager."

The known "risk factors" were disclosed to each purchaser in his/her/its purchase agreement by an express reference to a March 1996 Confidential Offering Memorandum (DX 1) that was incorporated into the purchase agreements.

The purchasers were represented in their purchase transactions by Wall Street financial advisors and transactional attorneys. A Wall Street financial advisor executed the purchase agreement for "victim" Charles Barkley.

The Government offered no evidence at trial, that Watkins, Sr., or Watkins, Jr., operated the businesses at issue as a "Ponzi scheme." In fact, all of the businesses referenced in the indictment were ongoing business concerns before, during, and after Watkins, Sr.'s indictment, trial, and conviction.

The "nominee" loans in Counts Nine and Ten were made by a particular Watkins-Pencor economic participant who held a 10% "controlling interest" in the Watkins Pencor business enterprise. The loan applicant was a qualified and capable borrower who used his own credit and collateral to secure the loans. The proceeds of the loan were used as the source of money to fullfil his capital call obligations to Watkins Pencor. As discussed in detail below, Watkins, Sr.,

played no role in the Bank's loan decision-making process with respect to either loan. In fact, the borrower never disclosed to Watkins, Sr., the source of the $151,739.50 "nominee" bank loan referenced in Count Ten. Yet, Watkins, Sr., was convicted on Count Ten on a strict liability theory.

There was no evidence presented by the Government at trial that the financial books and records of the Watkins businesses were duplicitious or fraudulent in any respect. There was no evidence presented by the Government at trial that Watkins, Sr., failed to declare all of the income from the sale of his economic participations on his personal tax returns, or that he failed to pay taxes on this income.

Watkins, Sr., asked to testify before the grand jury that indicted him on two occasions, which said requests were granted. (Doc. 254 at 2487).

Watkins, Sr.'s indictment in Birmingham, Alabama came 33 months after the U.S. Attorney for the District of New Jersey reviewed the same investor transactions that formed the basis of Watkins, Sr.'s conspiracy and wire fraud charges in Birmingham, Alabama, and cleared Watkins, Sr. of all allegations of conspiracy and wire fraud.

Watkins, Sr., also testified in his own defense at trial in Birmingham. (Doc. 254 at 2435 through 255 at 2767).

Watkins, Sr., seeks this court's review of the 11th Circuit Court of Appeals affirmance of his convictions, pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE PETITION

A. As a matter of law, Watkins, Sr., did not commit bank fraud, within the meaning of 18 U.S.C. §§1344 and 2, with respect to the $151,739.50 "nominee" bank loan referenced in Count Ten of the Indictment and the $750,000 "nominee" bank loan referenced in Count Nine of the Indictment.

While the Court of Appeals' Opinion discussed Regulation O's $100,000 cap on loans to a bank "insider" like Watkins, Sr., the Appeals Court wholly failed to address the exception to this cap, as codified in 12 C.F.R. §215.3(f)(2).

Watkins, Sr., repeatedly asserted §215.3(f)(2) as an affirmative defense to the bank fraud charges. Watkins, Sr., raised the issue that he lacked the requisite intent to commit the conspiracy and wire and bank fraud crimes for which he was charged in his motions for acquittal at the close of the Government's evidence (Doc. 144) and at the close of all evidence (Doc. 151). These motions were denied by the District Court. (Doc. 153 and 155, respectively).

Watkins, Sr. raised this defense again in his motion for Judgment of Acquittal after the jury verdict, or alternatively for a New Trial (Doc. 164). Again, it was denied by the District Court. (Doc. 198).

The issue of whether Watkins, Sr., had an intent to defraud with respect to the two "nominee" loans in

Counts Nine and Ten, was also presented in Watkins, Sr.'s requested jury instruction No. 23, which cited *United States v. Gens*, 493 F.2d 216, 221-23 (1st Cir. 1974), and *United States v. Docherty*, 468 F.2d 989, 994-95 (2nd Cir. 1972) in support of the proposition that "nominee" loans are not, in and of themselves, illegal.[7] (Doc. 147, at 3-4). There was no 11th Circuit case based upon analogous facts on this issue.

