3/3/23

No. 22-853

In The
Supreme Court of the United States

DONALD V. WATKINS, JR.
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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QUESTION PRESENTED

1. 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 Count Two) 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; (i) there was no allegation or evidence that Petitioner engaged in a "Ponzi" scheme, or fraudulent financial accounting practices, or that the defendants failed to grow the businesses in question, and (j) alleged co-conspirator (Donald V. Watkins, Jr.) merely provided non-executive administrative and bookkeeping services for the businesses involved in this case?

LIST OF PARTIES

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

1. Donald V. Watkins, Jr. ("Watkins, Jr."), Petitioner and Defendant-Appellant below.
2. Donald V. Watkins, Sr. ("Watkins, Sr."), Petitioner and Defendant-Appellant below. Watkins, Sr., has filed a separate Petition in this Court for a Writ of Certioari.
3. The United States of America, Respondent and Plaintiff below.

CORPORATE DISCLOSURE STATEMENT

Watkins, Jr., 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, Jr., and co-defendant Watkins, Sr., 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).[1]

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, Jr., raised the issue that he lacked the requisite intent to commit the conspiracy and wire fraud crimes for which he was charged in his motions for acquittal at the close of the Government's evidence (Doc. 145) and at the close of all evidence

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[1] 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.

(Doc. 152). These motions were denied by the District Court. (Doc. 154 and 156, respectively).

Watkins, Jr. raised this defense again in his motion for Judgment of Acquittal after the jury verdict, or alternatively for a New Trial (Doc. 163). Again, it was denied by the District Court. (Doc. 198).

The issue of Watkins, Jr.'s lack of intent to defraud with respect to the conspiracy and wire fraud charges was also raised on appeal in Watkins, Jr.'s Appellate Brief and Petition for a Rehearing En Banc.[2] The Court of Appeals ruled against Watkins, Jr., on both counts and on all issues raised in his appeal.

Watkins, Sr., was sentenced to 60 months in prison.[3] Watkins, Jr., was sentenced to 27 months.[4]

Watkins, Sr., and Watkins, Jr., timely appealed their convictions to the Eleventh Circuit Court of

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[2] In his Appellate Brief and Petition for Rehearing En Banc, Watkins, Jr. argued that, based upon the unique facts and circumstance in his case, there was no evidence of an intent to: (a) an intent to defraud under the wire fraud statute, or (c) engage in a conspiracy to commit wire fraud. Without the requisite statutory intent to defraud, there was no wire fraud and no conspiracy to commit wire 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*.

[3] On January 10, 2023, the Bureau of Prisons discharged Watkins, Sr., from its custody.

[4] On August 16, 2021, the Bureau of Prisons discharged Watkins, Jr., from its custody.

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, the Court of Appeals denied their respective Petitions.

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PETITION FOR WRIT OF CERTIORARI

Watkins, Jr., 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, and one count of wire fraud, in violation of 18 U.S.C. §§1343 and 2.

This Petition presents an important question of first impression in this Court. Additionally, there is a conflict between the Eleventh and Eight Circuit Courts of Appeals with respect to whether Watkins, Jr.'s non-executive administrative business activities in his father's businesses rose to the level of activity that warrants the imposition of criminal liability on him under the wire fraud and conspiracy statutes referenced above.[5]

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

[5] The cases that present the conflict are *United States v. Ward*, 486 F.3d 1212 (11th Cir. 2007), which the Court of Appeals relied upon to affirm Watkins, Jr.'s convictins, and *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985), which would have resulted in Judgment of Acquittal for Watkins, Jr.

F.4th 1278 (11th Cir. 2022) affirming Watkins, Sr.'s and Watkins, Jr.'s 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, Jr.'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, Jr.'s Petition for Rehearing En Banc.

STATUTES INVOLVED

The statutes involved in Watkins, Jr.'s case are: 18 U.S.C. §2, 18 U.S.C. §1343, 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 and Watkins, Jr.'s case devised a novel theory for creating and imposing criminal liability in a wire fraud conspiracy case that is not supported in any existing U.S. Supreme Court

case authority.

The conspiracy and wire fraud case against Watkins, Jr., 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.[6] (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."

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[6] In 2012, one investor, Charles Barkley, also purchased an economic participation interest in Watkins, Sr.s' equity portion of an oil and gas company named Nabirm. Nabirm is not a member of the Masada family of companies.

