No. _____

In the
Supreme Court of the United States

Michael Baker,

Petitioner,

v.

United States,

Respondent.

On Petition for Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

David M. Gonzalez
Counsel of Record
Sumpter & Gonzalez, LLP
1100B Guadalupe Street
Austin, Texas 78701
(512) 381-9955
david@sg-llp.com

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Does a stockholder possess a traditional property interest in "complete and accurate information" of a corporation such that any misstatement or omission on a conference call with current shareholders can form the basis for a wire fraud prosecution?

2. Is the fluctuation of a stock price a valid basis for calculating loss under the Sentencing Guidelines?

PARTIES TO THE PROCEEDING

Petitioner is Michael Baker. Respondent is the United States of America.

RELATED PROCEEDINGS

United States of America v. Michael Gluk and Michael Baker, No. 14-51012, U.S. Court of Appeals for the Fifth Circuit (judgment entered Aug. 4, 2016).

United States of America v. Michael Baker, U.S. District Court for the Western District of Texas, No 1:13-CR-346-SS-1 (judgment entered Nov. 16, 2017).

United States of America v. Michael Baker, No 17-51034, U.S. Court of Appeals for the Fifth Circuit (judgment entered April 26, 2019).

United States of America v. Michael Baker, No 1:13-CR-346-DEA, U.S. District Court for the Western District of Texas, Order denying Motion to Vacate under 28 U.S.C. § 2255 (judgment entered Nov. 27, 2023).

United States of America v. Michael Baker, No 23-50898, U.S. Court of Appeals for the Fifth Circuit, Order denying Certificate of Appealability (judgment entered May 31, 2024).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Baker respectfully petitions for a writ of certiorari to vacate the denial of a Certificate of Appealability (COA) by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion affirming the conviction after retrial, *United States of America v. Michael Baker*, is published at 923 F.3d 390 (5th Cir. 2019) and is reproduced at App. 46-83.

The slip copy of the U.S. magistrate's report and recommendation on § 2255 proceedings can be found at 2022 WL 21805928 and is reproduced at App. 25-45.

The slip copy of the U.S. District Court's Order denying § 2255 relief can be found at 2023 WL 8234212 and is reproduced at App. 4-24.

U.S. Circuit Judge Haynes' order denying a Certificate of Appealability can be found at 2024 WL 2880630 and is reproduced at App. 1-3.

JURISDICTION

The Fifth Circuit entered an Order denying a Certificate of Appealability on May 31, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, Section 1343 of the United States Code states, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Title 18, Section 1348 of the United States Code states, in pertinent part:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—

> (1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));
> or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); shall be fined under this title, or imprisoned not more than 25 years, or both.

STATEMENT OF THE CASE

Petitioner Michael Baker was the CEO of ArthroCare, a publicly traded medical device company. ArthroCare developed and sold devices

used for minimally invasive surgical procedures. The company enjoyed many years of success, including growing earnings and a rising stock price. As the company matured, however, the growth rate began to slow, and at times, the company disappointed Wall Street. In late 2007, prominent short sellers began to question ArthroCare's earnings. The New York Post picked up the accusations and questioned some of ArthroCare's business practices. ArthroCare commenced an internal investigation, led by outside auditors and outside counsel. They determined that ArthroCare had, in fact, overstated its earnings. The false earnings reports were based largely on a practice known as "channel stuffing," whereby companies book excess sales at the end of a quarter.

ArthroCare restated its earnings in 2008, in the midst of the financial crisis. Its stock price plummeted from over $40 per share to just a few dollars per share. ArthroCare's stock price eventually recovered in 2009 and 2010—the company, after all, had an excellent product line and the great majority of its revenues were legitimate. Investors who sold during the restatement crisis suffered financial losses; investors who held onto their stock did not.

The government alleged various counts of wire fraud under 18 U.S.C. § 1343 and securities fraud under 18 U.S.C. § 1348, as well as conspiracy and false statements charges. Many of the wire fraud counts were based on allegedly false statements Baker made on conference calls with professional investors and analysts in early 2008. Baker claimed that at the time he made the statements, he was relying on information he believed to be accurate.

More importantly, Baker argued that he was not seeking to defraud legitimate investors—to the contrary, he was seeking to defend legitimate investors and the company from attacks by short sellers. When ArthroCare restated earnings and the stock tanked, the legitimate investors lost a great deal of money—as did Baker. The only winners were the short sellers. The defense argued that Baker did not gain from the investors' loss; in fact, he lost with them. It argued that while there was undoubtedly fraud at ArthroCare, Baker never intended to defraud investors.

Consistent with that factual defense, Baker argued that to prove wire fraud, the government should be required to prove that he intended to obtain money or property. Baker specifically requested that the jury be instructed on the obtaining property element. His proposed instructions would have required the jury to find that he intended "*to obtain money or property from ArthroCare investors* by deceiving them about ArthroCare's financial condition." ROA.3846.[1] Instead, the jury was instructed that the government met its burden of proof if Baker only intended "to deceive investors about AthroCare Corporation's financial condition." ROA.3876. The "intent to obtain money or property" was only included in a disjunctive definition of a "scheme to defraud" and not in the application paragraph. *Id*. The district court's instructions on the securities fraud counts, brought under § 1348, were in this regard identical to the wire fraud counts, brought

[1] "ROA" refers to the record on appeal in Case No. 17-51034 in the Fifth Circuit.

under § 1343. The jury was not instructed that it had to find the obtain property element to convict under § 1348 and that the requirement was identical under both fraud statutes.

Throughout his prosecution, Mr. Baker maintained that he was not guilty of fraud because it was not his object to obtain money or property from investors. The Fifth Circuit reversed his convictions in his first trial, and the case was remanded for retrial. *United States v. Gluk*, 831 F.3d 608 (5th Cir. 2016). On retrial, the jury acquitted Baker on several counts but convicted him on most of the charged counts, including most of the core wire fraud counts. The district court sentenced him to a term of 20 years' imprisonment based upon the overall decline in the stock price over a 90 day period. The Fifth Circuit affirmed the judgment of the District Court. *United States v. Baker,* 923 F.3d 390 (5th Cir. 2019).

The argument on appeal made a number of legal challenges that the wire fraud statute, 18 U.S.C. § 1343, required the government to prove that the defendant "intended to obtain money or property from the deceived investors." The Fifth Circuit held that Section 1343 does not require an intent to obtain property directly from a victim and noted that "the issue is whether the victims' property rights were affected by the misrepresentations." *Baker,* 923 F.2d at 404, (quoting *United States v. McMillan,* 600 F.3d 434, 449 (5th Cir. 2010)).

Mr. Baker filed a petition under 28 U.S.C.§ 2255 arguing that the critical element of fraud as evidenced in *Kelly v. United States*, 140 S. Ct. 1565

(2020) is whether there was a fraudulent intent to obtain property, not whether the stock market reacts to a restatement of earnings. The District Court denied the petition on November 27, 2023 and also denied a Certificate of Appealability. Mr. Baker sought a Certificate of Appealability from the Fifth Circuit, and that application was denied on May 31, 2024.

Mr. Baker remains in custody serving his 20-year sentence.

REASONS FOR GRANTING THE WRIT

When a district court instructs the jury that property includes intangible interests such as the "right to control the use of one's assets" and deprives others of "potentially valuable economic information," a defendant is wrongfully convicted on an invalid theory of law. *Ciminelli v. United States,* 598 U.S. 306 (2023). However, the absence of the "intangible interests" language in other circuits' pattern jury charges creates a false inference that *Ciminelli's* holding is largely confined to the Second Circuit.

This Court's grant of certiorari in *Kousisis v. United States*, No. 23-909, addresses whether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme (the "fraudulent inducement" theory). Both *Ciminelli* and *Kousisis* involve completed financial transactions. So did four of the five circuit court opinions abrogated by *Ciminelli*:

- *United States v. Lebedev*, 932 F. 3d 40 (2nd Cir. 2019) (depriving financial institutions information about disguised Bitcoin financial transactions formed the basis for wire fraud conviction);

- *United States v. Binday*, 804 F. 3d 558 (2nd Cir. 2015) (depriving life insurance companies information about stranger-oriented life insurance policies formed the basis for wire fraud conviction);

- *United States v. Little*, 889 F. 2d 1367 (5th Cir. 1989) (depriving counties information about 5% kickback from contractor formed the basis for wire fraud conviction); and

- *United States v. Viloski*, 557 Fed. Appx. 28 (2nd Cir. 2014) (depriving Dick's Sporting Goods information about a real estate broker's no-work consulting fees formed the basis for wire fraud conviction).

This case is simultaneously narrow and noteworthy. Unlike the majority of wire fraud cases, no financial transaction occurred in this case. Mr. Baker was not raising money. Mr. Baker did not solicit investors to buy stock. Mr. Baker did not sell stock. Instead, the government's theory was that Baker's *failure* to provide shareholders with accurate and complete information resulted in shareholders *retaining* stock that they otherwise may have wished to sell. This is an "omission-otherwise" theory, namely, depriving or omitting accurate information

affects intangible property rights by leaving investors "without money that they would have otherwise possessed." *United States v. McMillan*, 600 F.3d 434, 449 (5th Cir. 2010); *United States v. Baker*, 923 F.3d 390.

In the wake of the abrogation of *United States v. Wallach*, 935 F. 2d 445 (2nd Cir. 1991) (depriving shareholders information about inflated profits per share formed the basis for wire fraud) this case is a uniquely appropriate vehicle to address whether withholding or inaccurate reporting of information constitutes "an intent to obtain property."

First, this case provides a vehicle to address the abrogation of *Wallach* and whether a stockholder's "right to complete and accurate information" is a traditional property interest regardless of the "right to control" theory.

Second, this case provides an excellent set of facts to address the meaningful distinction between "obtaining property" for purposes of wire fraud prosecutions and "false and misleading representations" for purposes of securities fraud prosecutions. This case demonstrates the harm when the jury was allowed to convict for wire fraud based upon an "omission-otherwise" theory instead of the statutory element of intent to obtain property.

Finally, this case can be used to address whether a stock price at a fixed point in time is a type of "property" that can form the basis for calculating loss under the Sentencing Guidelines.

I. OMISSIONS AND MISSTATEMENTS TO CURRENT SHAREHOLDERS ARE NOT GROUNDS FOR A WIRE FRAUD PROSECUTION WHEN NEITHER MONEY NOR PROPERTY CHANGES HANDS.

Ciminelli abrogated *Wallach* because the government relied upon a legally invalid prosecution theory. But *Wallach's* holdings were far broader than the right-to-control theory. The basis for the wire fraud prosecution in *Wallach* included using a more favorable accounting treatment as an expense, misrepresenting a payment as an expense, and omitting payments to directors to shareholders. *Wallach*, 935 F.2d at 451-453. The Second Circuit concluded that these actions constituted wire fraud as they artificially inflated the company's income per share. *Id*.

These were the types of misstatements and omissions that the Fifth Circuit ratified in rejecting Baker's objections in his prosecution for wire fraud. The Fifth Circuit held that Baker made false statements to investors to hold onto stock, and the "scheme to defraud" affected property rights by leaving investors "without money that they would have otherwise have possessed" had they elected to sell their shares. *Baker*, 923 F.3d at 405. While the Fifth Circuit did not label this justification as a right-to-control theory, the opinion did so directly by relying on the Third Circuit's opinion in *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004).

Hedaithy and *Baker* cannot be rectified with the abrogation of *Wallach* post-*Ciminelli*. Both the

Second Circuit and Fifth Circuit continue to uphold a disjunctive reading of the wire fraud statute that focuses on deception over obtaining a victim's property. This is the same foundation in *Wallach*: "the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution." *Wallach*, 935 F.2d 445 at 463. Under *Hedaithy* and *Baker* a person can be prosecuted for wire fraud even when no money or property changes hands because the intangible property interest was harmed. This is not wire fraud. This is different from recent circuit court opinions upholding convictions for wire fraud when there was a completed financial transaction that resulted in the defendant obtaining property through deception:

- *United States v. Gatto*, 986 F.3d 104 (2nd Cir. 2021) (deception resulted in completed financial transaction in the form of reimbursements);

- *United States v. Shulick*, 994 F.3d 123 (3d Cir.), reh'g granted in part, 12 F.4th 832 (3rd Cir. 2021) (deception resulted in completed financial transactions for personal enrichment);

- *United States v. Shelton,* 997 F.3d 749 (7th Cir. 2021) (deception resulted in actual use of public employees services for personal benefit);

- *United States v. Ruzicka*, 988 F.3d 997 (8th Cir. 2021) (misrepresentation to extract a discount that otherwise would not have been

offered/eligible that defendants then used to make a profit); and

•*United States v. Hansmeier*, 988 F.3d 428 (8th Cir. 2021) (lawyers' scheme to use federal court system to extract millions of dollars in settlements from purported copyright infringers).

First, in each instance the property described is money. *Shelton* is the only exception, but fits squarely within the parameters of *Ciminelli*. *Second*, the fraudulent statements were made prior to a decision to convey or award property. *Third*, the defendant made the statements as part of an application for an award or conveyance of property. *Finally*, the deception was instrumental in obtaining the property. But for the fraud, the property would not have been conveyed.

Here, there was no evidence presented at trial that Baker sought to obtain property from ArthroCare. There was no evidence of Baker's objective to obtain a particular investment, or receive funds from a particular investor. Baker's conversations were with people who already owned stock and employees who already worked for ArthroCare. The harm to the company resulted from a series of managerial decisions that created one problem to fix another. The economic losses resulted from the stock market's reaction to the restatements, not as a result of Baker's objective. Nobody knows how the stock market will react, let alone whether the reaction is rationale. This is why an effect on a stock price cannot be a metric for determining either

property under the fraud statutes or loss under the sentencing guidelines. Whether the stock price rose, declined, or remained the same after the restatement is irrelevant and incidental.

The type of property at issue in this case – accurate information about an acquisition delivered to shareholders in conference calls – is an invalid legal theory after the abrogation of *Wallach*. Certiorari should be granted to guide all circuits about whether a shareholder has a traditional property interest that extends to the right to complete and accurate information. This would provide much needed clarity that the wire fraud statute requires proof not just of deception, but also a financial transaction to harm a victim's property rights. If so, misrepresentations or omissions could constitute a deprivation of property subject to mail or wire fraud prosecution if money or property changed hands. Otherwise, informational deprivation alone cannot continue to be prosecuted as wire fraud after *Ciminelli*.

II. THIS CASE PRESENTS AN IDEAL SET OF FACTS TO ADDRESS THE STATUTORY DISTINCTION BETWEEN "OBTAINING PROPERTY" FOR PURPOSES OF WIRE FRAUD AND "FALSE AND MISLEADING REPRESENTATIONS" FOR PURPOSES OF SECURITIES FRAUD.