Citing *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987), *United States v. Willis*, 997 F.2d 407, 410 n.2 (8th Cir. 1993), *United States v. Waldroop*, 431 F.3d 736, 741 (10th Cir. 2005), *United States v. Jimenez*, 513 F.3d 62, 73 (3d Cir. 2008), and *United States v. Molinaro*, 11 F.3d 853, 857 (9th Cir. 1993), the Government argued for the imposition of strict liability on Watkins, Sr., for the two "nominee" loans. (Doc. 142,, at 28-29 and nn. 5-7). The trial judge gave the jury instruction requested by the Government. (Doc. 183-1, at 23-24). [8]

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[7] These cases hold that a nominee loan is illegal if made with the intent to defraud the lender, as where the loan is made with little likelihood or expectation that the named borrower would repay. On the other hand, where the named borrower is both financially able to repay the loan and fully understands he or she is responsible for repaying the loan, and the lender looks to the named borrower for repayment, there is no intent to defraud the lender, even though the named borrower turned over the loan proceeds to a third party.

[8] The points and authorities cited in Watkins' Request Jury Instruction No. 23 regarding Watkins, Sr.'s lack of an intent to defraud the bank, as a matter of law, were also presented in his motions for acquittal. (Docs. 144, 151, and 164).

The 11th Circuit affirmed the imposition of strict liability on Watkins, Sr., for these bank loans, despite §215.3(f)(2) and contrary to the precedent established in *United States v. Gens* and *United States v. Docherty*.

The issue of Watkins, Sr.'s lack of intent to defraud with respect to the wire and bank fraud charges was also raised on appeal in Watkins, Sr.'s Opening Appellate and Reply Briefs.[9] The Court of Appeals ruled against Watkins on all counts and on all issues raised in his appeal.

In effect, the Court of Appeals judicially nullified this codified exception in Watkins, Sr.'s case, without citing any explanation or precedent for doing so. The Court upheld Watkins, Sr.'s bank fraud conviction based upon that Watkins' non-disclosure of his "nominee" status constituted all the proof it needed for the "intent to defraud" element of the crime.[10]

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[9] In his Appellate Briefs, Watkins, Sr. argued that, based upon the unique facts and circumstance in his case, there was no evidence of an intent to: (a) defraud Alamerica Bank, or obtain bank money by fraudulent means or false pretenses, or (b) defraud under the wire fraud statute, or (c) engage in a conspiracy to commit bank or wire fraud. Without the requisite statutory intent to defraud, there was no wire or bank fraud offense in this case and no conspiracy to commit wire and bank fraud, as a matter of law, as held in *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016). The Court of Appeals cited and misapplied *Takhalov* in support of its rejection of Watkins' arguments. There is no precedent in this Court that mirrors the holding in *Takhalov*.

[10] The 11th Court of Appeals did not address how and why Watkins, Sr., was required to disclose his receipt of tangible economic benefits from the $151,739.50 bank loan when the borrower never disclosed to Watkins the source of this capital

Watkins, Sr. testified as to his good faith reliance on 12 C.F.R. §215.3(f)(2) with respect to the two bank loans charged in Counts Nine and Ten of the Indictment. Based upon plain language of §215.3(f)(2) and the unique facts and circumstances in this case, the Alamerica Bank loans that formed the basis of the bank fraud charges were NOT extensions of credit to Watkins, Sr., and they did not cause him to exceed the maximum amount of credit that can be extended to a bank "insider."

Specific Facts Relevant to the Two Bank Fraud Charges

Counts Nine and Ten alleging bank fraud, relate to two loans of $750,000 and $151,739.50[11] that Richard Arrington, Jr., a cooperating government witness, obtained from Alamerica Bank on September 21, 2012 (Doc. 180-113 (GX 171)) and November 20, 2012 (180-119 (GX 178)).

Arrington testified that he never disclosed to Watkins, Sr., the fact that Alamerica Bank was the source of his $151,739.50 loan. (See, Doc. 248, at 161, lines 11-21). Likewise, Arrington never told Watkins that Alamerica Bank was the source of Arrington's two prior, smaller loans (*Id.*, at 189 and 263).

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contribution payment.

[11] Throughout the trial transacript, the $151,739.50 Alamerica bank loan was referred by the parties to as the "$150,000" loan.