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 and Watkins, Jr.'s indictment, trial, and conviction.

There was no evidence presented by the Government at trial that the financial books and records of Watkins, Sr.' 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, Jr., seeks this court's review of the Eleventh 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, Jr, 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, Jr., 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., and Watkins, Jr., 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[7]; (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[8]; 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.[9]

The Government presented no evidence of Watkins, Jr.'s involvement in the solitication of investments in this case. Watkins, Jr. was an office manager who handled the administrative affairs of Watkins, Sr.'s businesses.

Watkins, Sr., asserted as a defense to the wire fraud charges that he acted in good faith and in

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[7] The Watkins-Pencor clearly define the legal interests that Watkins, Sr., conveyed to each purchaser. Based upon the plain language of the agreements, each purchaser invested in Watkins-Pencor, not Masada. These agreements speak for themselves and contradict this Court of Appeals finding.

[8] The Court of Appeals characterized loan repayments to Watkins, his family members (including Watkins, Jr.), 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.

[9] 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.

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, Sr., and the victims during their business relationship. Watkins, Sr., placed the pertinent offering memorandum and applicable operating agreements into evidence. (See, DX 1, 3, and 5). These documents were incorporated by reference into each alleged victims' Watkins-Pencor economic participation purchase agreement.

The Government argued at trial 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 investors. The existence of those corporate agreements and the incorporation of those agreements in the transactional documents (i.e., 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 by the Court of Appeals 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 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.

Watkins, Jr.'s Lack of Criminal Culpability

Watkins, Jr., argued at trial and in the Court of Appeals (1) that the evidence was insufficient to support his conspiracy conviction and (2) that the evidence was insufficient to support his conviction of aiding and abetting Senior in wire fraud.

In addition to the documented business context of the investor transactions between Watkins, Sr., and the "victims" identified by the Government, there was insufficient evidence to support Watkins, Jr.'s wire fraud conviction because the record is entirely devoid of any false, fraudulent, or misleading statements by Watkins, Jr., to Charles Barkley or any other investor.

The centerpiece of the Government's conspiracy and wire fraud case against Watkins, Jr., is a May 24, 2013 email that he wrote to Watkins, Sr. with a subject-line titled, "Idea for Money." (GX 46). The text of this email is as follows:

> You need to consider going back to Barkley for one last million loan/investment. I hate to go there but I don't think we have many more options. Perhaps the Nabrim and uranium

developments may be enough to pique his consideration. You need to call him as soon as you get back if not while you are over in Sierra Leone. I can't make that call.

If we do go back to him, and he sees his way clear to help us, the following have to be the payment priorities:

$40,000 – 2009 GA and Fed income taxes

$190,000 – FHG replacement of AB prepaid rent (into our FHG account)

$105,000 – AMEX

$125,000 – Rich Hewlett (we pay the other $125,000 a month or two later)

$45,000 – Midland loan interest (2 quarters)

$95,000 – past due bills, loan payments, fee payments and alimony

$600,000 – TOTAL

We hold on the remaining $400,000, no exceptions. We use that for monthly payroll and expenses until we decide for sure what we are going to do with the bank and building.

That's the only idea I have.

Donald Watkins, Jr.
Sent from my iPad2.

This email discussions the "idea" of seeking an $1 million loan or investment from Barkley, who was

already a Watkins Pencor and Nabirm economic participants in Watkins equity portion of these entities.

Watkins, Jr.'s email did not state whether the loan should be a business or personal loan.[10] The Government offered no evidence that Watkins Jr.'s May 24th email suggested a business loan from Barkley, as opposed to a personal loan.

Watkins, Jr.'s email also pitched the "idea" that Watkins, Sr. could approach Barkley about a $1 million investment transaction in connection with Watkins, Sr.'s Nabirm interests. The evidence established that Barkley, on two occasions in 2012, purchased an economic interest in Watkins, Sr.'s equity portion of an African-based oil and gas exploration company named Nabirm. There is no common ownership between the Masada family companies and Nabirm.[11]

The Operating Agreements for Nabirm permitted Watkins, Sr., and other Nabirm shareholders to sell economic participation interests in their shares of the company. The Government offered no evidence of

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[10] A personal loan between Barkley and Watkins, Sr., would allow Watkins, Sr., to use the loan proceeds as he saw fit. A business loan between the two would be subject to the managerial authority vested in Watkins, Sr., under the corporate Operating Agreements of the borrowing entity.