Criminal securities fraud cases have traditionally been charged under § 10(b) of the Securities and Exchange Act, and Rule 10b-5. But in

a majority of recent federal prosecutions, rather than charging under § 10(b), the government chose instead to charge under 18 U.S.C. § 1343 and § 1348. This charging strategy gives the government the benefit of a higher potential sentence. Both § 1343 and § 1348 have higher statutory maximum punishments than § 10(b), and using § 1343 allows the government to charge each email or phone call as a separate count.

Section 1343 and 1348, however, also have an additional element that must be proven for liability—those statutes require that the defendant "obtain money or property" from the victim. It is not wire fraud if shareholders do not have access to all the accurate information they want about a company. It is not wire fraud if shareholders' intangible property rights are affected in some general sense. Instead, the fraudulent inducements must be made with the specific intent to obtain property.

In cases involving prosecution for wire fraud, the gravamen of a "scheme to defraud" is to cause inducement into a transaction. The specific verbs used in the definition – "bring about", "cheat" and "deprive" are verbs to describe an individual has yet to enter into the transaction. Given the higher statutory penalty for wire fraud, Congress creates a higher evidentiary standard of both deception and intent to obtain property.

Compare 18 U.S.C. § 1343 to the elements of a securities fraud prosecution under Section 10(b) and Rule 10b–5 as articulated in *Stoneridge Inv. Partners, LLC v. Sci.- Atlanta*, 552 U.S. 148, 157 (2008):

WIRE FRAUD	**10b-5 SECURITIES FRAUD**
Title 18, United States Code, Section 1343, makes it a crime for anyone to use interstate [foreign] wire [radio] [television] communications in carrying out a scheme to defraud.	Title 17, Code of Federal Regulations, Section 240.10b-5, makes it a crime for anyone to deceive another in connection with the purchase or sale of any security.
First: That the defendant knowingly devised or intended to devise any scheme to defraud, that is _____ (describe scheme from the indictment);	*First*: The Defendant made false material representations or omissions;
Second: That the scheme to defraud employed false material representations [false material pretenses] [false material promises];	*Second*: There was a connection between the misrepresentation or omission and the purchase or sale of a security;
Third: That the	*Third:* The person relied

defendant transmitted [caused to be transmitted] by way of wire [radio] [television] communications, in interstate [foreign] commerce, any writing [sign] [signal] [picture] [sound] for the purpose of executing such scheme; and	upon the misrepresentation or omission;
Fourth: That the defendant acted with a specific intent to defraud.	*Fourth*: There was an economic loss; *Fifth*: The misrepresentation or omission caused the economic loss; an *Sixth*: That the defendant acted with a specific intent to defraud.

Granting a writ of certiorari in this case will provide much needed clarification in securities cases consistent with but different from *Ciminelli* and *Kousisis*.

First, given the lower statutory penalties for misrepresentation under Rule 10b-5, the statute logically criminalizes a broader array of conduct. Specifically, Congress used the term "omissions" in the securities fraud context but not in the wire and mail fraud.

Second, the lower statutory penalties for misrepresentation under Rule 10b-5 also does not contain the additional requirement of intent to obtain property in the wire and mail fraud statute. In the securities context, this distinction is monumental: a CEO delivering an update to shareholders is not trying to obtain shareholders' property.

Third, money or property must change hands in order to constitute wire fraud. When deception occurs *prior* to a transaction, the wire fraud statute's emphasis on "obtaining property" is appropriate as a "scheme to defraud." But for cases when misstatements or omissions occur *after* shareholders already are in possession of stock, the securities fraud statute's emphasis on "deception" should control. The misstatements may be prosecuted under securities fraud, but not wire fraud.

Here, Baker did not obtain any money or property from any investor; Arthrocare was a publicly traded company. In fact, Mr. Baker could not have obtained money from ArthroCare investors who were trading on the stock market. Mr. Baker received compensation in money and stock grants, but that did not come from investors.

The government's contention was that misrepresentations and omissions caused a stock price to fall. Baker didn't benefit financially from the stock price falling, and Baker didn't need the stock market for the company to operate. The government contented this was wire fraud because the failure to provide accurate information about the company deprived shareholders of their property when the stock price declined. The Fifth Circuit labeled this a property right as it left shareholders "without the money they would have otherwise possessed" on the assumption that all current investors would have immediately sold their stock to avoid losses in the secondary market. This is the "property" they would have possessed. But this is deductive legerdemain. The property is the *stock*, not the *stock price*. Baker didn't obtain anyone's stock. The Fifth Circuit's reasoning is that Baker deprived shareholders of "valuable economic information" which would have allowed them to then sell their property. This is also the legal theory that this Court rejected in *Ciminelli* and abrogated in *Wallach*. It is also the legal theory that has been repudiated in the following cases:

- *McNally v. United States*, 483 U.S. 350, 356 (1987) (failure to disclose an ownership interest "whose actions or deliberations could have been affected by the disclosure" was not a violation of the mail fraud statute);

- *United States v. Lewis*, 67 F.3d 225 (9th Cir. 1995) (rather than reporting a bad loan to his superiors, appellant made unauthorized loans in order to repay the loss, which is not a property right subject to wire fraud);

•*Cleveland v. United States*, 531 U.S. 12 (2000) (false statements hid ownership interest of the business, lied about capital for the partnership, and lied specifically "because they have tax and financial problems that could have undermined their suitability to receive a video poker license" not property subject to wire fraud conviction);

•*United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007) (misrepresentations regarding salary and employment benefits did not implicate the parish's property rights);

•*United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014) (appellant lied to pharmaceutical distributors when she ordered pills for the clinic by using a fake name on her drug orders and by falsely telling the distributors that the drugs were being used to serve "indigent" patients. "[Sadler] may have had many unflattering motives in mind in buying the pills, but unfairly depriving the distributors of their property was not one of them.");

•*United States v. Kelly*, 140 S.Ct. 1565 (2020) (realigning lanes on a bridge does not constitute depriving bridge owner of property);

•*United States v. Blaszczak*, 56 F.4th 230 (2nd Cir. 2024) (hedge fund makes trades on nonpublic information leading to $2.76 million

in profits on one tip, $2.73 million on a second tip, and $860,000 on a third); and

•*United States v. Yates*, 16 F.4th 256 (9th Cir. 2021) (purpose of false statements was to conceal the true financial condition of the Bank and to create a better financial picture of the Bank" for the board and regulators which is not wire fraud).

But further clarity from this Court is needed when statements are made to shareholders. In this case, the defense argued throughout trial that Baker was not seeking to deceive ArthroCare investors, much less obtain property from them. To the contrary, Baker's goal was to keep the stock price high—his interests were aligned with investors. The evidence demonstrated that Baker was obsessed with battling short sellers, perhaps to a fault. The statements that he made on analyst calls and in emails were not aimed at obtaining money from investors, but rather at beating back the negative stories about ArthroCare that had appeared in the press, pushed by short sellers. The defense's theory all along was that, far from attempting to swindle legitimate investors, Mr. Baker's efforts were aimed at *helping* those investors (and himself) by keeping the stock price high. It is easy to see in retrospect that some of his efforts were misguided or went too far, but regardless, it was not his intent to obtain money or property from ArthroCare's investors.

The harm was emphasized over and over by the government throughout its case which focused exclusively on deception. He did not obtain a single

share or dollar from any victim, nor did he induce any person to purchase shares in ArthroCare. Baker was convicted for misrepresentations and omissions alone, and he was subject to a higher statutory maximum penalty under the wire fraud statute.

III. A STOCK PRICE IS NOT A TYPE OF "PROPERTY" THAT CAN FORM THE BASIS FOR CALCULATING LOSS UNDER THE SENTENCING GUIDELINES.

Baker was sentenced to 240 months in prison. The critical element of fraud as evidenced in *Kelly v. United States*, 140 S. Ct. 1565 (2020) and *Ciminelli* is the fraudulent intent to obtain property, not how the stock market reacts. This case involves misrepresentations made to salvage a small part ($27 million) of a $1 billion dollar company which had a short-term effect on stock price but not a long-term effect on the company's overall value. Stock forecasters panicked over the company's uncertainty during the tumultuous year of 2008. The market followed.

The evidence in this case clearly pointed to Mr. Baker having only the intent to maintain and increase the value of ArthroCare stock, yet the sentencing transcript is clear that the district court did not consider the actual loss, if any, to investors when the stock price dropped on the two dates of disclosures. As a result, the market capitalization shift on two different dates was the basis for the district court's finding, and not on the preponderance

of the evidence concerning actual loss suffered as a product of Mr. Baker's intent and purpose. The sentencing errors were only further compounded because the stock price drop occurred during one of the two worst market depressions in history – the summer and fall of 2008 – which was not fully taken into account in the government's approach.

A stock price drop in the market does not cause an investor actual economic harm unless and until the investor sells the stock, which is the realization event. This is especially true when considering the nature of the stock market. Stock price decline, even a prolonged one, is not a loss (especially when the stock recovers beyond its previous price once the restatement period ends as it did in this case) unless the investor chooses to sell.

Ciminelli reined in the government expansion of the federal fraud statutes in line with that of civil securities fraud and tax cases. Notably, no such "paper losses" rule has ever applied in the securities fraud context. *See* G*VA Market Neutral Master Ltd. v. Veras Capital Partners Offshore Fund, Ltd*., 580 F.Supp.2d 321, 332 (S.D.N.Y. 2008) ("[I]n a securities fraud action, the injury occurs 'at the time an investor enters a transaction as a result of material misrepresentations.'"); *see also Walck v. American Stock Exchange, Inc*., 687 F.3d 778, 790 (3d Cir.1982) (holding that in a civil securities fraud action, there is no market loss to someone who buys prior to the fraudulent act and then holds the security thereafter, because the purchase price is not affected by the fraud, noting that both the security statute and Rule 10b–5 "authorize liability only for conduct occurring

'in connection with the purchase or sale of any security.")*; In re Cendant Corp. Litig.*, 264 F.3d 201, 242 (3d Cir. 2001) ("A stock's drop in market capitalization is not a proper measure of damages in securities cases under the statutory scheme laid out in §10(b) ...." because it entirely ignores the prices at which any of the plaintiffs purchased the stock).

The government theory of the case from indictment through trial was that Mr. Baker committed securities and wire fraud for his own personal enrichment. His gain was somewhere between $1.3 million and $21 million dollars, but at sentencing, the government abandoned evidence of Baker's personal enrichment and switched a singular focus on market loss. Why? The guidelines of even a $21 million gain are very different than an alleged $1 billion dollar stock market loss.

Mr. Baker's 240 month sentence was based on an unreasonable and unreliable estimate of loss that was imposed in violation of the Constitution and laws of the United States and must be reexamined after *Ciminelli*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David M. Gonzalez
Counsel of Record
Sumpter & Gonzalez, LLP
1100B Guadalupe Street
Austin, Texas 78701
(512) 381-9955
david@sg-llp.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 31, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-50898

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL BAKER,

Defendant-Appellant.

May 31, 2024, Filed

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-281
USDC No. 1:13-CR-346-1

ORDER:

Michael Baker, federal prisoner # 18533-111, was convicted by a jury of conspiracy to commit (a) wire fraud and (b) securities fraud, seven counts of wire fraud, and two counts of securities fraud, and he was sentenced

to concurrent 240-month terms of imprisonment on these counts. Baker was also convicted of two counts of making false statements, for which he was sentenced to concurrent 60-month terms of imprisonment. He now seeks a certificate of appealability (COA) to challenge the district court's denial of his 28 U.S.C. § 2255 motion.

As he did in his direct appeal, Baker challenges the jury instructions as to wire fraud. He contends that the instructions were erroneous because they did not require the jury to find an intent to obtain property, but instead allowed him to be convicted if the jury found that he engaged in deception. He relies primarily on *Ciminelli v. United States*, 598 U.S. 306, 143 S. Ct. 1121, 215 L. Ed. 2d 294 (2023), *Kelly v. United States*, 590 U.S. 391 (2020), and *United States v. Greenlaw*, 84 F.4th 325 (5th Cir. 2023), *cert. denied*, 2024 WL 2116272 (U.S. May 13, 2024) (No. 23-631). Further, Baker argues that the improper jury instructions resulted in harm. Baker also renews his claim that the loss calculations under the Sentencing Guidelines were erroneous.

Baker does not brief, and therefore has abandoned, his claim that his trial counsel was ineffective with respect to the issue of the loss calculations. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). To the extent that Baker raises other claims, they cannot be considered, as they were not raised in the district court. *See Black v. Davis*, 902 F.3d 541,545 (5th Cir. 2018).

To obtain a COA, Baker must make a substantial showing of the denial of a constitutional right. *See* 28

U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). He can satisfy this standard by demonstrating "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). Because Baker has failed to make the requisite showing, his motion for a COA is DENIED.

/s/ Catharina Haynes
CATHARINA HAYNES
United States Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED NOVEMBER 27, 2023

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

No. 1:13-CR-346-DAE
No. 1:21-CV-281-DAE

MICHAEL BAKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

November 27, 2023, Decided
November 27, 2023, Filed

ORDER (1) ADOPTING REPORT AND RECOMMENDATION, (2) DENYING MOTION TO VACATE UNDER 28 U.S.C. § 2255, AND (3) DENYING CERTIFICATE OF APPEALABILITY

Before the Court is a Report and Recommendation (the "Recommendation" or "Report") on Petitioner Michael Baker's ("Baker") Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Dkts. #

628; 629), filed by United States Magistrate Judge Mark Lane. (Dkt. # 645.) Baker has timely filed Objections to the Magistrate's Recommendation. (Dkt. # 646.) Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration, and for the reasons given below, the Court **ADOPTS** the Magistrate Judge's Recommendation (Dkt. # 645), **DENIES** Baker's § 2255 Motion to Vacate (Dkts. # 628; 629) and **DENIES** Baker a Certificate of Appealability.

BACKGROUND

The relevant factual and procedural background is discussed in the Report. (*See* Dkt. # 645 at 1-7.) Baker was indicted for wire fraud, securities fraud, making false statements to the SEC, and conspiracy to commit wire fraud and securities fraud. *U.S. v. Baker*, 923 F.3d 390, 392 (5th Cir. 2019). In June 2014, Baker was first tried and convicted on all counts. On appeal, the Fifth Circuit vacated Baker's convictions on evidentiary grounds and remanded for a new trial. At his second trial, the jury convicted Baker on twelve counts, acquitting him on two wire fraud counts and one false statement count. ID. at 395. The Trial court then (1) sentenced him to a 240-month term of imprisonment and five years of supervised release; (2) imposed an $1 million fine; and (3) ordered that he forfeit $12.7 million. *Id.*

Baker timely appealed. Baker objected to the jury instructions on two grounds and moved for judgment of acquittal. *Id.* at 403. First, Baker argued the wire fraud

statute imposes a "mirror image" requirement, such that a victim's loss or money or property directly led to the defendant's gain, i.e., that one is the mirror image of the other. *Id.* The Fifth Circuit rejected this argument.