Furthermore, Watkins, Sr., never interacted with bank officials in connection with any Arrington loan. (*Id.* at 204).

Yet, Watkins was found guilty of bank fraud for Arrington's $151,739.50 Alamerica Bank loan.

Regulation O, 12 C.F.R. Part 25, generally imposes a $100,000 maximum on the amount of credit a bank can extend to an "insider." (Doc. 248, at 238; Doc. 180-138 (GX 201, at 7-8). Watkins, Sr., was an "insider" at Alamerica Bank for purposes of Regulation O (Doc. 180-130 (GX 192, at 1); Doc 180-131 (GX 193, at 1) and had reached his Regulation O credit limit at the bank.

Arrington held a 10 percent economic interest in one of Watkins' Masada-related affiliates (i.e., Watkins-Pencor), which is deemed a "controlling interest." (GX 169). This level of economic participation subjected Arrington to capital call obligations under the Masada-related operating agreements.[12] (DX 3 and 5). Arrington confirmed that Watkins, Sr. informed him that he (Arrington) needed to pay this $750,000 obligation and that it would be used in connection with their Watkins-Pencor business relationship. (Doc. 248, at 190).

In both instances, Watkins, Sr., asked Arrington to obtain loans in those amounts as capital call

[12] The Government recognized this obligation. (See, Doc. 248, at 185, lines 15-25, and Doc. 255, at 2786, lines 18-22, and at 2788, lines 8-24; See. Also, Doc. 255, at 2619, lines 20-24, and at 2020, lines 17-20).

contributions because Arrington had gotten a free ride for so long. (Doc. 254, at 177).[13]

Watkins, Sr., did not direct Arrington, who had at least two other banking relationships, to go to Alamerica Bank for the loans, although Arrington told Watkins, Sr., in seeking the larger loan that he was going to Alamerica. (Doc. 248, at 189-90; Doc. 254, at 178-79, 183-84).

Watkins, Sr., knew he would receive economic benefits from the loans because Arrington was fulfilling his capital call obligations, and Watkins, Sr., has never denied that he received such benefits. (Doc. 254, at 185-86).

Under the plain language of 12 C.F.R. §215.3(f)(2), an "insider's" receipt of tangible economic benefits from the loan proceeds is NOT considered a loan to the "insider" if the loan involves a bona fide transaction for acquiring property, goods, or services from the insider. (Doc. 249, at 62-63; Doc. 254, at 179). Watkins, Sr. understood that this exception applied to the Arrington $750,000 loan.[14]

Watkins, Sr., has consistently invoked his rights under this exception as a defense to the bank fraud charges and related inquiries from bank regulators. (Doc. 254, at 183, 186). Larry Tate, Alamerica Bank's

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[13] The Johnson and Harms families made their Masada-related capital contribution in the form of loans, as well. (Doc. 254, at 177-78).

[14] This exception also applied to the $151,739.50 Alamerica Bank loan, as well.

CEO, shared the same understanding of 12 C.F.R. §215.3(f)(2). (Doc. 249, at 62-63).

Although Watkins, Sr., received benefits from the Arrington loans, he did not disclose this fact to the bank because there is no disclosure requirement in 12 C.F.R. §215.3(f)(2). (Doc. 254, at 183; *see,* Doc. 249, at 63-64).

Arrington testified he told Alamerica Bank loan officer Matt Rockett that he was in a business relationship with Watkins, Sr., and needed the $750,000 loan. He disclosed this fact to Larry Tate, as well. (Doc. 248, at 191-92).

Tate confirmed that Watkins, Sr., had disclosed his Masada and Watkins Pencor business interests to the bank on annual regulatory filings. (Doc. 249, at 35-36).

Even though the bank board, as a whole, did not receive information about Watkins' expected economic benefit when it voted on the loans, Tate and Rockett did. Furthermore, Tate testified that any loan officer who received this information had a duty to report it to the board. (Doc. 249, at 64).

Tate and Rockett were bank board members when the only Arrington loan that required board approval (i.e., the $750,000 loan) was presented to the bank board by Rocket and approved. (Doc. 248, at 236-37).