[11] In footnote 1, the Court of Appeals erroneously referred to Nabirm as a Masada company.

fraud in connection with these transactions.[12]

In affirming his convictions, the Court of Appeals did not 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 did not 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).

In affirming Watkins, Jr.'s wire fraud and conspiracy convictions, the Court of Appeals cited *United States v. Ward*, 486 F.3d 1212, 1222 (11th Cir. 2007). The Court held that Watkins, Sr.'s conduct fell within the ambit of *Ward* because:

> (1) Junior was Senior's "on the ground guy to oversee the administrative functions" of the business and that it was his job to make sure "whatever banking transactions needed to be done were done;" (2) Junior was included on multiple emails between Senior and the investors, many of which contained false statements; and (3) Junior himself devised a plan to solicit money from Charles Barkley, money that would be used to pay personal, not business, expenses. Indeed, the email in which Junior presented his plan to his father was

[12] In fact, the Government reduced its original forfeiture request by $2 million dollars because there was no evidence at trial that Watkins' sale of economic particpations in his portion of Nabirm were fraudulent. Nabirm is an ongoing business enterprise.

sufficient to support a conviction on the conspiracy count.

When carefully reviewed individually and collectively, these three actions do not evidence an intent by Watkins, Jr., to defraud anyone. What is more, the evidence regarding Watkins, Jr.'s activities is more akin to the non-executive administrative tasks of co-defendant Gerald Ruis in *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985), which entitled Ruis to a Judgment of Acquittal.

In *Ward*, defendant Artemus E. Ward, Jr. ("Ward"), and his alleged co-conspirator, incorporated the Collateral Equities Corporation ("CEC") in Nevada and designated themselves as president and general manager. CEC's business objective was to solicit potential investors to invest in collateralized corporate notes or promissory notes. The investors were told that their principal would be invested in the auto floor planning business, which involved lending car dealerships the funds to purchase inventory.

The titles to the cars were held as collateral, and as each car was sold, the dealer was required to repay a portion of the loan. Eventually, the lender would return the title to the dealer. Ward was highly involved with the scheme and went so far as to sign documents that falsely represented that CEC had been in business for some three and a half years when, in reality, the company had just been formed, used the funds to gamble, and personally sent mailers to solicit others to invest money in the scheme. Based on this

conduct, the Court concluded that Ward knowingly and intentionally participated for an extended period of time in the fraudulent scheme.

In contrast to Ward's high-level business conduct, Watkins, Jr.'s involvement in his father's business activities were non-executive and administrative nature. The work Watkins, Jr., performed for Watkins, Sr., is factually similar to business activities discussed in *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985), and is readily distinguishable from the activities that supported criminal liability in *Ward*.

In *Casperson*, the Eighth Circuit held that one of the appellants, Gerald Ruis ("Ruis"), was entitled to a judgment of acquittal because the level of his participation in the scheme was not substantial enough so that an intent to defraud could be inferred and there was insufficient evidence to show that he knowingly cooperated in the objective of the conspiracy. Ruis was employed by International Financial Services Group (IFSG) in March of 1982. He performed certain clerical duties for the corporation, including: (1) attending several of the meetings IFSG held for potential investors; (2) explaining the loan program to one prospective investor and his wife at a meeting in Adrian, Minnesota; (3) attending several meetings where the advance fee loan program was explained to prospective investors; (4) taking notes at meetings and maintaining a list of investors and potential investors. Although he was made a signatory on the IFSG checking account and was

referred to in several documents as a vice president of IFSG, Ruis never wrote any checks on the account, nor did he ever function as a vice president of the corporation. Pletcher, an alleged co-conspirator, characterized Ruis' participation in the operation as "clerical." Lastly, Ruis did not participate in any substantive decision-making of IFSG.

After considering these factors, the *Casperson* court stated, "The record contains no evidence that [Ruis] was a knowing participant in a fraudulent scheme. He did not partake in developing the advance fee program and made no decisions about its administration. Nor was the level of his participation in IFSG's affairs substantial enough that an intent to defraud can be inferred from the facts surrounding his actions."