Second, Baker argued that the jury instructions did not require the government to prove that he intended to obtain property form a victim, as required by the statute, but instead allowed for a conviction based on a scheme that was only intended to bring about financial gain to Baker, without directly obtaining money or property from any victim. *Id.* at 403-404. The Fifth Circuit rejected this argument and held the statute does not require intent to obtain property directly from a victim. *Id.* at 404-05. The Fifth Circuit found the jury instructions allowed for a conviction if Baker intended to deceive the victims out of their money for his own financial benefit. *Id.* 405. The evidence showed that by inducing investments in ArthroCare, Baker's scheme affected the victims' property rights by wrongfully leaving them "without money that they would otherwise would have possessed. *Id.* The Fifth Circuit also rejected all of Baker's other grounds for appeal and affirmed his conviction in its entirety. *Id.* at 407. The Supreme Court denied his petition for certiorari on March 30, 2020. (Dkt. # 618.)

Baker timely filed his Section 2255 motion and reply, contending that *Kelly v. U.S.*, 140 S. Ct. 1565, 206 L. Ed. 2d 882 (May 7, 2020), issued after the Supreme Court denied his petition, drastically changed the law with respect to wire fraud. (Dkt. # 646.)

Appendix B

On May 17, 2022, Magistrate Judge Mark Lane found *Kelly* did not demonstrably change the law with respect to wire fraud and summarily denied Baker's Section 2255 Motion. (Dkt. # 645.) According to the Magistrate Judge, the facts of *Kelly* could not be more dissimilar to Baker's case, and *Kelly*'s holding that obtaining property must be the object, not merely an incidental consequence, of the scheme, does not give the court reason to question Baker's conviction. (Dkt. # 645 at 4-5.) Additionally, the Magistrate Judge found that Baker did not show he is entitled to a new sentencing hearing because the government's estimate of loss does not satisfy *Kelly* or due process. (*Id.* at 10-11.)

Next, the Magistrate Judge found that Baker in raising ineffective assistance of counsel did not expand on his argument other than setting forth the standard to prove ineffective assistance of counsel and conceded in his reply brief that "his lawyers repeatedly objected to the loss calculations in his case." (*Id.* at 10-13.) Accordingly, the Magistrate Judge found Baker has not shown that he is entitled to relief because he was denied effective assistance of counsel. Finally, the Magistrate Judge found that Baker did not show that an evidentiary hearing is warranted, has shown no cause to amend, and failed to describe what discovery he needs under Rule 6(a)[1] or why such discovery is necessary. (*Id.* at 13-14.) As a result, Judge Lane denied Baker's requests for an evidentiary hearing, leave to amend, and discovery. (*Id.*)

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1. Of the Federal Rules of Criminal Procedure or Civil Procedure.

Thus, the Magistrate Judge recommended that the Court deny Baker's § 2255 motion. (Dkt. # 645 at 15.) On May 31, 2023, Baker timely filed objections. (Dkt. # 646.) The objections are discussed below.

LEGAL STANDARDS

I. Review of a Magistrate Judge's Report and Recommendation

The Court must conduct a de novo review of any of the Magistrate Judge's conclusions to which a party has specifically objected. *See* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). The objections must specifically identify those findings or recommendations that the party wishes to have the district court consider. *Thomas v. Arn*, 474 U.S. 140, 151, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). A district court need not consider "[f]rivolous, conclusive, or general objections." *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

Findings to which no specific objections are made do not require de novo review; the Court need only determine whether the Report and Recommendation is clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

II. Motion for Relief Pursuant to 28 U.S.C. § 2255

Section 2255 "provides the federal prisoner with a post-conviction remedy to test the legality of his detention by filing a motion to vacate judgment and sentence in his trial court." *Kuhn v. United States*, 432 F.2d 82, 83 (5th Cir. 1970). "The statute establishes that a prisoner in custody under a sentence of a court established by Congress 'may move the court which imposed the sentence to vacate, set aside or correct the sentence.'" *United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004) (quoting 28 U.S.C. § 2255). "Where there has been a 'denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.'" *Id.* (quoting 28 U.S.C. § 2255).

"There are four grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is 'otherwise subject to collateral attack.'" *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996) (quoting 28 U.S.C. § 2255).

Appendix B

DISCUSSION

Baker objects to the Magistrate Judge's Recommendation on several bases. (Dkt. # 646.) Baker first objects to the Recommendation's conclusions regarding the impact that *Kelly v. United States*[2] had on his case, arguing that a stock price is not property and that the Report fails to address what property Mr. Baker obtained as part of his scheme. (Id. at 5-6.) Baker also objects to the Report on the grounds that *Kelly* changes the Jury Charge that should have been issued. (*Id.* at 7-9.) Next, Baker objects to the Magistrate's finding that *Kelly* does not change his sentencing, arguing using a stock market loss in an intent to obtain property prosecution cannot be squared with *Kelly*. (Id. at 11-13.)

Baker objects additionally to the Report's recommendation for the Court to not issue a Certification of Appeal. (*Id.* at 1-5.) Finally, Baker objects to the Magistrate's finding that an evidentiary hearing was not warranted, stating expert affidavits warrant a hearing. (*Id.* at 9-10.)

Separately from these objections, Baker presents the recent Supreme Court decision in *Ciminelli v. United States*[3] to the this Court as support for his argument that the wire fraud statute reaches only traditional property interests, of which stock price is not one. (Dkt. # 648.) Baker therefore asks the Court to sustain his objections and grant relief pursuant to *Ciminelli*.

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2. 140 S. Ct. 1565, 206 L. Ed. 2d 882 (2020).

3. 143 S. Ct. 1121, 2023 WL 3356526 (May 11, 2023).

Appendix B

A. Objection to Recommendations About Kelly's Impact on Baker's Case

Baker objects to the Magistrate Judge's conclusions about *Kelly*, arguing: (1) Kelly requires an intent to obtain property to prove wire fraud, stock price is not property, and the Magistrate Judge failed to address what property Baker obtained; (2) *Kelly* changes the Jury Charge that should have been issued in Baker's case; and, (3) *Kelly* alters Baker's sentencing because using a stock market loss in an intent to obtain property prosecution is not appropriate post-*Kelly*.

1. Kelly's Requirement that Wire Fraud Must Include an Object to Obtain Property Does Not Alter Baker's Case

In his Recommendation, the Magistrate Judge stated that *Kelly*'s holding "that obtaining property must be the object, not merely an incidental consequence of the scheme...does not give the court reason to question Baker's conviction" because the victims "were defrauded when they kept or purchased ArthroCare Stock because of Baker's false statements." (Dkt. # 645 at 7-8.) Since the scheme left victims "without money that they otherwise would have possessed," Baker's scheme had obtaining money as the object of the scheme, and Kelly affords Baker no relief. (*Id.* at 10.) Baker objects on the basis that the Government did not present evidence that he intended to obtain property by making statements to induce individuals to invest. (Dkt. # 646 at 5.) Rather, Baker claims there was no transfer of property or money to him,

even if the investing public were to buy or hold stock due to his claims. (*Id.* at 6.) Baker says that the Magistrate Judge failed to address what property Baker sought to obtain, and therefore, the District Court should find *Kelly* did materially change the law related to his offenses. (*Id.*)

The Court overrules this objection. Baker fails to establish that the object of his scheme was not to obtain property. He argues that his only object was to "keep the stock price high for his own benefit, not to obtain money from investors." (Dkt. # 646 at 7.) According to Baker, this reflects a "salary theory" of fraud, and the Government needed to prove a property fraud to convict for wire fraud after *Kelly*. (*Id.*) This misrepresents Baker's actions and the Government's allegations at his trials.

Contrary to Baker's claims, the Government did argue, successfully, that Baker made false statements to induce investors or potential investors to buy stock. (Dkt. # 645 at 10 (quoting *Baker*, 923 F.3d at 405)). Indeed, ArthroCare's stock price "could not be fraudulently inflated without continued investment by investor-victims." (Dkt. # 651 at 5.) The victim-investors' money was inherently an object of Baker's fraud—he could not continue to reap the financial benefits of increased stock price for ArthroCare without inducing victim-investors to buy stock to continue to increase the stock price. (*Id.*) Wresting the victim-investor's money from them was not an incidental byproduct of the scheme. Baker actively put out false information to induce further investment and thereby part investors from their money. Baker did not merely act with an intent to retain his salary. (Dkt. #

646 at 5.) The Magistrate Judge was correct in finding the "salary-theory" cases that Baker cites in support of his claims are not applicable to his case. (Dkt. # 645 at 8-10.) Additionally, since Baker acted to part victim-investors with their money, the Court rejects Baker's objection that he only impacted stock price and therefore did not act with the object to obtain money. The Magistrate Judge was correct in finding Kelly and the salary theory cases do not afford Baker any relief. (*Id.* at 10.)

2. Kelly and Baker's Jury Charge

The Magistrate Judge found that the Fifth Circuit's holding that Baker's jury instructions were not defective remains appropriate post-*Kelly*. (Dkt. # 645 at 10.) Baker objects, finding that the jury instructions given cannot be reconciled with *Kelly*. (Dkt. # 646 at 8.) Baker argues (1) that the Report fails to address the salary-theory cases he presented in support of his claims and (2) that statements made that affect the secondary stock market pricing are no longer an intent to obtain property after *Kelly*. (*Id.* at 8-9). Finally, Baker argues the jury instructions needed to inform the jury that the scheme having an object to obtain money or property was an element of wire fraud, and the instructions did not do so. This failure to instruct on an element of the offense, Baker argues, violated his Fifth and Sixth Amendment rights to have a jury find each element of the offense beyond a reasonable doubt. (*Id.* at 8.)

First, as discussed above, because Baker's scheme, as alleged by the Government, is inextricably linked not just to his salary but with parting investors with their

money to increase stock prices, the salary-theory cases do not have any bearing on the outcome of Baker's case. The Magistrate Judge explained as much in his Report. (Dkt. # 645 at 8-10.) The Court overrules this objection.

Secondly, and in line with this, Baker did more than make statements that impacted the secondary stock market, so *Kelly* does not prevent him from being found guilty of wire fraud. Rather than only aim to impact stock prices, Baker actively put out false information to induce further investment from investors. The stock prices could not have been inflated without increased investment by investors. Obtaining investor's money was thereby an object of Baker's scheme, so *Kelly* does not afford Baker relief.

Finally, the Magistrate Judge agreed with the Fifth Circuit that Baker's jury instructions did include the intent to obtain the investor's money as an element of the crime, even if it was not explicitly phrased this way. (Dkt. # 645 at 10.) The Fifth Circuit held:

> The jury instructions here allowed for a conviction if Baker intended to deceive the victims out of their money for his own financial benefit. The evidence at trial showed that Baker did just that: (1) He made false statements to investors and potential investors to induce them to hold onto or buy ArthroCare stock; (2) he knew the statements did not accurately reflect ArthroCare's business model or revenue projections; and (3) the scheme was intended to

> benefit Baker via bonuses and appreciation of his own stock options. By inducing investments in ArthroCare, the scheme affected the victims' property rights by wrongfully leaving them "without money that they otherwise would have possessed."

Baker, 923 F.3d at 405. Baker intending to deceive the victims out of their money is, in every sense, Baker's scheme having the object of obtaining money or property from the victims. Moreover, the Government proved at trial that Baker made false statements to induce investors to buy ArthroCare stock. *Id.* The scheme left victims "without money that they otherwise would have possessed." *Id.* Baker's argument that the scheme involved only economic information or stock price is untenable when the Government alleged and proved at trial that a critical part of the scheme was to part victims with their money.

The Court dismisses Baker's objection regarding the Jury Charges and affirms the Magistrate Judge's finding that *Kelly* does not entitle Baker to a new trial because the jury was properly instructed about the offense, even considering *Kelly*.

3. Kelly and Baker's Sentencing

In his report, the Magistrate Judge explained that technical application of Sentencing Guidelines do not give rise to a constitutional issue cognizable under Section 2255. (Dkt. # 645 at 11 (citing *United States v. Walker*, 68 F.3d 931, 934 (5th Cir. 1995)). "Relief under Section 2255

is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal, and would, if condoned, result in a complete miscarriage of justice." (*Id.* (citing *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992)). As a result, Baker is afforded no relief from his concerns about the sentencing guideline application under Section 2255. (*Id.*) Moreover, the Magistrate Judge found that *Kelly* does not discuss any loss calculation related to sentencing, so even if this was relief that could be granted under 2255, *Kelly* would afford no such relief. (*Id.*)

Baker objects, stating this was not just a guidelines objection but an objection to the argument that the Government used for conviction based on Baker's gain, when the sentencing determination relied upon market loss. (Dkt. # 646 at 11.) Baker states that the Report should have considered why Baker's gain was not used in determining his sentence, especially since there was no specific victim named in the Pre-Sentencing Report. Baker argues that the District Court did not consider that the actual gain to Baker should be the focal point in determining his sentence, even when the evidence in the case clearly pointed to Baker having the intent to increase the value of the stock. (*Id.*) Rather, the District Court calculated loss and increased the offense level based on the amount of loss. Baker alleges the following errors in the District Court's loss calculations: (1) failing to measure inflation per share to a reasonable degree of certainty; (2) failing to account for when investors purchased their shares of ArthroCare; (3) incorrectly calculating that all ArthroCare shareholders could have avoided incurring

losses; (4) incorrectly calculating that all investors who purchased ArthroCare shares after the scheme began were harmed equally; and, (5) ignoring benefits received by investors who both purchased and sold ArthroCare shares while the stock price was inflated by the scheme. (*Id.*) Finally, Baker argues that federal fraud statues do not address every type of deceit and must therefore be limited to fraud in which the acquisition of money or property is the purpose of the fraud. (*Id.* at 12.) Baker maintains the purpose of his fraud was not acquisition of money or property. (*Id.*)

The Court dismisses this objection. First, Baker fails to explain how this is more than an objection to how the District Court applied the Sentencing Guidelines in a way that would allow for this to be a cognizable issue under Section 2255. Secondly, even if this was a cognizable issue, as explained above, acquiring money was the purpose of Baker's fraud here. Mr. Baker is not a regulator of the stock price. As the Magistrate Judge explained, Baker's attempt to cast his acts as mere stock price manipulation fails to recognize that the Government alleged and proved at trial that Baker intended to obtain money from victim-investors as part of this scheme. (Dkt. # 645 at 11.) *Kelly* affords Baker no relief.

B. Objection to Recommendation Not to Issue a Certificate of Appeal

Baker, rather than explain his objection to the Magistrate Judge's recommendation not to issue a certificate of appeal, expounds that the Magistrate Judge

misinterpreted *Kelly*'s impact on the law at hand. (Dkt. # 646 at 1-5.) He cites Judge Costa's dissenting opinion in *United States v. Durbin* to support his argument. 27 F.4th 1021 (5th Cir. 2022).