Watkins did not direct the bank loan officer to make any of the three of the Alamerica bank loans to Arrington that required no board approval. (Doc. 248, at 263). What is more, Watkins was not present at the

board meeting where Arrington's $750,000 loan was presented, discussed, and approved. (*Id.*, at 264).

In processing the $750,000 loan, bank loan officer Rockett asked for a source of repayment letter confirming Arrington's right to receive $750,000 from a purchase by Charles Barkley of an economic interest in Watkins' portion of Nabirm (a non-Masada related oil and gas exploration business). That September 18, 2012 letter, drafted by Watkins, Sr., and signed by his new general counsel (Kimberly Perkins), confirmed the right of JennRo (Arrington's business entity) to receive this $750,000 by December 31, 2012. (Doc. 180-133 (GX 196))

According to Rockett, he showed the letter to bank president Tate, who directed Rockett to remove it from the loan file. (Doc. 248, at 243, 257-59). As such, the source of repayment letter was not in the loan file reviewed by the bank board in approving the application for the $750,000 September 21, 2012 loan. (*See,* Doc. 248, at 235; Doc. 249, at 30-32, 131-37).

In any event, the bank made each of its four loans to Arrington based on his creditworthiness. (Doc. 249, at 64). Watkins was not a guarantor of the loans. (*Id.* at 32). Arrington was solely responsible for repayment of the loans, with his assets (including his house) as collateral (*Id.* at 38). When Arrington told Rockett that he (Arrington) had this business relationship with Watkins, Sr., and needed the $750,000 loan, Rockett made sure Arrington

understood it was Arrington and not Watkins on the loan. (Doc. 248, at 192).

Tate testified that the bank wanted to make the $750,000 loan to Arrington. The loan was a "good loan;" the bank made money from the loan; and in Tate's opinion, it did "not jeopardize in any way the security and safety of the bank." (Doc. 249, at 41).

The seminal 11th Circuit Court of Appeals case on bank fraud at the time of Watkins, Sr.'s appeal was *United States v. De La Mata*, 266 F.3d 1275 (11th Cir. 2001), which was a case of first impression in the 11th Circuit. The *De La Mata* court upheld a bank fraud conviction only because the bank "insiders" engaged in a pattern of deception by repeatedly and willfully concealing the insiders' personal financial interest in various entities in order to induce the bank to enter into transactions remunerative to the "insiders." The "insiders" also voted as bank directors on the transactions in question without disclosing their financial interests in them.

While *De La* Mata discussed certain aspects of Regulation O, it did not address the 12 C.F.R. §215.3(f)(2) affirmative defense raised by Watkins, Sr., in this case.

None of the factors that evidenced an intent to defraud the bank in *De La Mata* is present in Watkins, Sr.'s case. This is particularly true with respect to the $151,739.50 bank loan because Arrington never told Watkins the funding source of this loan, and Watkins played no role in the lending decision.

Notwithstanding diligent searches, Petitioner has not found and does not know of any federal wire fraud appellate decisions, and specifically any such decisions of this Court, involving similar or even analogous facts to those here. Watkins, Sr.'s case of bank fraud was one of first impression in the Court of Appeals and is one of first impression in this Court.

Watkins, Sr.'s case also presents a conflict between the Circuit Courts of Appeals on an "insider's" criminal culpability for "nominee" bank loans.

B. As a matter of law, Watkins, Sr, did not commit wire fraud conspiracy under 18 U.S.C. §1349 (as referenced in Count One of the Indictment) or wire fraud under 18 U.S.C. §§1343 and 2 (as referenced in Counts Two through Eight of the Indictment).

Watkins asserts that the Government's theories of (a) "fraud in the inducement" of Watkins-Pencor purchase agreements and (b) "lulling" the alleged "victims" are foreclosed in this case, as a matter of law.