In Watkins, Jr.'s case, the Government failed to provide an adequate evidentiary showing that Junior's administrative duties were substantial enough to allow a reasonable jury to infer that he knowingly cooperated/purposefully furthered the objective of an illegal conspiracy or possessed the intent to defraud.

In fact, the Government offered no proof that Watkins, Jr.'s administrative functions induced any investor to invest in Watkins-Pencor or make a loan to his father.

Additionally, Watkins, Jr.'s receipt of emails containing false statements by Watkins, Sr., means nothing without proof that Watkins, Jr., knew that

the statements at issue were false. The Government offered no such proof at trial.

Furthermore, nothing in Watkins, Jr.'s May 24th email instructs, suggests, encourages, or contemplates any illegal act to obtain a loan or an investment. Likewise, nothing in the email affirms any ongoing scheme to defraud anyone.

Notwithstanding diligent searches, Petitioner has not found and does not know of any conspiracy and wire fraud decision of this Court involving similar or even analogous facts to those presented here.

Watkins, Jr.'s conspiracy and wire fraud case is an important one of first impression in this Court. It is also one that presents a conflict between *United States v. Ward*, which the Eleventh Circuit Court of Appeals relied upon to affirm Watkins, Jr.'s convictins, and *United States v. Casperson*, which likely would have resulted in a Judgment of Acquittal for Watkins, Jr., in the Eight Circuit Court of Appeals.

Specific Facts Relevant to the Wire Fraud Conspiracy and Charges[13]

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."[14] In plain language,

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[13] These facts are presented in detail in Watkins, Sr.'s Petition for a Writ of Certiorari and are adopted by Watkins, Jr. in support of his Petition.

[14]Footnote number 1 in the Court of Appeals opinion identifies

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 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.[15]

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 this case are: No. 5, "Conflicts of Interest," including the Manager's authority to conduct various "insider" transactions[16], as referenced in the

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what it considered as the Masada family of companies, for the purposes of this appeal.

[15] 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).

[16] The insider transactions consisted of loans that Watkins, Sr., his family members, his ex-girlfriend, and Watkins, Jr. 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."

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 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 affirming Watkins, Sr.'s and Watkins, Jr.'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,[17] (g) to repay

[17] 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

creditors with accrued interest, including family members like Watkins, Jr., and friends who loaned money to benefit Masada's operations, and (h) allocate funds toward such business purposes, all within his sole discretion. (Doc. 254, at 79-89).

What began as a business dispute between Watkins, Sr., 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

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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.

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.

While Watkins, Jr., managed administrative and bookkeeping affairs for his father's businesses, there was no evidence that he functioned as a high-level executive with the power to direct and control major business activities. Additionally, Watkins, Sr., did not solicit investments or business loans from investors, or make investor presentations. Watkins, Jr., did not represent himself as being a higher-ranking executive in his father's business. Lastly, Watkins, Jr., did he have the authority to make major business decisions in his father's businesses.

As such, the facts in Watkins, Jr.'s case and his affirmative defense of a lack of intent to deceive and defraud the "victims" fell squarely within the ambit of *United States v. Casperson*, supra, ***and*** the Eleventh 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).

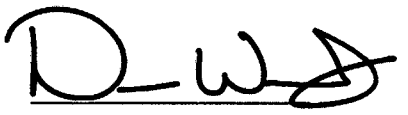
Yet, the Court of Appeals distinguished the facts in Watkins, Sr.'s and Watkins, Jr.'s case from those that formed the basis of its holding in *Takhalov* by: (a) completely disregarding the nature and scope of the business relationship, as defined in the applicable corporate governance agreements and transactional documents exexuted between Watkins and the "victims," and (b) artificially inflating Watkins, Jr.'s role in his father's business to reach the *Ward* threshold of business activities and avoid the contrary *Casperson* precedent.

CONCLUSION

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, (d) the fact that the "victims" were "accredited investors" who were represented by financial advisors and lawyers, and (e) Watkins, Jr.'s non-executive administrative role in his father's businesses, Watkins, Jr., did not commit the crime of conspiracy and wire fraud, as a matter of law.

As such, the conspiracy and wire fraud convictions in Watkins, Jr.'s case are due to be reversed and rendered with instructions to dismiss the Indictment with prejudice.

Respectfully Submitted,



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