In *Durbin*, the Fifth Circuit cited *Kelly* to support "avoiding reading federal fraud statutes to criminalize all conduct that involves deception, corruption, abuse of power." *Id.* at 1041 (quotation omitted). Baker argues that *Durbin* rejects an expansive reading of sentencing enhancements, supporting his argument that his sentencing was inappropriate under *Kelly*. (Dkt. # 646 at 1-3.) Baker also argues that the Magistrate Judge found Kelly to be inapplicable outside of exercises of governmental regulatory power. (*Id.* at 1.)

As explained in detail above, *Kelly* does not change Baker's sentencing, nor is application of sentencing guidelines an appealable issue under Section 2255. Furthermore, that *Durbin* held that courts should not assign federal criminal statutes a "breathtaking" scope when a narrower reading is reasonable changes nothing in Baker's case. 27 F.4th at 1041 (quoting *Van Buren v. United States*, 140 S.Ct. 1565, 1568, 206 L. Ed. 2d 882 (2020)). The Government alleged and proved at trial that Baker committed a scheme intended to part victims with their money. (Dkt. # 645 at 8-10.) Nothing about applying the wire fraud statute to Baker's crimes widens the scope of that statute, and certainly not to a breathtaking scope. Baker's argument that *Durbin* makes clear that *Kelly* is not cabined to exercises of government regulatory power provides him no relief.

C. Objections to Conclusion Declining Evidentiary Hearing

The Magistrate Judge found Baker failed to show an evidentiary hearing is warranted because his claims rest on the applicability of *Kelly* to his case. (Dkt # 645 at 13.) Baker objects, arguing that the Report did not address the expert affidavits he submitted showing that the government's loss calculation for his sentencing was unreasonable and unreliable, the basis of a due process violation that deserves a hearing. (Dkt. # 646 at 9-10.)

In his Section 2255 Motion, Baker argued that under *Kelly*, the Government had to prove a measure of actual investor losses. (Dkt. # 629.) The Government admitted that it would be "near impossible" to prove actual loss, and the Government instead provided three different loss calculation figures to the district court for consideration at the sentencing hearings. (*Id.* at 43-49.) Baker argues that a defendant showing that a district court used unreliable information as the basis for the sentence imposed is a due process violation, so the Report should have considered the expert affidavits he submitted as evidence that the government's loss calculation was unreliable. (Dkt. # 646 at 9 (citing *United States v. Christensen*, 732 F.3d 1094, 1106 (9th Cir. 2013)). He argues the Report should have found he is entitled to an evidentiary hearing to develop the record for this alleged due process violation.

The Court rejects this objection. The Government presented the District Court with three different loss calculation options in the pre-sentencing report

after being up-front that a precise loss calculation would be nearly impossible to obtain. The Government further presented an expert witness to support its loss calculations. (*Id.*) Baker cites a Ninth Circuit case for the proposition that a staggeringly large range between loss calculations cannot be said to be reasonably determined. (*Id.* at 45 (citing *United States v. Hussain*, 2019 U.S. Dist. LEXIS 76388, 2019 WL 1995764 (9th Cir. 2019)). However, in that case, the range was a billion dollars, 1,000 million dollars. The range estimates here varied by 750 million dollars total, three fourths of the range in *Hussain*. (*Id.*) Moreover, the range between two of the options was only 200 million dollars, a fifth of the range in Hussain, and the sentencing guidelines would not change between those two estimates. Baker cited no other precedent explaining why this range was too large, why the loss calculation the District Court chose was inappropriate, or why his expert reports should be weighed more heavily than the government's expert reports. (*Id.* at 43-49.) Moreover, the Magistrate Judge correctly found that Baker's objections to his sentencing is based on Kelly's application to Baker's case, which requires actual property loss caused by the defendant as the object of the fraud. (Dkt. # 645 at 10-13.) Baker argued that this required a reexamination of loss in his case. (Dkt. # 629 at 43.) As explained above, *Kelly* has no bearing on Baker's case and does not create a need to re-examine loss here.

D. Ciminelli v. United States

In a May 12, 2023 Advisory to the Court, Baker argues *Ciminelli* decides the precise legal issue raised in his writ

of habeas corpus. (Dkt. # 648 at 2.) The Supreme Court in *Ciminelli* held: "[T]he wire fraud statutes reaches only traditional property interests. The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest." *Ciminelli v. United States*, 143 S. Ct. 1121, 2023 WL 3356526 at *5 (May 11, 2023). Baker alleges he sought to obtain no traditional property interest, casting his statements made to affect stock market pricing as the kind of economic information *Ciminelli* discussed. (Dkt. # 648 at 1.) However, "*Ciminelli* did not involve a victim parting with money based on material misrepresentations made with an intent to defraud, which is a classic and well-recognized scheme to deprive a person of a traditional property interest, namely money." *United States v. Jesneik*, No. 3:20-cr-228, 2023 U.S. Dist. LEXIS 85080, 2023 WL 3455638, at *2 (D. Or. May 15, 2023). Rather, *Ciminelli* addressed a scheme to award development projects in New York to specific developers.

In *Ciminelli*, the Government alleged that by "rigging the [developer requests] to favor their companies, defendants [including Ciminelli] deprived [the government] of potentially valuable economic information." *Ciminelli*, 143 S. Ct. 1121, 2023 WL 3356526 at 1. While Ciminelli helped create a set of developer requests that made Ciminelli's construction company qualify for preferred-developer status and resulted in the company's award of a $750 million contract, the Government did not allege that Ciminelli obtained property in the form of valuable contracts via this fraud. The Government alleged only that Ciminelli deprived Plaintiff of economic information.

Ciminelli was thereby convicted for scheming to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions. *Id.* This conviction was overturned when the Supreme Court found that withholding economic information was not a traditional property interest that wire fraud reaches. *Id.* The Court did not address the merits of any alternative theory of wire fraud the Government could have but did not present in this case, for example whether obtaining contracts was a traditional property interest. (*Id.* at 1129.) The only allegation in this case involved withholding economic information.

Here, Baker misrepresented ArthoCare's financial condition and business practices to deprive victim-investors of their money by inducing them, fraudulently, to invest in ArthroCare. *Baker*, 923 F.3d at 405. The Government alleged Baker intended to deprive investors of money they would have otherwise had, not that Baker deprived the investors of potentially valuable economic information. (Dkt. # 651 at 1.) Because the Government alleged Baker sought to obtain money from the victims, not that he only withheld valuable economic information, *Ciminelli* does not apply to or alter Baker's conviction. As previously discussed, ArthoCare's stock price "could not be fraudulently inflated without continued investment by investor-victims." (Dkt. # 651 at 5.) The victim-investors' money was inherently an object of Baker's fraud—he could not continue to reap the financial benefits of increased stock price for ArthroCare without inducing victim-investors to buy stock to continue to increase the stock price. (*Id.*) Wresting the victim-investor's money from

them was not an incidental byproduct of the scheme. Baker did not merely withhold information. He actively put out false information to induce further investment and thereby part investors from their money.

CERTIFICATE OF APPEALABILITY

A Certificate of Appealability may only be issued if a movant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). A movant is required to show that reasonable jurists could debate whether the issues could have been resolved differently or are "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Here, Baker has made no such showing. Reasonable jurists could not debate whether these issues could have been resolved differently. Further, the issues raised are not "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 483. Accordingly, the Court **DENIES** Baker a Certificate of Appealability.

CONCLUSION

For the foregoing reasons, the Court **ADOPTS** the Magistrate Judge's Report and Recommendation (Dkt. # 645), and **DENIES** Baker's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Dkts. # 628; 629). The Court **DENIES** a certificate of appealability in this case.

IT IS SO ORDERED.

Appendix B

DATED: Austin, Texas, November 27, 2023.

/s/ David Alan Ezra
David Alan Ezra
Senior United States District
Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED MAY 17, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

A-13-CR-346-1-LY
A-21-CV-281-LY-ML

MICHAEL BAKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

May 17, 2022, Decided
May 17, 2022, Filed

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE:

Before the court is Petitioner Michael Baker's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28

U.S.C. § 2255 and Memorandum of Law in Support (Dkt. #628, #629) and all related briefing. After reviewing the pleadings and the relevant case law, the undersigned submits the following Report and Recommendation to the District Court.

I. Background

A. Procedural History

Michael Baker was the Chief Executive Officer of ArthroCare, a publicly traded medical-device company. *U.S. v. Baker*, 923 F.3d 390, 392 (5th Cir. 2019). Baker, along with other senior executives, engaged in a "channel-stuffing" scheme that involved sending excess products to a distributor that did not need those products. *Id.* ArthroCare reported those shipments as legitimate sales, which inflated the company's revenue numbers in its financial reports. *Id.* Eventually, the fraud unraveled, and ArthroCare's board of directors restated its earnings, resulting in a significant drop of the value of ArthroCare's stock. *Id.* at 394. Both the SEC and DOJ investigated, and Baker was indicted for wire fraud, securities fraud, making false statements to the SEC, and conspiracy to commit wire fraud and securities fraud. *Id.* Baker was first tried and convicted on all counts in June 2014. *Id.* On appeal, the Fifth Circuit vacated his convictions on evidentiary grounds and remanded for a new trial. *Id.* At his second trial, the jury convicted Baker on twelve counts and acquitted him on two of the wire-fraud counts and one false-statement count. *Id.* at 395. The trial court then (1) sentenced him to a 240-month term of imprisonment and

five years of supervised release; (2) imposed a $1 million fine; and (3) ordered that he forfeit $12.7 million. *Id.*

Baker timely appealed. *Id.* Baker's grounds for appeal included the argument that the term "obtain money or property" in the wire fraud statute, 18 U.S.C. § 1343, required the government to plead and prove that he "intended to obtain money or property from deceived investors." *Id.* at 402. Because the argument presented a question of statutory interpretation, the Fifth Circuit reviewed it de novo. *Id.* At trial, the district court had instructed the jury that "[a] 'scheme to defraud' means any plan, pattern, or course of action intended to deprive another of money or property, or bring about some financial gain to the person engaged in the scheme." *Id.* at 402-03. After the trial, Baker had reasserted his objection to the jury instructions and moved for judgment of acquittal. *Id.* at 403. The district court denied the motion, concluding that "the focus" of a scheme to defraud is on "depriving the victim of property for some benefit" and that there is "no requirement that a defendant must directly gain or possess [the victim's] property." *Id.* On appeal, Baker challenged the instruction on two grounds. *Id.* First, he asserted the wire fraud statute imposes a "mirror image" requirement, such that the victim's loss or money or property supplied the defendant's gain, with one being the mirror image of the other. *Id.* The Fifth Circuit rejected this argument. Second, Baker argued that the instruction did not require the government to prove that he intended to obtain property from a victim, as required by the statute, but instead allowed for a conviction based on a scheme that was only intended to

bring about a financial gain to Baker. *Id.* at 403-04. The Fifth Circuit also rejected this argument and held § 1343 does not require an intent to obtain property directly from a victim. *Id.* at 404-05. The Fifth Circuit found the jury instructions allowed for a conviction if Baker intended to deceive the victims out of their money for his own financial benefit. *Id.* at 405. The Fifth Circuit found the evidence showed that by inducing investments in ArthroCare, Baker's scheme affected the victims' property rights by wrongfully leaving them "without money that they otherwise would have possessed." *Id.* Accordingly, the jury instructions were not erroneous.

The Fifth Circuit similarly rejected all of Baker's other grounds for appeal and affirmed his conviction in its entirety. *Id.* at 407. The Supreme Court denied his petition for writ of certiorari on March 30, 2020. Dkt. #618.

Baker timely filed his § 2255 motion and reply, which include 90 pages of attorney argument and well over 100 pages of exhibits. Baker contends *Kelly v. U.S.*, 140 S. Ct. 1565, 206 L. Ed. 2d 882 (May 7, 2020), which issued after the Supreme Court denied his petition, drastically changed the law with respect to wire fraud.

B. Issues Presented

Baker articulates his issues slightly differently in his form 2255 motion and in his written 2255 motion and memorandum of law in support. *Compare* Dkt. #628, *with* Dkt. #629. In summary, Baker asserts the following issues:

1. Whether Baker is entitled to a new trial because *Kelly* requires an intent to obtain property from a victim and Baker's jury was not instructed this was an element of the offense,[1]

2. Whether Baker is entitled to a new sentencing hearing because the government's estimate of loss does not satisfy *Kelly* or otherwise violated due process,[2]

3. Whether counsel provided ineffective assistance in failing to preserve any issue related to sentencing and loss.[3]

Baker also requests an evidentiary hearing, leave to amend, and discovery. Dkt. #629 at 74-75.

II. Standard of Review

Under section 2255, there are generally four grounds upon which a defendant may move to vacate, set aside or correct his sentence: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the district court was without jurisdiction to impose the sentence; (3) the sentence imposed was in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255.

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1. *See* Dkt. #628 at Ground One; Dkt. #629 at Section I.

2. *See* Dkt. #628 at Ground Two; Dkt. #629 at Section II.A-F.

3. *See* Dkt. #628 at Ground Three; Dkt. #629 at Section II.H.

The nature of a collateral challenge under section 2255 is extremely limited: "A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude . . . and may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (quoting *United States v. Frady*, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)). If the error is not of constitutional or jurisdictional magnitude, the movant must show that the error could not have been raised on direct appeal and would, if condoned, "result in a complete miscarriage of justice." *United States v. Smith*, 32 F.3d 194, 196 (5th Cir. 1994). However, a defendant's ineffective assistance of counsel claim does create a constitutional issue and is cognizable pursuant to Section 2255. *United States v. Walker*, 68 F.3d 931, 934 (5th Cir. 1996).

III. Analysis

A. Whether *Kelly* Entitles Baker to Any Relief

The facts of *Kelly v. U.S.*, 140 S. Ct. 1565, 206 L. Ed. 2d 882 (May 7, 2020), could not be more unlike this case. *Kelly* concerned the infamous case known as "Bridgegate," where public officials with ties to New Jersey's then-Governor Chris Christie realigned the toll lanes leading to the George Washington Bridge from Fort Lee, New Jersey to punish the Fort Lee mayor for refusing to support Christie's reelection bid. *Id.* The defendants

were charged with and convicted of violating federal wire fraud and fraud on a federally funded program or entity statutes. *Id.* at 1568*; see* 18 U.S.C. §§ 1343, 666(a)(1)(A). The Court held those statutes "target fraudulent schemes for obtaining property." *Id.* (citing § 1343 (barring fraudulent schemes "for obtaining money or property"); § 666(a)(1)(A) (making it a crime to "obtain[ ] by fraud . . . property")). The government argued the scheme sought to obtain the Port Authority's money or property because the defendants sought both to "commandeer" the Bridge's access lanes and to divert the wage labor of the Port Authority employees used in that effort. *Id.* The Court rejected that argument and held the lane realignment was an exercise of regulatory power and any employee labor that was used was an incidental cost, rather than the object, of the scheme. Thus, the scheme failed to satisfy the statutes' property requirements, and the Court reversed the convictions. *Id.*

Baker argues *Kelly* is retroactive on collateral review and adopted the very arguments he had previously made. Dkt. #629 at 26, 37-39. Specifically, Baker argues, "*Kelly* held that to prove fraud, it is not enough to prove that the defendant lied, and that his lies caused property loss to the victims. Instead, the government must prove that the conscious object of the defendant's lies was to obtain property from the victims." *Id.* at 29. Baker contends *Kelly* changed the law. *Id.* According to Baker, under Fifth Circuit pre-*Kelly* precedent, it was enough to show that the defendant harmed the victim, caused loss to the victim, or affected the victim's property rights. *Id.* Baker argues that under *Kelly* the government had to prove he

intended to obtain the victim's property, and the jury was not instructed on that element. Dkt. #629 at 31-36.