The Court of Appeals erroneously found that Watkins, Sr., secured the Watkins-Pencor investments through several different fraudulent misrepresentations, such as: (1) misleading the investors into believing Watkins, Sr., owned at least 50% of the interest in Masada, when in fact he was

only the manager[15]; (2) misleading investors into believing the solicited funds would be used for business purposes, when in fact they were used to pay personal expenses and debts[16]; and (3) misleading investors into believing high-profile individuals such as Condoleeza Rice and Martin Luther King III were heavily involved in the management of Masada, when in fact they were not.[17]

Watkins, Sr., asserted as a defense to the wire fraud charges that he acted in good faith and in accordance with the authority vested in him under the plain language of the applicable corporate governance documents, operating agreements, and offering memorandum that governed the conduct between Watkins and the victims during their business relationship. Watkins placed the pertinent offering memorandum and applicable operating agreements into evidence. (See, DX 1, 3, and 5). These documents

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[15] The Watkins-Pencor agreements clearly define the legal interests conveyed to each purchaser. Each one invested in Watkins-Pencor, not Masada. These agreements speak for themselves and contradict this Court of Appeals finding.

[16] The Court of Appeals characterized loan repayments to Watkins, his family members, and an ex-girlfriend as payment for personal expenses, even though the applicable Masada-related Operating Agreements (DX 3 and 5) permitted these "insiders" to make loans to the Watkins-Pencor and Masada-related businesses and authorized Watkins to repay these creditors from available funds.

[17] One of the "risk factors" identified in the Offering Memoradum (DX 1) was the disclosed fact that management's efforts to recruit high-profile individuals as employees or consultants might not be successful.

were incorporated by reference into each alleged victims' Watkins-Pencor economic participation purchase agreement.

The Government argued that Watkins, Sr., cannot contract his way out of wire fraud. This assertion seeks to override the documented business relationship between Watkins, Sr., and his business partners. The existence of those corporate agreements and the incorporation of those agreements in the transactional documents (the respective economic participation agreements) means that a reasonable person in these investors' shoes would expect to be bound by those incorporated agreements. And, it's a plausible assumption that a reasonable person would consider the ***contents*** of those incorporated agreements as having some importance in determining whether to enter into and finalize the purchase transaction.

Both of those premises – i.e., expecting to be bound by those incorporated agreements (because the agreement each one signs so provides), and attaching some importance to the contents of those agreements – are relevant to the materiality or lack of materiality of the alleged misrepresentations, which ***is*** an essential element of the wire fraud charges and for the jury to decide. *Neder v. United States*, 527 U.S. 1, 20, 25.

As such, Watkins, Sr., was ***not***, in any way, trying to "contract out of fraud." In none of the business agreements that Watkins, Sr., placed in evidence is

there a provision waiving their liability, negating representations, or disclaiming representations other than those in the written agreement. But, the incorporated agreements ***do*** include matters that a reasonable person could well – and ought to—deem relevant to a decision whether to enter into the initial economic participation relationship, or a later economic interest or loan arising out of and adding on to the original participation interest.

Although conveniently ignored and downplayed by the Government, the specifically alleged wire fraud transactions and every transaction otherwise alleged to be part of the scheme to defraud are not like "point of sale" transactions such as a store purchase of a good at a marked price. Instead, every challenged transaction is part of an ongoing business relationship in which Watkins, Sr., as the global manager of Masada and Watkins-Pencor, had consistently worked to develop new markets, in many countries, often over a period of more than ten years, subject to the forces of various market conditions (e.g., the Great Recession of 2008, an Ebola epidemic in Sierra Leona, war in Ukraine, domestic political unrest in Egypt, global and regional prices of competing energy sources) that were beyond Watkins, Sr.'s control and which required frequent adaptation and modification of business plans and strategies.

In affirming his conviction, the Court of Appeals failed to cite a single financial transaction undertaken by Watkins, Sr., that was not expressly authorized

between Watkins, Sr. and the alleged "victims" in the transactional agreements. Likewise, the Court of Appeals failed to cite a single example of a alleged "misrepresentation" that fell outside of the disclosed "risk factors" that were identified in the 1996 Masada-related offering memo. (DX 1).

Notwithstanding diligent searches, Petitioner has not found and does not know of any federal wire fraud appellate decisions, and specifically any such decisions of this Court, involving similar or even analogous facts to those here. Watkins, Sr.'s conspiracy and wire fraud case was truly one of first impression in the 11th Circuit and is an important one of first impression in this Court.

Specific Facts Relevant to the Wire Fraud Conspiracy and Charges

All of the financial transactions alleged in the Indictment occurred within the context of the Watkins-Pencor business relationships between Watkins, Sr., and the "victims."[18] In plain language, the purchase agreements placed in evidence by the Government stated that each of the "victims" purchased an economic participation in Watkins' equity share of the Masada family of companies only, and not Masada itself. The agreements also stated

[18]Footnote number 1 in the Court of Appeals opinion identifies what it considered as the Masada family of companies, for the purposes of this appeal.

that Watkins may be entitled to receive an economic benefit from Masada Resource Group, as well as from its parent company, Controlled Environmental Systems Corporation.[19]

The purchase agreements incorporated an express reference to "risk factors" in a 1996 offering memo that was made available to each "victim" prior to executing his/her purchase transaction. (DX 1, at 4-11).

The identified risk factors applicable to the fraud charges in Watkins, Sr.'s case are: No. 5, "Conflicts of Interest," including the Manager's authority to conduct various "insider" transactions[20], as referenced in the applicable operating agreements (DX 3 and 5); No. 7, "No Assurance of Cash Distributions"; No. 13, "Additional Capital Contributions" (for certain stakeholders), which may be in the form of loans; No. 15, "Financial Projections;" No 16(c), "Abandonment of Target Markets," when deemed necessary by

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[19] During the conspiracy period alleged in the Indictment, Watkins executed bona fide purchase agreements with the equity owners of Masada Resource Group, LLC, and Controlled Environmental Systems Corporation to purchase all of their equity interests in these companies. Additionally, Watkins was a Class A equity owner in a host of Masada affiliates, domestically and abroad. (See, DX 5).

[20] The insider transactions consisted of loans that Watkins, his family members, and ex-girlfriend made to Watkins-Pencor and Masada to help these businesses survive the Great Recession of 2008 that tanked 125 of Masada's competitiors. Repayment of these loans is expressly authorized in the Operating Agreements, but these repayments were mischaracterized by the Government and Court of Appeals as the "payment of personal expenses."

Masada's Manager (Watkins, Sr.) within his sole discretion; No. 16(d), "Significant Capital Requirements;" No. 16(g), "Dependence on Key Personnel," including the disclaimer that Masada may not be able to attract or retain the personnel that the company seeks; No 16(k), "General Risks;" and No. 17(e), "Consultants, Engineers, and Other Advisors," including the disclaimer that Masada makes no assurances that the company will be able to hire consultants (like Condoleeza Rice and Martin Luther King, III) to fill key roles with Masada. (DX 1, at 4-11).

In upholding Watkins, Sr.'s conviction, the Court of Appeals (a) disregarded the plain language of the purchase agreements that specifically identified the interest purchased and (b) converted the risk factors that were disclosed to the "victims" prior to the execution of their purchase agreements into examples of so-called "wire fraud."

The evidence showed that the gateway for each "victim," whether allegedly defrauded as an investor or lender/creditor, to become involved in Watkins, Sr.'s affiliated Masada businesses, was through the purchase of an economic interest in Watkins, Sr.'s own Masada-related holdings (i.e., principally, Watkins-Pencor). Each involved an executed purchase contract that was negotiated at arms-length between high net worth, accredited investors, who were sophisticated business parties. These business parties were represented by financial and legal professionals before

execution of their purchase agreements. All of the "victims" agreed in their purchase agreements to be bound by all terms and conditions for "assignees" that are set forth in the operating agreements for each Masada entity, including adherence to the entire operating agreements. (*See*, DX 3 and 5; Doc. 254, at 84-89).

The purchase agreement and other documents incorporated therein governed the business relationship between the purchasers and Watkins, Sr. The Masada-related operating agreements (i.e., DX 3 and 5) define the broad managerial authority of Watkins, Sr., specifically including his authority to: (a) define proper business purposes, (b) rent or lease property, (c) borrow money for business purposes, (d) conduct "insider" transactions, (e) hire consultants and determine the terms and conditions of their employment, (f) compensate himself with a salary and reimburse himself for any and all expenses he incurred that were related to Masada,[21] (g) to repay creditors with accrued interest, including family members and friends who loaned money to benefit Masada's operations, and (h) allocate funds toward

[21] Watkins' salary as "Manager" was established, quantified, and authorized in the Pencor Masada OxyNol. LLC, operating agreements. See, DX 5 at 44-46. However, during the ten-year period (2007 to 2016) identified by the Government for the alleged conspiracy, Watkins, Sr., deferred his authorized salary. See, Doc. 255 at 2732, lines 10-11. This deferment of salary is one of the reasons why Masada survived the Great Recession of 2008 that tanked 125 of Masada's competitiors.

such business purposes, all within his sole discretion. (Doc. 254, at 79-89).