A petitioner can collaterally attack his conviction based on a decision issued "after [the petitioner's] conviction was affirmed" if that decision established that the "conviction and punishment are for an act that the law does not make criminal." *Garland v. Roy*, 615 F.3d 391, 396-97 (5th Cir. 2010) (citing *Davis v. U.S.*, 417 U.S. 333, 346 (1974), 94 S. Ct. 2298, 41 L. Ed. 2d 109). However, claims raised and rejected on direct appeal are barred on collateral review. *U.S. v. Webster*, 392 F.3d 787, 791 (5th Cir. 2004). Nonetheless, a defendant is entitled to relitigate an issue decided on direct appeal where there has been an intervening change in the law. *Chapman v. U.S.*, 547 F.2d 1240, 1242 (5th Cir. 1977) (citing *Davis*, 417 U.S. at 342). Baker argues *Kelly* narrowed the elements for wire fraud and the thus the jury was not properly instructed on the elements of his charges. The government contends *Kelly* did not announce a new understanding of the wire fraud statutes and does not affect Baker's conviction.

Kelly's central holding, for which it quotes prior cases, is that the fraud statutes at issue only target or bar "schemes for obtaining property." *Kelly*, 140 S. Ct. at 1568, 1574, 1571 ("The wire fraud statute thus prohibits only deceptive 'schemes to deprive [the victim of] money or property.'") (quoting *McNally v. U.S.*, 483 U.S. 350, 356 (1987), 107 S. Ct. 2875, 97 L. Ed. 2d 292); *id.* at 1571 ("So under either provision, the Government had to show not only that Baroni and Kelly engaged in deception, but that an 'object of the[ir] fraud [was] 'property.'") (quoting

Cleveland v. U.S., 531 U.S. 12, 26 (2000), 121 S. Ct. 365, 148 L. Ed. 2d 221); *id.* at 1571 ("The fraud statutes, we held in *McNally*, were 'limited in scope to the protection of property rights.'"). In *Kelly*, the government argued that defendants' scheme met this requirement because defendants sought to take control of the bridge's physical lanes and sought to deprive the Port Authority of the costs of compensating traffic engineers and back-up toll collections. *Id.* at 1572. Relying again on *Cleveland*, the Court stated it "ha[d] already held that a scheme to alter such a regulatory choice [of realigning toll lanes] is not one to appropriate the government's property." *Id.* Although the Court reiterated that a scheme to defraud a local government of its employees' time and labor could satisfy the statute, here "[t]he time and labor of Port Authority employees were just the implementation costs of the defendants' scheme to reallocate the Bridge's access lanes." *Id.* at 1573-74. "[Defendants'] plan aimed to impede access from Fort Lee to the George Washington Bridge. The cost of the employee hours spent on implementing that plan was its incidental byproduct." *Id.* at 1574. *Kelly* did not render a new understanding of the statutes at issue. Rather, *Kelly* merely applied previously announced principles to the situation before it. Nor does anything in *Kelly* give the court reason to believe the Fifth Circuit's decision on appeal would have been different had *Kelly* been rendered before Baker's appeal.

Kelly's first holding—that taking over an exercise of governmental regulatory power cannot satisfy the fraud statutes' "obtaining property" requirement—is inapplicable to Baker. Baker's situation did not involve

any exercise of governmental regulatory power. *Kelly's* second holding—that obtaining property must be the object, not merely an incidental consequence, of the scheme—also does not give the court reason to question Baker's conviction. Baker conceded "hedge funds and institutional investors lost money," but argues "there is no evidence that this was Baker's objective." Dkt. #643 at 13. But Baker conflates investors' losses with the property at issue in his scheme. Contrary to how Baker attempts to describe the scheme, the government does not argue that the object of his scheme was that investors would lose money when stock prices went down. Rather, "the purpose of the scheme was to mislead the investing public and induce them to buy or hold ArthroCare stock so that ArthroCare's share price would continue to increase." Dkt. #640 at 13; *see also Baker*, 923 F.3d at 405 ("He made false statements to investors and potential investors to induce them to hold onto or buy ArthroCare stock . . . . By inducing investments in ArthroCare, the scheme affected the victims' property rights by wrongfully leaving them 'without money that they otherwise would have possessed.'"). The investors may have *felt* the harm of Baker's fraudulent scheme when the scheme became public and their stock value decreased, but they were defrauded when they kept or purchased ArthroCare stock because of Baker's false statements. Accordingly, *Kelly* does afford Baker any relief.

Baker argues the government's position in the appeals of *United States v. Blaszczak*, 947 F.3d 19 (2d Cir. 2019), and *United States v. Olan*, 947 F.3d 19 (2d Cir. 2019), demonstrate his conviction cannot stand after *Kelly. See*

Dkt. #629 at 29-20; Dkt. #643 at 8-14. Blaszczak and Olan were charged with violations of 18 U.S.C. §§ 1343 and 1348, *inter alia*, for misappropriating confidential nonpublic information from the Centers for Medicare and Medicaid Services ("CMS") and trading on it. 947 F.3d at 26. For instance, if they learned that a forthcoming CMS rule would lower reimbursement rates, they would direct a hedge fund to short stock a company that would be negatively affected by the rule. Once the rule was announced, the company's stock prices would go down, and the short stock purchase would make money. *Id.* at 27. The wire fraud counts were based on the misappropriation of confidential CMS information. *Id.* at 29. The Second Circuit affirmed the convictions on the pre-*Kelly* basis that confidential government information could constitute government property. *Id.* at 34. In response to defendants' petitions for writs of certiorari, the government conceded a remand to the Second Circuit would be appropriate so the Second Circuit could address any impact *Kelly* had on its analysis.

As opposed to how Baker attempts to portray *Blaszczak/Olan*, nothing relevant has actually been decided in those cases. The government recognized that the Second Circuit did not have the benefit of *Kelly*—or any arguments addressing *Kelly*—when it reached its decision and agreed to have the cases remanded so the Second Circuit could consider *Kelly*. Contrary to Baker's attempts to make his scheme similar to *Blaszczak/Olan*, his scheme did not seek to deprive ArthroCare of its confidential information. Unlike *Blaszczak/Olan*, Baker's "scheme affected the victims' property rights by wrongfully leaving

them 'without money that they otherwise would have possessed.'" *Baker*, at 405. Accordingly, *Blaszczak/Olan* do not offer Baker any relief.

Baker also argues that the Ninth Circuit's opinion in *United States v. Yates*, 16 F.4th 256 (9th Cir. 2021), which came after *Kelly*, also demonstrates his conviction cannot stand. *See* Dkt. #643 at 8-14. In *Yates*, Yates and Heine worked for a new bank and allegedly made false statements on quarterly reports to the FDIC and the bank's board of directors. They were charged with bank fraud and 18 counts of making false bank entries under 18 U.S.C. §§ 1349 and 1005, respectively. *Yates*, 16 F.4th at 263. The indictment alleged the purpose of the bank fraud conspiracy "'was to conceal the true financial condition of the Bank and to create a better financial picture of the Bank' for the board and regulators." *Id.* at 264-65. In rejecting the government's position that the right to accurate information was a cognizable property right, the Ninth Circuit relied on cases that predated *Kelly*. *Id.* at 265-70, 269 ("We need not consider whether or how *Kelly* might affect this case.").

Yates does not support Baker's claim for relief. *Yates* reached the decision it reached relying on pre-*Kelly* law. *Yates*, 16 F.4th at 269. If anything, *Yates* supports the government's position that *Kelly* did not change the law in any meaningful way. Baker's arguments with respect to *Yates* epitomize the problems with most of his arguments. Baker argues that his case is similar to *Yates* because he too made misrepresentations to maintain his salary and employment benefits. *See* Dkt. #643 at 10-14. He

acknowledges that hedge funds and institutional investors lost money, but he contends that was just an incidental byproduct of the scheme for which he cannot be liable after *Kelly*. *Id.* at 13-14. Baker's attempts to factually recast his scheme as something else directly conflict with the Fifth Circuit's opinion on direct review. On Baker's motion for judgment after his conviction, the trial court "explained that 'substantial evidence was presented to show the misleading and fraudulent statements made by Baker induced investment in ArthroCare,' and that 'a rational trier of fact could have found the goal of the scheme . . . was to deprive investors of money they otherwise would have possessed.'" *Baker*, 923 F.3d at 403. In rejecting Baker's arguments that the jury instructions were defective, the Fifth Circuit held:

> The jury instructions here allowed for a conviction *if Baker intended to deceive the victims out of their money for his own financial benefit*. The evidence at trial showed that Baker did just that: (1) He made false statements to investors and potential investors to induce them to hold onto or buy ArthroCare stock; (2) he knew the statements did not accurately reflect ArthroCare's business model or revenue projections; and (3) the scheme was intended to benefit Baker via bonuses and appreciation of his own stock options. By inducing investments in ArthroCare, *the scheme affected the victims' property rights by wrongfully leaving them "without money that they otherwise would have possessed."*

Id. at 405 (emphasis added). Baker's argument changes the property at issue from the victim's money to accurate information about ArthroCare. Unlike *Yates*, where the defendants deceived their employer to continue to receive their salaries but did not otherwise take money from the employer, Baker deceived investors and potential investors to induce them to keep or buy ArthroCare stock to benefit him via bonuses and appreciation of his own stock options.

Accordingly, Baker has not shown *Kelly* materially changed the law related to his offenses or that he is entitled to a new trial because the jury was not properly instructed about the offense in light of *Kelly*.

B. Whether the Government's Loss Calculation Violated *Kelly* or Due Process

Baker acknowledges that "Comment 3 of §2B1.1 [of the Sentencing Guidelines] allows [] calculating 'actual loss' as 'the reasonable foreseeable pecuniary harm that resulted from the offense.'" Dkt. #643 at 15. Generally, claims concerning the application of the Sentencing Guidelines cannot be raised in a § 2255 motion. Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). A district court's technical application of the Guidelines does not give rise to a constitutional issue cognizable under § 2255. *Id.; United States v. Walker*, 68 F.3d 931, 934 (5th Cir. 1995). Thus, Baker's claim concerning loss for his Guideline calculation is not cognizable on collateral review.

Baker nonetheless argues that "*Kelly* necessarily applies to a calculation of loss. It is axiomatic that if 'a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme' the government cannot get in the back door the very prosecution theory the Court rejected up front." Dkt. #643 at 15. The court has already rejected Baker's twisted application of *Kelly* to his scheme and his attempts to recharacterize his fraud scheme into something different than it was. Moreover, *Kelly* does not discuss any loss calculation related to sentencing.

Accordingly, Baker has not shown he is entitled to a new sentencing hearing because the government's estimate of loss does not satisfy *Kelly* or due process.

C. Whether Counsel Was Ineffective

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case reasonably effective assistance of counsel. U.S. CONST. amend VI; *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). To prevail on an ineffective assistance of counsel claim, a movant must satisfy the two-part test enunciated in *Strickland v. Washington*. 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, he must demonstrate counsel's performance fell below an objective standard of reasonableness. *Id.* Under this standard, counsel must "research relevant facts and law, or make an informed decision that certain avenues will not be fruitful." *United States v. Conley*, 349 F.3d 837, 841 (5th Cir. 2003). The effectiveness of an

attorney's representation must be gauged "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. A court will not find ineffective assistance merely because it disagrees with counsel's trial strategy. *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999). Whether counsel's performance was deficient is determined by examining "the law as it existed" at the time of the representation. *See id.* "[C]ounsel is not ineffective for failing to raise a claim that courts in the controlling jurisdiction have repeatedly rejected . . . or even for not rais[ing] every nonfrivolous ground that might be pressed on appeal." *United States v. Fields*, 565 F.3d 290, 294 (5th Cir. 2009) (internal quotations and citations omitted).

Second, movant must prove he was prejudiced by counsel's substandard performance. "[T]o prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Conley*, 349 F.3d at 841-42. When a movant fails to meet either requirement of the *Strickland* test, his ineffective assistance of counsel claim is defeated. *See Belyeu v. Scott*, 67 F.3d 535, 538 (5th Cir. 1995); *United States v. Gaudet*, 81 F.3d 585, 591-92 (5th Cir. 1996). "'[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *United States v. Fields*, 761 F.3d 443, 453 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 689)). Additionally, courts presume that counsel's "challenged action might be considered sound trial strategy." *Belyeu*, 67 F.3d at 538 (citing *Strickland*).

Baker contends that even if the court does not find he in entitled to relief under *Kelly*, the court "should consider the loss calculation issue and new expert reports through the lens of ineffective assistance of counsel." Dkt. #629 at 74. Apart from setting forth the standard for ineffective assistance of counsel, Baker does not expand on his argument. *Id.* However, in his reply brief, he concedes that "his lawyers repeatedly objected to the loss calculations in his case." Dkt. #643 at 15. As the government points out, Baker has not properly raised an ineffective assistance of counsel claim and his counsel did make the same argument that the loss calculations were unreliable and his gain should be used instead. Dkt. #640 at 22 n.6 (citing Dkt. #317-2 at 10, 12 ("[the PSR's loss calculation] is an inherently unreliable method of calculating loss that substantially overstates the loss to victims" and "Mr. Baker's gains are a more reasonable measure"); Dkt. #323 at 12-21; Dkt. #562 at 1; Dkt. #629 at 72 ("[Baker's] lawyers repeatedly objected to the loss calculations in his case.")).

Accordingly, Baker has not shown he is entitled to relief because he was denied effective assistance of counsel.

D. Request for an Evidentiary Hearing, Leave to Amend, and Discovery

Citing a Ninth Circuit case, Baker requests an evidentiary hearing. Baker has not shown that an evidentiary hearing is warranted. Baker's claims rest on the applicability of the *Kelly* decision, and he has not shown *Kelly* to be relevant to his conviction or sentence.

Baker also seeks leave to amend his motion on the grounds that his attorney was only recently hired, he faced a strict 1-year deadline to file the § 2255 motion, and the government has not responded to his attempts to obtain "crucial information that was referenced in the record but was not made part of the electronic record on appeal." Dkt. #629 at 75. Baker has not described what "crucial information" is missing from the record or how he would amend his motion. After Baker's motion was filed, the parties requested various extensions to file the response and reply briefs. Thus, Baker has had ample time to articulate any specific need to amend his motion and has not done so. Accordingly, Baker has not shown cause to amend.

Finally, Baker seeks authorization for discovery under Rule 6(a), which provides a "[j]udge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law." Dkt. #629 at 75. Baker does not describe what discovery he needs or why it is necessary. Accordingly, Baker has not shown cause for discovery.

Accordingly, the undersigned denies this relief.

IV. Recommendations

For the reasons given above, the Magistrate Court respectfully **RECOMMENDS** Petitioner Michael Baker's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum of Law in Support (Dkt. #628, #629) be **DENIED**.

Appendix C

V. Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a proceeding under section 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c) (1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2255 Proceedings, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability ("COA") may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). In cases where a district court rejected a movant's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the denial of the movant's section 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the District Court not issue a certificate of appealability.

VI. Objections

The parties may file objections to this Report and Recommendation. A party filing objection must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); Thomas *v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

Appendix C

SIGNED May 17, 2022.

/s/ Mark Lane
MARK LANE
UNITED STATES
MAGISTRATE JUDGE

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 26, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-51034

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL BAKER,

Defendant-Appellant.

April 26, 2019, Filed

Appeal from the United States District Court
for the Western District of Texas

Before WIENER, SOUTHWICK, and COSTA, Circuit Judges.

WIENER, Circuit Judge:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for rehearing en banc is DENIED. The following is substituted in place of our opinion.

Appendix D

Defendant-Appellant Michael Baker was the Chief Executive Officer of ArthroCare, a publicly traded medical-device company. Baker, along with the company's other senior executives, engaged in a "channel-stuffing" scheme that involved sending excess products to a distributor that did not need those products. ArthroCare reported those shipments as legitimate sales, which inflated the company's revenue numbers in its financial reports. Baker hid this scheme from ArthroCare's board and auditors, and he made false statements to the SEC and to investors about the company's business model and relationships with its distributors. When it was uncovered that the statements were false and that some of these sales were not legitimate, ArthroCare restated its earnings and revenues, causing its stock price to drop.

This is the second time Baker has been convicted. He was first convicted in 2014, but this court vacated that conviction based on erroneous evidentiary rulings. At the second trial, after seven days of testimony—including from the other ArthroCare executives involved in the scheme—a jury convicted Baker on charges of wire fraud, securities fraud, making false statements to the SEC, and conspiracy to commit wire fraud and securities fraud.

Baker appealed, raising challenges to the district court's evidentiary rulings and jury instructions. Finding no reversible error, we AFFIRM.

Appendix D

I. Facts And Proceedings

A. Factual Background

Michael Baker was the CEO of ArthroCare, a publicly traded medical-device company based in Austin, Texas. ArthroCare's products used a technology that allowed doctors to cut, seal, and remove tissue at a low temperature and in a minimally invasive manner. ArthroCare sold its products to hospitals and surgery centers through sales representatives, sales agents, and, relevant here, distributors. As CEO, Baker was involved in ArthroCare's day-to-day operations. He worked closely with other senior executives, including Michael Gluk, the Chief Financial Officer, John Raffle, the Senior Vice President of Operations, David Applegate, the Vice President of the "spine division," and Steve Oliver, the Senior Director of Financial Planning.[1]

Baker set growth targets for the company and oversaw a "channel-stuffing" operation to inflate ArthroCare's revenue numbers. Baker, as well as Gluk, Raffle, and Applegate, hid the fraudulent nature of this operation from ArthroCare's board of directors, audit committee, and auditors. They also made false statements to investors about the company's revenue projections

1. Raffle described Baker's "inner circle" at the company and testified that he did not "believe anyone held anything back from this group when we were there. . . . [I]t was a small company, we were working together to achieve a goal, and we talked about everything." Gluk testified to the executives' "informal" "open-door" working environment and that he and Baker would talk "at least once a day."

and relationships with its distributors. When all this was uncovered, ArthroCare restated its past earnings and revenue, causing its stock price to drop and its investors to sustain significant losses.

This court previously described the basic structure of the channel-stuffing scheme between ArthroCare and one of its distributors, DiscoCare; Baker's false statements to investors about that relationship; and how the fraud was uncovered:

> "Channel stuffing" is a fraudulent scheme companies sometimes attempt, in an effort to smooth out uneven earnings—typically to meet Wall Street earnings expectations. Specifically, a company that anticipates missing its earnings goals will agree to sell products to a coconspirator. The company will book those sales as revenue for the current quarter, increasing reported earnings. In the following quarter, the coconspirator returns the products, decreasing the company's reported earnings in that quarter. Effectively, the company fraudulently "borrows" earnings from the future quarter to meet earnings expectations in the present. Thus, in the second quarter, the company must have enough genuine revenue to make up for the "borrowed" earnings and to meet that quarter's earnings expectations. If the company does not meet expectations in the second quarter, it might "borrow" ever-larger amounts of money from future quarters, until

the amounts become so large that they can no longer be hidden and the fraud is revealed.

ArthroCare carried out exactly this fraud, with DiscoCare playing the role of coconspirator. Over several years, ArthroCare fraudulently "borrowed" around $26 million from DiscoCare. This "borrowing" occurred by directing DiscoCare to buy products from ArthroCare on credit, with the agreement that ArthroCare would be paid only when DiscoCare could sell those products. Although this can be a legitimate sales strategy, it was fraudulent here because DiscoCare purchased medical devices that it knew it could not sell reasonably soon for the sole purpose of propping up ArthroCare's quarterly earnings. This fraud was carried out under the day-to-day supervision of John Raffle, the Vice President of Strategic Business Units, and of David Applegate, another [ArthroCare] executive.

DiscoCare's business model (apart from the accounting fraud) was potentially wrongful, though no charges were brought. DiscoCare provided a medical device for which most insurers refused reimbursement. To sell its device, DiscoCare reached agreements with plaintiffs' attorneys in civil actions for personal injuries. These agreements resulted in the majority of DiscoCare's sales. Under this agreement, DiscoCare would treat clients of

the attorneys. The plaintiffs' attorneys would then cite the expense of their clients' treatment as a reason for defendants to settle personal injury lawsuits. DiscoCare also allegedly illegally coached doctors on which billing codes to use, in an effort to increase insurance reimbursements. This practice allegedly went as far as instructing doctors to perform an unnecessary surgical incision to classify the treatment as a surgery. No charges were filed on any of this conduct.

ArthroCare subsequently purchased DiscoCare for $25 million, a price that far exceeded its true value (DiscoCare had no employees at the time). During this purchase, the fraud began to unravel, with media reports alleging accounting improprieties. To reassure investors, Gluk and Baker made several false statements during a series of conference calls. As evidence mounted, the audit committee of ArthroCare's board of directors commissioned an independent investigation by forensic accountants and the law firm Latham & Watkins. As a result of this investigation, the board determined that Raffle and Applegate had committed fraud and that Gluk and Baker had not adequately supervised them. The board restated earnings, resulting in a significant drop in the value of ArthroCare stock. The board fired Raffle and Applegate for their roles in the fraud. The board also fired Gluk, determining that he had been remiss

> in not detecting the fraud earlier. Finally, the board fired Baker, determining that he should have implemented better internal controls.[2]

After the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") investigated, a grand jury indicted Baker and Gluk on charges for wire fraud, securities fraud, making false statements to the SEC, and conspiracy to commit wire fraud and securities fraud.

B. Procedural Background

Baker has been convicted twice for his conduct relating to the fraud at ArthroCare. At the first trial in June 2014, a jury convicted Baker and Gluk on all counts. On appeal, this court vacated Baker's and Gluk's convictions on evidentiary grounds and remanded for a new trial.[3]

On remand, Gluk admitted that he had participated in the fraud, agreed to cooperate and testify against Baker, and pleaded guilty to conspiracy to commit wire fraud and securities fraud. The government retried Baker, this time with Gluk as a witness. The facts established at the second trial largely track the facts in the first trial, as this court set them out in the previous appeal.[4] The

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2. *United States v. Gluk*, 831 F.3d 608, 611-12 (5th Cir. 2016) (amended opinion on petition for panel rehearing).

3. *Id.* at 610.

4. *See id.* at 611-612.

government put on thirteen witnesses, including: Gluk,[5] Raffle,[6] Applegate,[7] Oliver,[8] ArthroCare's Chief Medical Officer and Audit Committee chairman, and several analysts and investors who testified to their reliance on Baker's statements.

At trial, Baker's counsel conceded that a fraud had occurred at ArthroCare, but the defense was that Gluk, Raffle, and Applegate had orchestrated it without Baker's knowledge. Baker's counsel attempted to show that although Baker was generally aware of the nature of DiscoCare's business, he did not have specific knowledge about the fraudulent details, or he learned about them too late. Baker's counsel also sought to undermine Gluk's, Raffle's, and Applegate's credibility based on their plea

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5. Gluk testified that he "conspired with Mike Baker, John Raffle, David Applegate and others to misrepresent the accounts of ArthroCare Corporation, to engage in channel stuffing and hide the nature of the relationship between DiscoCare and ArthroCare, and as a result of all that, [] filed incorrect statements with the Securities and Exchange Commission."

6. Raffles testified that he had "an agreement" with Baker to engage in channel stuffing to "manipulate ArthroCare's earnings and revenue numbers."

7. Applegate testified that he had an agreement with Baker "[n]ot to disclose DiscoCare and particularly not to disclose the personal injury aspect of DiscoCare."

8. Oliver testified that he participated in a scheme with Baker to "manipulate revenue and income in order to achieve targets that were in alignment with what the expectation[] of the analyst community were."

deals with the government and their own participation in the DiscoCare scheme. Baker did not testify or present witnesses, but his counsel did introduce exhibits, including the SEC memoranda that this court had held were admissible.

The jury convicted Baker on twelve counts and acquitted him on two of the wire fraud counts and one false statement count. The trial court then (1) sentenced him to a 240-month term of imprisonment and five years of supervised release; (2) imposed a $1 million fine; and (3) ordered that he forfeit $12.7 million.

Baker timely appealed.

II. Analysis

Baker challenges his conviction on four grounds. First, he contends that the FBI case agent's testimony was improper "summary witness" testimony. Second, he asserts that the district court should have admitted the SEC deposition testimony of Brian Simmons, ArthroCare's former controller who invoked the Fifth Amendment and did not testify at Baker's trial. Third, he challenges the district court's jury instruction on wire fraud, insisting that it did not require the government to prove the "obtain money or property" element of that offense. Finally, he maintains that the district court erred by refusing to instruct the jury on "advance knowledge" for accomplice liability under *Rosemond v. United States*, 572 U.S. 65, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014). We address each issue in turn.

Appendix D

A. Summary Witness Testimony

1. Background

FBI Special Agent Steven Callender was the case agent. He reviewed many of the documents admitted into evidence and testified at trial. Baker contends that Agent Callender's testimony was impermissible "summary witness" testimony.

Baker objected at trial to Agent Callender's testimony. The district court overruled his objection and allowed Agent Callender to testify, but stated that its ruling did not stop Baker's counsel "from making an objection if [the testimony] gets into substantive evidence. If he's just talking about his research of documents, that's tangible, then he can go into the summary. But if he gets into any other testimony, feel free to object."

When the prosecutor asked Agent Callender to explain his summary charts setting out the exhibits that corresponded to each count in the indictment, Baker's counsel objected to the witness "being asked whether or not these are the exhibits that correspond to those counts in the indictment." The district court overruled that objection, stating "I think this is a very complicated case." The court then gave the jury a limiting instruction about the use of demonstratives and summary witnesses:

> [L]et me remind you, a demonstrative evidence is really not evidence. When he moves to introduce it, he's just giving notice that he's

> got a [sic] demonstrative evidence. If we had a great big blackboard or bulletin board while he presents a witness, he could have the witness -- or he can draw on it with regard to the witness' testimony. So this is not evidence. It is merely an illustration because they're going to use this FBI agent as a summary witness, and you'll give it whatever substance that you think it deserves, if any.

Agent Callender then testified. His testimony consisted primarily of reading and explaining (1) exhibits that had already been admitted at the trial and (2) new exhibits that were being admitted through his testimony. The exhibits he testified about included audio clips, transcripts of conference calls, documents showing ArthroCare's organizational charts, board presentations, payroll information, emails between Baker and other executives, and SEC filings.

2. Analysis

We review "the admission of evidence, including summaries and summary testimony, for abuse of discretion."[9] "If there is error, it is 'excused unless it had a substantial and injurious effect or influence in determining the jury's verdict.'"[10]

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9. *United States v. Armstrong*, 619 F.3d 380, 383 (5th Cir. 2010).

10. *Id.* (quoting *United States v. Harms*, 442 F.3d 367, 375 (5th Cir. 2006)).

We "allow[] summary witness testimony in 'limited circumstances' in complex cases," but have "repeatedly warned of its dangers."[11] "While such witnesses may be appropriate for summarizing voluminous records, as contemplated by Rule 1006, rebuttal testimony by an advocate summarizing and organizing the case for the jury constitutes a very different phenomenon, not justified by the Federal Rules of Evidence or our precedent."[12] "In particular, 'summary witnesses are not to be used as a substitute for, or a supplement to, closing argument.'"[13]

"To minimize the danger of abuse, summary testimony 'must have an adequate foundation in evidence that is already admitted, and should be accompanied by a cautionary jury instruction.'"[14] "Moreover, '[f]ull cross-examination and admonitions to the jury minimize the risk of prejudice.'"[15]

i. Summary Witnesses in General

Baker claims that, in general, summary witness testimony is inadmissible. He argues that summary

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11. *Id.* at 385 (quoting *United States v. Nguyen*, 504 F.3d 561, 572 (5th Cir. 2007)).

12. *Id.* (quoting *United States v. Fullwood*, 342 F.3d 409, 414 (5th Cir. 2003)).

13. *Id.*

14. *Id.* (quoting *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir. 2001)).

15. *Id.* (quoting *Bishop*, 264 F.3d at 547).

witnesses lack personal knowledge of the matter to which they are testifying, so Rule 602 of the Federal Rules of Evidence prohibits that type of testimony. He also contends that, because Rule 1006, which governs summaries, is located within Article X of the Rules that govern "writings and recordings"—and not "witnesses"—Rule 1006 does not allow live summary witnesses.

Regrettably, Baker does not cite *United States v. Armstrong*, the key Fifth Circuit case that refutes these arguments. Contrary to Baker's contention that summary witnesses are inadmissible, this circuit expressly allows summary witnesses to summarize voluminous records in complex cases.[16]

ii. Agent Callender's Testimony

The next issue is whether Agent Callender's testimony permissibly summarized the voluminous evidence, or impermissibly "organiz[ed] the case for the jury" or served as a "substitute" for closing argument.[17]

Baker contends that Agent Callender's testimony was "wholly argumentative," drew inferences for the jury, and impermissibly summarized the prosecutor's closing argument. Baker flags several parts of Agent Callender's testimony as objectionable: (1) Agent Callender read an email in which Raffle indicates that Baker had approved adding DiscoCare employees to the ArthroCare payroll;

16. *Id.*

17. *See id.*

(2) the prosecutor asked Agent Callender whether a letter in an employee's file was "consistent or inconsistent" with ArthroCare's organizational charts; (3) testimony about a conference call at which Gluk discussed a "small success fee" paid to DiscoCare and subsequent emails showing a related $10 million payment to DiscoCare; (4) Agent Callender's discussion of emails that Baker had sent to himself containing his monthly stock portfolio; and (5) Agent Callender's testimony about particular exhibits that corresponded to the counts listed on a demonstrative chart. Baker describes this testimony as "highlight[ing] key pieces of prosecution evidence," "walk[ing] through the charges count by count," and "indistinguishable from a closing argument."

The government counters that most of Agent Callender's testimony was not "summary witness" testimony, but rather was about exhibits that were being admitted during his testimony. The government also argues that the large number of documents and the complexity of the case justified the use of a summary witness.

When Agent Callender began testifying, the government introduced twenty-one new exhibits, each of which was admitted. Much of his testimony consisted of reading the contents of those exhibits aloud. Baker's specific objections are primarily to the parts of Agent Callender's testimony that introduced those new exhibits. But, this type of testimony is not summary testimony.[18]

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18. *See United States v. Castillo*, 77 F.3d 1480, 1499 (5th Cir. 1996) ("[T]he witness may testify to facts that were 'personally

In contrast, Agent Callender's testimony that tied specific, already-admitted exhibits to the substantive indictment counts listed on a demonstrative chart is summary testimony. Such testimony is permissible in complex cases with voluminous evidence. Contrary to Baker's contention that this was not a complex case, channel stuffing is a relatively complicated type of fraud. The jury heard seven days of testimony; there were 15 charges; and the district court stated that it was "a very complicated case." The evidence was also voluminous. The government introduced 193 exhibits and Baker introduced 87. Agent Callender gave a "rough estimate" that the investigation involved "between three and seven million" documents.

A review of the testimony shows that, although Agent Callender highlighted some key pieces of evidence, the testimony did not draw inferences for the jury, was not "wholly argumentative," and did not serve as a substitute for closing argument.[19] Rather, the testimony consisted of reading the contents of exhibits and sorting through the evidence to show how the documents related to each other and to the charges in the indictment.[20] This type of

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experienced' by him, even though this testimony 'bolsters' the government's other evidence.").

19. *See United States v. Echols*, 574 F. App'x 350, 356 (5th Cir. 2014) ("[The summary witness] only succinctly referenced patients' and doctors' testimony to remind the jury which witnesses the documentary evidence related to and said virtually nothing about the testimony of the government's principal trial witnesses.").

20. Here is one representative example:

testimony is different from the testimony that this circuit has excluded, such as allowing a case agent "to recap a significant portion of the testimony already introduced by the Government" during a rebuttal case,[21] putting on a summary witness "before there [was] any evidence admitted for the witness to summarize,"[22] or using a summary witness to "merely [] repeat or paraphrase the in-court testimony of another as to ordinary, observable facts . . . ."[23] We conclude that Agent Callender's testimony was permissible.

To the extent that Agent Callender's testimony went too far, all three curatives were present: (1) the testimony had an adequate foundation in the evidence already admitted; (2) the district court gave the jury a limiting instruction about summary evidence generally; and (3) Baker's counsel cross-examined Agent Callender.[24]

> Q. Can we take a look at Count 5? Can you tell the jury about what government exhibits relate to Count 5?
>
> A. Count 5 relates to an email from Mike Gluk to Mike Baker, who were both in Texas, and it was routed through ArthroCare's servers in California. And the e-mail was sent March 20, 2008. It's Exhibit 379.
>
> Q. All right. And that's been put into evidence, correct?
>
> A. It has.

21. *Fullwood*, 342 F.3d at 412-13.

22. *United States v. Griffin*, 324 F.3d 330, 348-49 (5th Cir. 2003).

23. *Castillo*, 77 F.3d at 1499-1500.

24. *Armstrong*, 619 F.3d at 385.

These minimized the risk of prejudice, so any error was harmless.[25]

B. Brian Simmons's SEC Deposition Testimony

In 2010, the SEC deposed Brian Simmons, ArthroCare's former controller, in its civil investigation of the company. At the first trial, Baker sought to subpoena Simmons, but Simmons refused to testify, asserting his Fifth Amendment right against self-incrimination. Baker and Gluk sought to admit Simmons's SEC deposition testimony under Rule 804(b)(1). In a written order, the district court excluded the testimony.

At the second trial, after Raffle, Applegate, and Gluk testified that Simmons had participated in the fraud at ArthroCare,[26] Baker again subpoenaed Simmons. But Simmons refused to testify on Fifth Amendment grounds, and Baker again sought to admit excerpts of Simmons's SEC deposition testimony. Baker proffered excerpts of that testimony, in which Simmons (1) denied wrongdoing and awareness of improper activities at ArthroCare and (2) stated that ArthroCare's audit committee and outside auditor, PricewaterhouseCoopers, were aware of a "bill-and-hold" practice for ArthroCare's sales to DiscoCare. The district court, referencing its order in the first trial, again excluded the testimony.

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25. *See United States v. Spalding*, 894 F.3d 173, 186 (5th Cir. 2018).

26. Simmons was an unindicted co-conspirator.

Appendix D

Rule 804(b)(1) provides exceptions to the rule against hearsay for "former testimony" of witnesses who are unavailable. It provides:

> **(b)** . . .
>
> **(1) Former Testimony**. Testimony that:
>
> > **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
> >
> > **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.[27]

Simmons's deposition testimony contains hearsay and his invocation of the Fifth Amendment made him unavailable.[28] The issues therefore are (1) whether the DOJ and the SEC are the "same party" or "predecessors in interest," and (2) if so, whether the SEC, in its civil investigation of ArthroCare, had both the opportunity and a similar motive to the DOJ in developing Simmons's testimony.

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27. FED. R. EVID. 804(b)(1).

28. *Id.* R. 804(a)(1).

We review the district court's exclusion of the testimony for abuse of discretion.[29] We conclude that the SEC and the DOJ were not the same party for 804(b) purposes under these circumstances. But even if the agencies were the same party, they did not have sufficiently similar motives in developing Simmons's testimony.

1. Same Party

This court has not decided whether the SEC and the DOJ are the same party for 804(b) purposes.[30] The case law on this issue is limited, and no court has expressly held that the SEC and the DOJ are the same party.[31] Courts sometimes proceed directly to the "similar motive" inquiry.[32]

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29. *United States v. Kimball*, 15 F.3d 54, 55 (5th Cir. 1994).

30. Neither party contends that the SEC was the DOJ's "predecessor in interest" at Simmons's deposition.

31. *See United States v. Sklena*, 692 F.3d 725, 731 (7th Cir. 2012) ("There is very little law on the question whether two government agencies, or as in this case the United States and a subsidiary agency, should be considered as different parties for litigation purposes, or if they are both merely agents of the United States.").

32. *See, e.g., United States v. Whitman*, 555 F. App'x 98, 103 (2d Cir. 2014) (summary order) ("Assuming arguendo that the SEC lawyers and the trial prosecutors can be treated as the same party, the district court reasonably concluded that they had differing motivations to develop testimony by cross-examination."); *see also United States v. Kennard*, 472 F.3d 851, 855 (11th Cir. 2006) (not addressing the "same party" issue and instead addressing only whether the SEC and the DOJ had similar motives).

Baker contends that the two agencies are the same party because they are both Executive Branch agencies. He relies primarily on *United States v. Sklena*, 692 F.3d 725, 730-32 (7th Cir. 2012), which held that the Commodity Futures Trading Commission ("CFTC") and the DOJ were the same party for 804(b) purposes. He also relies on *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980), in which we held that different government agencies were the same party for res judicata purposes.

In response, the government cites *United States v. Martoma*, 12-Cr. 973, 2014 U.S. Dist. LEXIS 152926, 2014 WL 5361977, at *3-5 & n.5 (S.D.N.Y. Jan. 8, 2014), in which the district court considered whether an unavailable co-conspirator's prior SEC deposition was admissible at a later criminal trial. The *Martoma* court held that the SEC and DOJ were not the same party for 804(b) purposes.[33]

In *Sklena*, the Seventh Circuit relied on the significant control that the DOJ exercised over the CFTC, including the CFTC's statutory mandate to report to the DOJ.[34] The court reasoned that the "statutory control mechanism suggests to us that, had the Department wished, it could have ensured that the CFTC lawyers included questions of interest to the United States when they deposed [the non-testifying codefendant]."[35] The court's holding also

33. *United States v. Martoma*, 12-Cr. 973, 2014 U.S. Dist. LEXIS 152926, 2014 WL 5361977, at *3-5 & n.5 (S.D.N.Y. Jan. 8, 2014).

34. 692 F.3d at 731-32 (citing 7 U.S.C. § 13a-1(a), (f)-(g)).

35. *Id.* at 732.

relied on the agencies' "closely coordinated roles on behalf of the United States in the overall enforcement of a single statutory scheme."[36] The *Sklena* court concluded that "[f]unctionally, the United States is acting in the present case through both its attorneys in the Department and one of its agencies, and we find this to be enough to satisfy the 'same party' requirement of Rule 804(b)(1)."[37]

Here, the district court determined that the SEC and the DOJ were not the same party because the SEC conducted an independent investigation of ArthroCare and its employees and independently pursued its own criminal and civil actions. On appeal, Baker disagrees with that conclusion. He points to several emails between prosecutors and SEC investigators describing telephone calls, meetings, and "working together." According to Baker, these show that the SEC "was functionally working as part of the prosecution team."

In response, the government points out that (1) the SEC did not participate in any interviews conducted by the DOJ; (2) the DOJ was not present at any of the SEC's depositions; (3) an SEC attorney was not cross-designated or assigned to the prosecution team; and (4) the DOJ did not provide the SEC with materials from its investigation. In an order denying the designation of the SEC as part of the prosecution team at the first trial, the district court concluded that "[w]hile the SEC provided some material to the Government—which the Government, in turn,

36. *Id.*

37. *Id.*

has provided to Defendants—the SEC's investigation pre-dated and was independent from the Government's investigation, and there was no overlap of personnel or direction." The government also notes that when the DOJ formally requested information from the SEC, the SEC faced restrictions responding to that request and limited the information it provided to the DOJ.

Although there was some cooperation between the two agencies, it was not extensive enough for the SEC and the DOJ to be deemed the same party. Baker's contention that the SEC and the DOJ coordinated closely is undermined by (1) the telephone calls and meetings Baker cites occurred after Simmons's February 2010 deposition and (2) the district court's specific findings that the SEC had been uncooperative and limited the information it provided to the DOJ.

Sklena does not mandate a different result. Unlike the CFTC, the SEC is not statutorily required to report to the DOJ, nor must the two agencies cooperate to enforce the same statutory scheme. The SEC is an independent agency with its own litigating authority.[38]

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38. In contrast to the CFTC, "the SEC has 'complete autonomy in civil prosecutions' and is not required to report on its activities to the USAO." *Martoma*, 2014 U.S. Dist. LEXIS 152926, 2014 WL 5361977, at *4 & n.5 (quoting *SEC v. Robert Collier & Co. Inc.*, 76 F.2d 939, 940 (2d Cir. 1935)); *see United States v. Klein*, 16-cr-422, 2017 U.S. Dist. LEXIS 19943, 2017 WL 1316999, at *6 (S.D.N.Y. Feb. 2, 2017) ("In contrast [to *Sklena*,] the SEC and DOJ are independent executive agencies and there is no indication whatsoever that they coordinated their investigations here."); *see also* 15 U.S.C. § 77t

2. Opportunity and Similar Motive

Even if the SEC and the DOJ were deemed to be the same party, they did not share a sufficiently similar motive in developing Simmons's testimony. When, as here, testimony in a prior civil proceeding is being offered against the government in a subsequent criminal proceeding, this court considers "(1) the type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties."[39]

At the first trial, the district court excluded the testimony, ruling that the SEC and the DOJ did not have sufficiently similar motives. At the second trial, the district court referenced its previous order and again excluded Simmons's testimony. The court added that there was "no question" that Simmons was "involved in a conspiracy if there was a conspiracy," and that he would have had

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("Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, . . . the Commission may, in its discretion, bring an action in any district court of the United States . . . .").

39. *United States v. McDonald*, 837 F.2d 1287, 1292 (1988) (quoting *United States v. Feldman*, 761 F.2d 380, 385 (7th Cir. 1985)); *see also* WRIGHT & MILLER, 30B FED. PRAC. & PROC. § 6974 (2018 ed.) ("The 'similar motive' sentiment can be boiled down to a call for trial courts to analyze: (i) the issue or issues to which the testimony was addressed, (ii) the degree to which those issues mattered to the ultimate resolution of the proceeding; and then (iii) compare those variables across the two proceedings.").

"to be deaf, blind and dumb in his position not to see it." The court concluded that (1) "the SEC ha[d] been totally noncooperative in this criminal case from the beginning, declined to share any information to the Department of Justice [or] counsel in this case for the defense" and would not "provide its investigators to cooperate in any way"; (2) The SEC's civil investigation of ArthroCare was "totally different from a criminal trial"; and (3) the court's review of the SEC deposition testimony showed no "basis for any cross-examination."

Even if we assumed that the SEC and the DOJ are the same party, the agencies did not have sufficiently similar motives. First, the stakes and burdens of proof were different: The SEC was in the discovery phase in relation to potential civil enforcement actions, whereas the DOJ was investigating for potential criminal involvement after a grand jury indictment. Second, the focuses and motivations of the investigations were different: The SEC was likely developing a factual background regarding wrongdoing at the company generally, whereas the DOJ would have been gathering evidence to convict specific individuals.[40] Third, the lack of cross-examination shows

40. *See Martoma*, 2014 U.S. Dist. LEXIS 152926, 2014 WL 5361977, at *4 ("[T]he purpose of a deposition in a civil case or an administrative investigation is to develop investigative leads and to 'freeze the witness['s] . . . story.' . . . The SEC lawyers taking [the co-conspirator's] deposition were not attempting to persuade a jury to convict, or even attempting to persuade a grand jury to indict. Instead, the [co-conspirator's SEC deposition] was part of an effort to 'develop the facts to determine if an [enforcement action] was warranted.'" (quoting *DiNapoli*, 8 F.3d at 913)).

the agencies' different trial strategies: The SEC deposition excerpts show no sign of cross-examination or additional follow-up questions after Simmons denied his involvement and that he had any conversations with Baker. In contrast, for the reasons we have already explained, the agencies were not coordinating their activity to a degree that would have led the SEC lawyer to cross-examine Simmons like a criminal prosecutor would have.[41]

The district court did not abuse its discretion in excluding Simmons's deposition testimony.

C. The "Obtain Money or Property" Element of Wire Fraud

Baker next contends that the term "obtain money or property" in the wire fraud statute, 18 U.S.C. § 1343, requires the government to plead and prove that Baker "intended to obtain money or property from deceived investors." This challenge to the jury instructions presents a question of statutory interpretation, so we review it de

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41. *See Whitman*, 555 F. App'x at 103 ("The rest of the examination consisted of general inquiries about his relationship to [the defendant] and his work at [the company], many of which elicited long, descriptive answers from [the unavailable co-conspirator] that, unsurprisingly, asserted innocence. A prosecutor seeking to rebut a trial defense would have pressed the witness, but the SEC examiner rarely did, for the most part allowing [the co-conspirator's testimony to stand unquestioned."); *McDonald*, 837 F.2d at 1293 (although the DOJ and the former party in a civil action had "similar status in their respective claims, we find that the trial strategies were not sufficiently similar" for admission under Rule 804(b)(1)).

novo.[42] We also review de novo Baker's contention that the indictment did not charge the elements of the offense.[43]

Baker asked for a jury instruction defining a "scheme to defraud" as one "intended to obtain money or property from the victim by fraudulent means," and requiring that the defendant intended to "acquire[] some money or property that the victim gives up." The district court denied that request. Instead, the district court's jury instructions on wire fraud required, in relevant part:

> That the defendant knowingly devised, or intended to devise, any scheme to defraud, that is to deceive investors about ArthroCare Corporation's financial condition[.]
>
> . . .
>
> A "scheme to defraud" means any plan, pattern, or course of action intended to deprive another of money or property, *or bring about some financial gain to the person engaged in the scheme*.

After the jury convicted Baker, he moved for a judgment of acquittal. He reasserted his objection to the definition of a "scheme to defraud," focusing on the "or bring about some financial gain to the person engaged in the scheme" language. The district court denied the

42. *United States v. Harris*, 740 F.3d 956, 964 (5th Cir. 2014).

43. *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004).

motion, concluding that "the focus" of a scheme to defraud is on "depriving the victim of property for some benefit" and that there is "no requirement that a defendant must directly gain or possess [the victim's] property." The court explained that "substantial evidence was presented to show the misleading and fraudulent statements made by Baker induced investment in ArthroCare," and that "a rational trier of fact could have found the goal of the scheme . . . was to deprive investors of money they otherwise would have possessed."

On appeal, Baker challenges this instruction on two grounds. First, he contends that the wire fraud statute imposes a "mirror image" requirement. For support, he relies on the Supreme Court's decision in *Skilling v. United States*, which states that under "traditional" fraud, "the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other.'"[44]

Although Baker describes that statement from *Skilling* as its holding, a review of the case proves otherwise. In context, the Court was comparing "traditional" fraud with honest-services fraud:

> *Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other*, . . . the honest-services theory targeted corruption

44. *Skilling v. United States*, 561 U.S. 358, 400, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010).

> that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment.[45]

Skilling did not impose a "mirror image" requirement for wire fraud. As the district court explained, "*Skilling* merely commented that traditional fraud features a bilateral relationship—one between the offender and the victim—while the honest-services theory concerns a trilateral relationship between bribe-giver, bribe-recipient, and betrayed party. . . . *Skilling* did not interpret wire fraud or securities fraud to require proof the defendant sought to personally acquire money or property from the victim." Moreover, no court has held that a "mirror image" transaction is necessary.[46]

Baker next points to the language of § 1343, which provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, . . . transmits or causes to be transmitted by means of wire, . . . any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or

45. *Id.* (emphasis added).

46. *United States v. Hedaithy*, 392 F.3d 580, 601 (3d Cir. 2004); *see United States v. Finazzo*, 850 F.3d 94, 105-07 (2d Cir. 2017).

> artifice, shall be fined . . . or imprisoned not more than 20 years, or both.[47]

Baker compares the statute's "obtaining money or property" language with the jury instruction's definition of a "scheme to defraud" that required that the scheme intended to "bring about some financial gain to the person engaged in the scheme." According to Baker, the instruction did not require the government to prove that he intended to obtain property from a victim, but instead allowed for a conviction based on a scheme that was only intended to bring about a financial gain to Baker.

Baker relies on *Sekhar v. United States*, a case interpreting the Hobbs Act, which held that "a defendant must pursue something of value from the victim that can be exercised, transferred, or sold . . . ."[48] However, "[u]nlike the mail fraud statute, the Hobbs Act expressly requires the Government to prove that the defendant 'obtain[ed] property from another.'"[49]

He also relies on *United States v. Honeycutt*, a case interpreting the federal forfeiture statute, which held that a defendant may not "be held jointly and severally liable for property that his co-conspirator derived from a

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47. 18 U.S.C. § 1343.

48. 570 U.S. 729, 736, 133 S. Ct. 2720, 186 L. Ed. 2d 794 (2013).

49. *Hedaithy*, 392 F.3d at 602 n.21; *see Finazzo*, 850 F.3d at 107 ("[I]n contrast to the Hobbs Act extortion provision, the mail and wire fraud statutes do not require a defendant to obtain or seek to obtain property . . . .").

crime but that the defendant himself did not acquire."[50] But *Honeycutt* did not consider the wire fraud statute and therefore did not broaden the Court's interpretation of that offense.[51]

Section 1343 does not require an intent to obtain property directly from a victim. In *United States v. Hedaithy*, the Third Circuit considered a similar assertion. There, the defendants argued that a scheme must be "designed to actually 'obtain' the victim's property." The court rejected that argument on several grounds:

> We reject [that argument], primarily because it is inconsistent with the Supreme Court's decision in *Carpenter [v. United States*, 484 U.S. 19, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987)]. Although the defendants in *Carpenter* clearly "obtained" the Journal's confidential business information, this was not the conduct, according to the Court, that constituted the mail fraud violation. Rather, the conduct on which the Court focused was the act of fraudulently depriving the Journal of the exclusive use of its information.

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50. *Honeycutt v. United States*, 137 S. Ct. 1626, 1630, 198 L. Ed. 2d 73 (2017).

51. *See Porcelli v. United States*, 404 F.3d 157, 162 (2d Cir. 2005) ("The fact that the Hobbs Act and the mail and wire fraud statutes contain the word 'obtain' does not necessitate imposing [a] construction of a wholly separate statute onto this Court's pre-existing construction of the mail fraud statute.").

Furthermore, Defendants' argument misconstrues the language of other relevant decisions. For example, they rely upon the Supreme Court's statement in *Cleveland* [*v. United States*] that "[i]t does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." [531 U.S. 12, 15, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000)]. The context in which this statement was written, however, clarifies that the Court was not setting out a requirement that a mail fraud scheme must be designed to "obtain" property. Rather, this language reflects the Court's conclusion that a victim has been defrauded of "property," within the meaning of the mail fraud statute, only if that which the victim was defrauded of is something that constitutes "property" in the hands of the victim.

Defendants also insist that their interpretation of the mail fraud statute is supported by the Supreme Court's holdings, in *McNally* and *Cleveland*, that § 1341's second clause—"or for obtaining money or property by means of false or fraudulent promises"—"simply modifies" the first clause—"any scheme or artifice to defraud." *McNally*, 483 U.S. at 359, 107 S. Ct. 2875; *Cleveland*, 531 U.S. at 26, 121 S. Ct. 365. Defendants construe this language as meaning that any violation of the mail fraud statute must

> involve a scheme for obtaining the victim's property. We do not read *McNally* or *Cleveland* as providing any such requirement. . . . In neither case, . . . did the Court hold that a mail fraud violation requires that the second clause of § 1341 be satisfied.[52]

In addition to the Third Circuit's persuasive rejection of the argument that Baker advances, this court, in *United States v. McMillan*, held that an indictment sufficiently charged mail fraud in the context of a scheme to "defraud the victim insofar as victims were left without money that they otherwise would have possessed."[53] This court also explained that the "issue is whether the victims' property rights were affected by the misrepresentations."[54]

The jury instructions here allowed for a conviction if Baker intended to deceive the victims out of their money for his own financial benefit. The evidence at trial showed that Baker did just that: (1) He made false statements to investors and potential investors to induce them to hold onto or buy ArthroCare stock; (2) he knew the statements did not accurately reflect ArthroCare's business model or revenue projections; and (3) the scheme was intended to benefit Baker via bonuses and appreciation of his own stock options. By inducing investments in ArthroCare, the scheme affected the victims' property rights by wrongfully

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52. *Hedaithy*, 392 F.3d at 601-02.

53. 600 F.3d 434, 449 (5th Cir. 2010).

54. *Id.*

leaving them "without money that they otherwise would have possessed."[55]

The jury instructions were not erroneous.

D. Accomplice and Co-conspirator Liability

Baker was charged as both a principal and an aider or abettor under 18 U.S.C. § 2 for the wire and securities fraud charges. The district court's jury instructions on "Aiding and Abetting (Agency)" included some general language about accomplice liability, then stated:

> You must be convinced that the Government has proved each of the following beyond a reasonable doubt:
>
> *First*: That the offenses alleged in Counts Two through Twelve were committed by some person;
>
> *Second*: That the defendant associated with the criminal venture;
>
> *Third*: That the defendant purposefully participated in the criminal venture; and
>
> *Fourth*: That the defendant sought by action to make that venture successful.

55. *McMillan*, 600 F.3d at 449.

> "To associate with the criminal venture" means that the defendant shared the criminal intent of the principal. This element cannot be established if the defendant had no knowledge of the principal's criminal venture.
>
> "To participate in the criminal venture" means that the defendant engaged in some affirmative conduct designed to aid the venture or assist the principal of the crime.

This instruction tracked the Fifth Circuit Pattern Instruction on accomplice liability.[56] Baker challenges this instruction as lacking an express "advance knowledge" instruction based on *Rosemond*, a Supreme Court decision addressing the federal aiding and abetting statute's mens rea requirements.

Although Baker preserved that objection and briefed the *Rosemond* issue on appeal, we need not address it because the jury also convicted Baker as a co-conspirator. In addition to the charges for aiding and abetting wire and securities fraud, Baker was also charged with and convicted of "Conspiracy to Commit Wire Fraud and Securities Fraud."[57]

"In *Pinkerton*, the Supreme Court held that conspirators are criminally liable for substantive crimes committed by other conspirators in furtherance of the

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56. Fifth Circuit Pattern Crim. Jury Instructions § 2.4.

57. ROA.3885.

conspiracy, unless the crime 'did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.'"[58] "A substantive conviction cannot be upheld solely under *Pinkerton* unless the jury was given a *Pinkerton* instruction."[59]

Here, the jury (1) was properly instructed on the *Pinkerton* theory of co-conspirator liability and (2) convicted Baker on a separate charge for conspiracy to commit wire and securities fraud.[60] The evidence at trial showed that Baker instructed others to participate in the channel-stuffing scheme and approved the statements covering it up. The substantial evidence of Baker's involvement establishes that the fraudulent acts were reasonably foreseeable by him and done in furtherance of the conspiracy. We therefore affirm Baker's conviction on the wire and securities fraud charges under the *Pinkerton* theory of co-conspirator liability and do not address Baker's challenge to the jury instructions under *Rosemond*.[61]

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58. *United States v. Gonzales*, 841 F.3d 339, 344 n.4 (5th Cir. 2016) (quoting *Pinkerton v. United States*, 328 U.S. 640, 647-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1948)).

59. *United States v. Alaniz*, 726 F.3d 586, 614 (5th Cir. 2013) (quotation omitted).

60. ROA.3875-76.

61. *See United States v. Saunders*, 605 F. App'x 285, 288-89 (5th Cir. 2015) ("We will assume that the jury charge on aiding and abetting is inadequate under *Rosemond*. [The defendant's] rights,

E. Baker's "Other" Objections

Baker contends that, in addition to the purported *Rosemond* error, the jury instructions were flawed in several other ways. Baker did not object to these issues in the district court, so they are reviewed for plain error.[62] None of these challenges has merit under the plain-error test.

First, Baker challenges the instruction that: "If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct." Baker contends that this statement "is no longer legally accurate after *Rosemond*," and that the instruction implied that he could be liable for the crimes of ArthroCare's employees who were "acting under" his direction.

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however, were not affected because the jury was given a correct *Pinkerton* instruction. . . . Given the copious evidence under the *Pinkerton* theory, any inadequacy in the district court's aiding and abetting instruction did not affect [the defendant's] substantial rights."); *see also United States v. Hare*, 820 F.3d 93, 105 (4th Cir.), *cert. denied*, 137 S. Ct. 224, 196 L. Ed. 2d 173 (2016) (same); *United States v. Stubbs*, 578 F. App'x 114, 118 n.6 (3d Cir. 2014) ("Since we find the evidence sufficient to convict [the defendant] under a *Pinkerton* theory of vicarious liability, we need not decide whether there was sufficient evidence of [the defendant's] advance knowledge under *Rosemond*.").

62. *United States v. Fuchs*, 467 F.3d 889, 901 (5th Cir. 2006).

This instruction prefaced the formal elements of accomplice liability. Given that context, the instruction simply set out the basic principle of accomplice liability and was followed by a formal four-part definition. This instruction was not erroneous.[63]

Next, Baker contends that the *Pinkerton* instruction was improper, noting that *Pinkerton* is controversial and has been criticized by courts. He also contends that "there was no evidentiary basis" for the *Pinkerton* instruction. But this circuit has repeatedly applied *Pinkerton*,[64] and the evidence at trial—including testimony from three co-conspirators—provided a sufficient basis for the instruction.

Finally, Baker argues that the court's "reckless indifference" instruction was improper because it conflicted with the wire fraud statute's required "specific intent to defraud."[65] But we have approved such instructions.[66] The "reckless indifference" instruction was not erroneous.

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63. *See Kay*, 513 F.3d at 463 ("When reviewing the jury's understanding of the charge, we look to the total context of the trial, with the benefit of arguments by all counsel.").

64. *E.g.*, *Gonzales*, 841 F.3d at 351-53.

65. The district court instructed the jury that a representation is false if it "is made with reckless indifference as to its truth or falsity" and that "[r]eckless indifference means the omission or misrepresentation was so obvious that the defendant must have been aware of it."

66. *See United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993) ("'Reckless indifference' has been held sufficient to satisfy § 1001's scienter requirement so that a defendant who deliberately avoids learning the truth cannot circumvent criminal sanctions.").

Appendix D

III. Conclusion

Baker's conviction is, in all respects, AFFIRMED.