What began as a business dispute between Watkins and less than a handful of his 30 investors has been inappropriately criminalized, by a prosecutorial override on conspiracy and wire fraud charges brought 10 to 12 years later, solely because these investors' refreshed recollection of the nature and scope of the purchase transaction differed from the express material representations in the written purchase agreements and other governing contractual documents.

Even with these investors' years-later-refreshed recollections of alleged oral representations, the documentary evidence established: (a) the nature and scope of the purchase transaction, (b) the nature and scope of the "risk factors" that were made known to each "victim," (c) Watkins, Sr.'s good faith reliance on his contractual authority, as set forth in the applicable operating agreements, (d) the actual truth of his alleged misrepresentations, (e) Watkins. Sr.'s good faith belief that any such representations were true (e.g., relating to Condoleeza Rice and Martin Luther King, III), and (f) the investors' receipt and continued present possession of what they bargained for (i.e., their economic participation interests in an ongoing and growing business enterprise).

As a matter of law, these factors, individually and collectively: (a) negate the scheme to defraud and intent to defraud necessary to convict on wire fraud;

(b) constitute a complete defense to the conspiracy and wire fraud charges; and (c) required the entry of a judgment of acquittal on the conspiracy and wire fraud charges.

As such, the facts in Watkins, Sr.'s case and his affirmative defense of a lack of intent to deceive and defraud the "victims" fell squarely within the ambit of the 11th Circuit's precedent in *United States v. Takhalov*, 827 F.3d 1307, 1312-14 (11th Cir. 2016).

The *Takhalov* case cited and followed precedent set in the following 2nd Circuit cases: (a) *United States v. Shellef*, 507 F.3d 82 (2nd Cir. 2007), (b) *United States v. Starr*, 816 F.2d 94 (2nd Cir. 1987), and (c) *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2nd Cir. 1970).

Yet, the Court of Appeals distinguished the facts in Watkins, Sr.'s case from those that formed the basis of its holding in *Takhalov* by completely disregarding the nature and scope of the business relationship, as defined in the applicable corporate governance agreements and transactional documents exexuted between Watkins and the "victims."

CONCLUSION

The Court of Appeals effectively criminalized banking conduct that is permissible under 12 C.F.R. §215.3(f)(2). Prior to the Court of Appeal's opinion, there was no published decision of this Court that nullified the right of a bank "insider" under

§215.3(f)(2) to receive tangible economic benefits from a loan made to his business partner.

The Court of Appeals makes Watkins, Sr., a bank fraud criminal even though: (a) he was not told the source of the $151,739.50 bank loan to Arrington and he never interacted with any bank officer with respect to that loan; (b) there was no evidence that Watkins, Sr., gave false information to any bank official, or directed Arrington to do so, (c) at least two bank directors (i.e., Matt Rockett and Larry Tate) knew of Watkins' entitlement to part of the Arrington loan proceeds, and (d) Watkins recused himself from all aspects of the bank's decision to make loans to Arrington.

The Court of Appeals' affirmance of the bank fraud conviction presents a conflict between the 1st, 2nd, and 11th Circuits Courts of Appeal on this issue that should be resolved by this Court.

Finally, in light of (a) the plain language of the Watkins-Pencor purchase agreements, (b) the "risk factors" that were disclosed in the transactional documents to the alleged "victims," (c) the managerial authority conferred on Watkins, Sr. in the applicable Masada corporate governing documents, and (d) the fact that the "victims" were "accredited investors" who were represented by financial advisors and lawyers, Watkins, Sr., did not commit the crime of conspiracy and wire fraud, as a matter of law.

As such, the conspiracy and wire fraud convictions in this case are due to be reversed and rendered with

instructions to dismiss the Indictment with prejudice.

Respectfully Submitted,

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No. 23-_____

In The
Supreme Court of the United States

DONALD V. WATKINS,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI