No. 20-___

IN THE

Supreme Court of the United States

SAMIR KHOURY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Court of Appeals may review, on petition for a writ of mandamus, the denial of a criminal defendant's motion to dismiss the indictment on speedy-trial grounds, or whether, as the Fifth Circuit held below, the ultimate availability of post-judgment appellate review categorically bars mandamus relief—even where, as here, the District Court concludes that a criminal defendant has suffered substantial, actual prejudice as a result of post-indictment delay in bringing him to trial.

PARTIES TO THE PROCEEDING

Petitioner Samir Khoury was the defendant in the District Court and the mandamus petitioner in the Fifth Circuit.

Respondent United States of America was the plaintiff in the District Court and the respondent in the Fifth Circuit.

STATEMENT OF RELATED CASES

- *United States of America* v. *Samir Khoury*, No. 20-20126, United States Court of Appeals for the Fifth Circuit. Judgment entered May 12, 2020.
- *United States of America* v. *Samir Khoury*, No. 08-CR-0763, United States District Court for the Southern District of Texas. No judgment entered; orders under review entered December 6, 2019, and February 24, 2020.
- *United States of America* v. *Samir Khoury*, No. 17-MC-2553, United States District Court for the Southern District of Texas. No judgment entered.
- *Sealed Appellee 1* v. *Sealed Appellant 1*, No. 15-98003, United States Court of Appeals for the Fifth Circuit. Judgment entered May 20, 2015.
- *United States of America* v. *Samir Khoury*, No. 14-MC-2884, United States District Court for the Southern District of Texas. Judgment entered February 19, 2015.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samir Khoury respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The dispositive order entered by the Fifth Circuit (App. 1a) is unreported, as is the Fifth Circuit's subsequent order clarifying the basis for that order (App. 2a–4a). The opinions of the United States District Court for the Southern District of Texas (App. 5a–23a) are unreported.

JURISDICTION

On May 12, 2020, the Fifth Circuit entered a dispositive order summarily denying Mr. Khoury's petition for a writ of mandamus. App. 1a. The Fifth Circuit clarified that order on June 16, 2020, App. 2a–4a, and then, on July 13, 2020, denied Mr. Khoury's timely petition for panel rehearing and rehearing en banc, App. 29a.

Pursuant to this Court's order of March 19, 2020, the time for filing this petition was extended to 150 days from the date of that denial.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment's Speedy Trial Clause provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ." U.S. Const. amend. VI.

The All Writs Act, 28 U.S.C. § 1651(a), states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

INTRODUCTION

This case presents a question of paramount importance to criminal defendants: whether they can be categorically denied mandamus review of serious error affecting the most fundamental of constitutional rights. In denying the mandamus petition below, the Fifth Circuit applied a *per se* rule that a criminal defendant may *never* obtain pre-judgment mandamus review of the denial of his motion to dismiss on speedy-trial grounds, because of the ultimate availability of post-sentence appellate review. In doing so, the Fifth Circuit not only read out of *Cheney* v. *United States District Court*, 542 U.S. 367 (2004), the principle that an alternative remedy precludes mandamus relief only if it is an "adequate" one, *id.*, at 380–81, but also ignored this Court's longstanding command that mandamus petitions be assessed flexibly and in light of all the facts and exigencies of each individual case. As explained below, the analysis that led the Fifth Circuit to this extreme result substituted the standards governing *appealability* in place of the requirements for *mandamus*.

This case is an ideal vehicle for restoring mandamus as a necessary safety valve for promptly correcting serious errors in the criminal justice system. Mandamus, an extraordinary remedy, should be limited to extraordinary cases. This is just such a case, presenting extraordinary facts and exigencies. The government indicted Samir Khoury under seal in 2008 for conduct allegedly occurring in the 1980s. It kept the

Indictment sealed for nearly 10 years, despite knowing Mr. Khoury's exact location and the identity of his counsel. The government refused to respond to his counsel's inquiries regarding Mr. Khoury's status, and resisted his applications to obtain notice of any sealed charges by arguing that an indictment was "not known to exist."

The District Court below found that the decade of pretrial delay had resulted in the loss of at least a dozen defense witnesses, impaired memories of other witnesses, eroded Mr. Khoury's ability to testify credibly in his own defense, and prevented the preservation of documentary evidence. Despite recognizing that three of four *Barker* factors favored Mr. Khoury, the District Court reasoned that his supposed s*uspicion* that he had been charged—the government's representations to the contrary notwithstanding—somehow imposed a duty upon Mr. Khoury to bring himself to trial.

The Fifth Circuit's categorical approach to mandamus would force Mr. Khoury, and other defendants to whom it will be applied, to endure unfair proceedings and plainly unconstitutional convictions in order to gain the right to plead the facts and exigencies of their cases to an appellate court. This Court should grant certiorari to prevent these unreasoned and unreasonable outcomes.

STATEMENT OF THE CASE

A. Legal Framework

1. The Speedy-Trial Clause

The Sixth Amendment promises all criminal defendants a speedy trial. To give substance to that guarantee, this Court, in *Barker* v. *Wingo*, 407 U.S. 514

(1972), announced a four-part test for assessing whether an accused's right to a speedy trial had been infringed. Courts assessing such claims must consider "[(1)] whether delay before trial was uncommonly long, [(2)] whether the government or the criminal defendant is more to blame for that delay, [(3)] whether, in due course, the defendant asserted his right to a speedy trial, and [(4)] whether he suffered prejudice as the delay's result." *Doggett* v. *United States*, 505 U.S. 647, 651 (1992) (citing *Barker*, 407 U.S., at 530).

There is no rigid formula for analyzing or balancing the *Barker* factors, but this Court's decisions do establish a number of guardrails to guide courts' analyses.

First, the inquiry is individualized and depends greatly on the facts of each case. See *Barker*, 407 U.S., at 522 ("[t]he right of a speedy trial is necessarily relative" and "depends upon circumstances" (citations and internal quotation marks omitted)).

Second, courts' assessment of governmental diligence must take into account not just the facts at a single moment in time (*e.g.*, the moment of the defendant's indictment or his motion to dismiss that indictment) but also how those facts evolve over time. Consequently, a justification that suffices to defeat a speedy-trial challenge shortly after a defendant's indictment can lose its persuasive force as time passes and the facts (or assumptions) underlying that justification are called into question or disproved. See *Doggett*, 505 U.S., at 652–53 ("For six years, the Government's investigators made no serious effort to test their progressively more questionable assumption that Doggett was living abroad . . ."); cf. *id.*, at 657 ("Thus, our toleration of [governmental] negligence varies inversely with its protractedness").

Finally, although a defendant may always seek to prove actual prejudice to his defense (as Mr. Khoury has done here, App. 9a–10a), in cases where the first three *Barker* factors favor the accused, prejudice is presumed and the burden shifts to the government to "persuasively" rebut the presumption. *Doggett*, 505 U.S., at 656–58. This burden is nearly impossible to satisfy because "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.*, at 655; see also *id.*, at 654 n.4 ("[the government] has not, and probably could not have, affirmatively proved that the delay left [defendant's] ability to defend himself unimpaired").

Furthermore, courts in the Fifth Circuit must also presume prejudice to the defendant when pretrial delay exceeds five years. See, *e.g.*, *United States* v. *Bergfeld*, 280 F.3d 486, 491 (5th Cir. 2002) ("the five-year delay. . . entitles Bergfeld to a presumption of prejudice").

2. Pretrial Appellate Review of Speedy-Trial Determinations

In *United States* v. *MacDonald*, 435 U.S. 850 (1978), this Court held that "a pretrial order rejecting a defendant's speedy trial claim plainly lacks the finality traditionally considered indispensable to appellate review, that is, such an order obviously is not final in the sense of terminating the criminal proceedings in the trial court." *Id.*, at 856 (citation and internal quotation marks omitted).

The Court also considered whether collateral-order review was available for speedy-trial claims, ultimately concluding that it was not, because, "in the usual case," the question whether the defense has

been prejudiced by delay is "intertwined" with the facts to be adjudicated at trial. *Id.*, at 859.

MacDonald did not, however, address whether and in what circumstances a defendant might obtain review of a speedy-trial denial via a writ of mandamus.

3. The Writ of Mandamus

Although the Court has refused to impose "formal rules" to cabin the circumstances when mandamus relief may be granted, see *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943), it has established three criteria that deserving cases should meet:

> First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires. . . . Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney, 542 U.S., at 380–81 (alterations in original) (citations and internal quotation marks omitted).

"These hurdles, however demanding, are not insuperable, *id.*, at 381, and, while useful in informing an appellate court's discretionary decision whether to grant or refuse the writ, do not define the full universe of circumstances in which writ review may be granted, see 16 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 3934.1 (3d ed.) ("Courts have developed the extraordinary writs, chiefly mandamus, as an occasional and ad hoc device for permissive interlocutory appeal").

B. Factual and Procedural History

1. Samir Khoury

Samir Khoury is a native of Lebanon and resided there until he came to the U.S. to attend college in 1971; he became a naturalized U.S. citizen in 1976 while in graduate school. App. 52a. In 1977, he left the U.S. to work overseas for M.W. Kellogg and its successor entities (collectively, "Kellogg"), first as an employee and later as a consultant, helping the company secure construction and liquefied natural gas ("LNG") contracts in the Middle East, Africa, and Asia. App. 30a–31a, 52a–53a.

Given his ties to the Middle East and the geographic focus of his work, Mr. Khoury eventually decided to move there permanently, obtaining the necessary permits to live and work in the United Arab Emirates by early 2003. App. 57a–59a. Then, in 2004, Mr. Khoury "returned to Lebanon to live near his elderly parents, and he has resided in or near Beirut[,] Lebanon since that time." *United States* v. *Khoury*, No. 4:17-MC-2553, 2018 WL 2864413, at *1 n.2 (S.D. Tex. June 11, 2018).

2. The Government's Smearing of Mr. Khoury

In March 2004, Kellogg's successor company disclosed the existence of a Foreign Corrupt Practices Act ("FCPA") investigation of Nigerian LNG projects awarded to a joint venture in which it had participated. See Halliburton Co., SEC Form 10-K (March 8, 2004) at 54, *available at* https://content.edgar-online.com/ExternalLink/EDGAR/0000045012-04-000086.html?hash=2bd560dcaca34f73cee444b464934280fed3bc11e390c767bd4fb99f8aec6dec&dest=EXH4_15_TXT#

EXH4_15_TXT (last accessed Dec. 3, 2020). The investigation continued for at least eight years. In 2006, at the government's request, Mr. Khoury came to the U.S. to be interviewed. App. 53a. Since at least that time, both his place of residence and the identity of his attorney have been known to the government.

As a result of that investigation, Jack Stanley, Kellogg's former CEO, pleaded guilty in September 2008 to one count of conspiring to violate the FCPA in connection with certain LNG projects in Nigeria. App. 99a–103a. Stanley also pleaded guilty to a charge of conspiracy to receive "kickbacks" from an unindicted "LNG Consultant" on specified LNG projects. App. 103a–106a. According to the government's Factual Basis, Stanley "caused" Kellogg to award consulting contracts to the "LNG Consultant" and affiliated companies, and the "LNG Consultant" then "kicked-back" consulting fees to Stanley. App. 103a–105a.

The DOJ's description of the "LNG Consultant" in the Stanley plea identified Mr. Khoury in all but name, describing that unindicted co-conspirator as a dual-U.S./Lebanese citizen who worked for Kellogg and its successors as an employee from 1977 to 1988 and then as a consultant to those same companies, and worked for a "Lebanese Consulting Company" in connection with certain specified LNG projects. App. 83a, 85a–87a. No one other than Mr. Khoury fit that detailed profile.

During Mr. Stanley's plea hearing, the prosecutor referred to the LNG Consultant as a "*potential* defendan[t]" but declined the District Court's invitation to seal the proceedings following that revelation. App. 122a (emphasis added).

Within months, two other individuals were indicted for FCPA violations in connection with the Nigerian

LNG projects, *United States* v. *Tesler*, *et al.*, No. 09-cr-098, Doc. 1 (Indictment) (S.D. Tex. Feb. 17, 2009) (unsealed Mar. 5, 2009), and subsequently pleaded guilty. *Id.*, at Docs. 34, 23. Both were then residing overseas, but the prosecutors did not keep their indictment sealed.

3. The Government's Charging and "Pursuit" of Mr. Khoury

In November 2008, the government indicted Mr. Khoury under seal, charging him with one count of conspiracy to commit mail and wire fraud, 18 U.S.C. § 1349; seven counts of wire fraud in violation of 18 U.S.C. §§ 1343, 1346, and 2; and three counts of mail fraud in violation of 18 U.S.C. §§ 1341, 1346, and 2. See App. 30a–50a.

In the six years following the sealing of the Indictment, the government made only a single inquiry to other countries regarding Mr. Khoury: A May 2009 "Diffusion Notice" to 12 foreign countries, not including Lebanon. See App. 140a.[1] DOJ did nothing further until 2015, and it did not notify Lebanon that Mr. Khoury was a wanted person until after the Indictment was unsealed in 2018. App. 140a–141a.

In October 2014, undersigned counsel contacted DOJ prosecutors to ask if the investigation was closed as to Mr. Khoury. The prosecutors refused to respond to that inquiry and to questions regarding whether Mr. Khoury was the subject of ongoing investigative activity, sealed charges, or an arrest warrant. App. 144a–145a.

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[1] A Diffusion Notice is an alternative to an Interpol "Red Notice" and is used to obtain international cooperation in detaining a wanted subject.

4. The First Motion to Unseal and Dismiss

In light of that refusal, counsel filed in December 2014 a motion to unseal and dismiss the indictment that he surmised was pending under seal. ROA.20-20126.870.[2] The government protested that Mr. Khoury did not know, and had no right to know, whether charges were pending.[3] On February 19, 2015, the District Court denied without explanation Mr. Khoury's motion to unseal. App. 24a.

On appeal, the government argued again that any indictment "was not known to exist," and that review of Mr. Khoury's challenges was therefore premature.[4] On May 20, 2015, the Fifth Circuit granted the government's motion to dismiss the appeal.[5]

After Mr. Khoury's motion was denied, the government renewed its Diffusion Notice. See App. 141a (March 10, 2015 entries). The government took no other action until after the Indictment was unsealed. See *ibid.*

5. August 2015 *Briggs* Action

In August 2015, Mr. Khoury (proceeding as "John Doe") sought declaratory relief and expungement of the government's accusations against him in the

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[2] Citations prefaced by "ROA" refer to documents in the record on appeal to the Fifth Circuit.

[3] See*, e.g.*, App. 148a (Gov't Resp. to Mot.) ("[A]n individual lacks legal authority to require the government to confirm the existence or non-existence of under seal charges. . ."); App. 156a ("the defense [is] without knowledge of whether or not there's an indictment").

[4] *Sealed Appellee 1* v. *Sealed Appellant 1*, No. 15-98003, Doc. 00512997618, at 1, 3 (5th Cir. Apr. 8, 2015) (Motion by Sealed Appellee 1 to Dismiss Appeal for Lack of Appellate Jurisdiction); *id.*, at 5 ("an indictment not even known to exist").

[5] Order, *Sealed Appellee 1.* v. *Sealed Appellant 1*, No. 15-98003 (5th Cir. May 20, 2015).

Stanley prosecution. See *Doe* v. *United States*, No. 15-cv-2414, Doc. 1 (S.D. Tex. Aug. 20, 2015). Relying on *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975), he sought a determination that the government violated his due process rights by identifying him as an unindicted co-conspirator without affording him a forum for vindication. See *ibid.* The government moved to dismiss, contending, *inter alia*, that his claims were untimely, see *Doe* No. 15-cv-2414, Doc. 9 (Oct. 20, 2015), and the District Court (Hittner, J.) dismissed the *Briggs* claim as time-barred. *Doe* v. *United States*, 197 F. Supp. 3d 933, 938 (S.D. Tex. 2016).

On appeal, the Fifth Circuit recognized that the government had improperly identified Mr. Khoury as Stanley's co-conspirator without affording him a public forum to contest the accusations, *Doe* v. *United States*, 853 F.3d 792, 800 (5th Cir. 2017), but nonetheless affirmed the District Court's limitations-based dismissal. *Ibid.*

6. The Second Motion to Unseal and Dismiss

In September 2017, Mr. Khoury filed a second motion to unseal and dismiss the Indictment. ROA.20-20126.1055. The government reprised the arguments it made in opposing his 2014 motion.[6]

The District Court rejected the government's position that Mr. Khoury was a "fugitive" from charges he did not know to exist, but allowed the government to

[6] *United States* v. *Khoury*, No. 4:17-mc-02553, Doc. 13 at 8 (S.D. Tex. Nov. 27, 2017) ("neither he nor his counsel is entitled to confirmation of [any indictment]"); App. 184a ("Mr. Khoury seeks . . . to unseal . . . an alleged indictment that he does not know to exist").

show, *ex parte*, any grounds for continued sealing.[7] The government could not make any such showing, see App. 199a–200a, and the District Court unsealed the Indictment in July 2018, App. 26a–27a.

The government next contended that it need not respond to Mr. Khoury's motion to dismiss because he was *still* a fugitive. App. 202a. After briefing and a hearing, the District Court again "decline[d] to apply the fugitive disentitlement doctrine," App. 223a (Nov. 29, 2018 Minute Entry),[8] and directed Mr. Khoury to refile his motion to dismiss, *ibid.*

Mr. Khoury complied, filing a renewed motion to dismiss the Indictment on speedy-trial and limitations grounds. ROA.20-20126.289. Following briefing and a hearing, the District Court found that *Barker* factors one (length of delay), three (prompt assertion of rights), and four (actual prejudice) all favored Mr. Khoury. App. 9a–10a. Regarding prejudice, the District Court found that at least a dozen potential defense witnesses had died since 2009, and that Mr. Khoury's ability to preserve documents and testify were impaired. *Ibid.*

The District Court nevertheless rejected Mr. Khoury's speedy-trial challenge because it concluded that "the government ha[d] proceeded with 'reasonable diligence,'" and "Mr. Khoury strongly suspected his

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[7] *Khoury*, 2018 WL 2864413, at *3 ("without a public indictment, there is no instruction on how he could submit to custody"); *id.*, at *5.

[8] Consistent with that conclusion, the District Court also permitted Mr. Khoury to appear and argue the threshold legal issues presented by his motions to unseal and dismiss through counsel, excusing him from appearing personally, pursuant to Federal Rule of Criminal Procedure 43(b)(3). App. 267a.

indictment and chose to remain in Lebanon." App. 10a–14a.[9]

Regarding the statute of limitations, the District Court concluded that although Mr. Khoury had shown "substantial actual prejudice" from sealing of the Indictment, that prejudice was "self-inflicted." App. 14a–15a. Therefore, it reasoned, the Indictment was "found" for limitations purposes when filed in November 2008. App. 15a. The District Court also concluded that although the government did not apply to suspend the statute of limitations under 18 U.S.C. § 3292 until after the limitations period expired, the application resuscitated the already-expired period. App. 19a.

Mr. Khoury then asked the District Court to rule on two aspects of his motion to dismiss not addressed in its initial opinion: (1) whether the government's violation of his due process rights in September 2008 (publicly accusing him of a crime) required it to give Mr. Khoury immediate notice of, and opportunity to contest, the November 2008 Indictment; and (2) whether the one-year presumptive prejudice threshold that triggers the *Barker* inquiry also obligated the government to afford Mr. Khoury notice of the charges no later than November 2009. App. 20a.

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[9] The District Court did not address the fact that the government identified Mr. Khoury only as a "potential" defendant during the September 2008 Stanley proceedings, see *supra*, at 8, nearly 5 years after he returned to live in his native country, or explain when and how he supposedly deduced that he had been indicted. Nor did the District Court attempt to reconcile this ruling on the second *Barker* factor with its previous finding that Mr. Khoury lacked knowledge of any indictment and "how he could submit to custody." See *supra*, at 12 n.7.

In its February 24, 2020 opinion, the District Court found that any due process violation was "separate" from the question of which party was responsible for the delay. App. 21a. On the presumptive-prejudice issue, the District Court (1) reasoned that Mr. Khoury was not entitled to formal notice because he "strongly suspected" charges existed, and (2) accepted the government's argument that it needed to keep the Indictment sealed "to increase the likelihood that Defendant would venture outside Lebanon." App. 22a.

7. Appellate and Mandamus Review in the Fifth Circuit

Mr. Khoury noticed an appeal to the Fifth Circuit on March 9, 2020. App. 270a–271a. Eighteen days later, he filed a joint principal brief on appeal and petition for a writ of mandamus.

The government moved to dismiss the appeal, arguing in relevant part that this Court's decision in *United States* v. *MacDonald*, 435 U.S. 850 (1978), precluded Mr. Khoury from taking an interlocutory appeal from the District Court's denial of his motion to dismiss the Indictment. *United States* v. *Khoury*, No. 20-20126, Doc.00515386628, at 9–11, 13–15 (5th Cir. Apr. 17, 2020).

The government also asked the court to summarily deny Mr. Khoury's mandamus petition because, *inter alia*, he allegedly "has an adequate, alternative means for obtaining relief"—namely, "an appeal from final judgment." *Id.*, at 18.

On May 12, 2020, the Fifth Circuit granted the government's motion in a one-line order stating that "Appellee's opposed motion to dismiss the appeal for lack of jurisdiction is GRANTED." App. 1a.

The following day, Mr. Khoury filed a motion for clarification of whether the Fifth Circuit had intended its order also to dispose of his alternative petition for mandamus. Because the court did not act on that motion within the time allotted for requesting rehearing, Mr. Khoury filed a timely petition for panel and en banc rehearing on May 26, 2020.

On June 16, 2020, the court granted Mr. Khoury's request for clarification, holding that speedy-trial claims such as his necessarily failed at the first step of the mandamus test because such claimants would always have "[an]other adequate means to attain relief," i.e., an appeal "after final judgment is entered." App. 3a.

The court rested its holding exclusively on *MacDonald*'s justification for finding such decisions unsuitable for interlocutory appeal. *Ibid.* Specifically, the court reasoned that because "'*most* speedy trial claims . . . are best considered only after the relevant facts have been developed at trial,'" *ibid.* (quoting 435 U.S., at 858) (emphasis added) (alteration in original), and because requiring defendants to go to trial would not "cause or compound the deprivation already suffered,'" *ibid.* (quoting 435 U.S., at 861), defendants like Mr. Khoury possessed an adequate remedy in the form of an appeal "after final judgment is entered," *ibid.*

On July 13, 2020, the Fifth Circuit denied Mr. Khoury's petition for panel and en banc rehearing. App. 29a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS GOVERNING THE ISSUANCE OF MANDAMUS RELIEF.

A. The Fifth Circuit's Bright-Line Rule Violates This Court's Requirement of a Case-Specific Mandamus Analysis.

In denying Mr. Khoury's mandamus petition, the Fifth Circuit applied a bright-line rule of *per se* disentitlement: a criminal defendant may never obtain pre-judgment mandamus review of the denial of his motion to dismiss on speedy-trial grounds, because the ultimate availability of post-sentence appellate review is always an "adequate means to attain the relief he desires," *Cheney*, 542 U.S., at 380. See App. 3a.

The Fifth Circuit's rule is doubly and dangerously wrong, in that it both ignores this Court's longstanding command that mandamus petitions be assessed flexibly and in light of all the facts and exigencies of each individual case, and because it also conflates the standards for determining *appealability* with those for issuing *mandamus*. Taken together, those errors will force numerous criminal defendants to endure unfair—and, more importantly, unconstitutional—proceedings and convictions in order to gain the right to plead their case to an appellate court.

This Court's review is needed to restore mandamus as a necessary "safety valv[e] for promptly correcting serious errors" in the criminal justice system. *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 111 (2009) (internal quotation marks omitted).

1. The essence of mandamus relief is flexibility. It, "like equitable remedies, may be granted or withheld in the sound discretion of the court." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). Accordingly, the question for a court reviewing a mandamus petition "is not whether the court . . . ha[s] power to grant the writ but whether in the light of all the circumstances the case [i]s an appropriate one for the exercise of that power." *Id.*, at 25–26. And "[i]n determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action." *Id.*, at 26.

That flexibility is essential to maintaining the delicate balance that this Court has established for mandamus relief—ensuring that the great power of the writ is sparingly and judiciously used,[10] while at the same time guaranteeing that it remains available for truly exceptional cases.[11] See *Will*, 389 U.S., at 107 (majority opinion) ("The preemptory common-law writs are among the most potent weapons in the judicial arsenal. 'As extraordinary remedies, they are reserved for really extraordinary causes'" (quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947))).

The Fifth Circuit's decision disrupts that careful balance, replacing it with a blanket rule that precludes

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[10] *Kerr* v. *U.S. District Court for Northern Dist. of California*, 426 U.S. 394, 403 (1976) ("A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by [the final judgment rule]").

[11] See *Will* v. *United States*, 389 U.S. 90, 108 (1967) (Black, J., concurring) ("[T]he issuance of the writ of mandamus is proper where a court finds exceptional circumstances to support such an order").

the very sort of case-specific judgment that this Court's cases require.

2. The cornerstone of the Fifth Circuit's erroneous framework was its gross misapplication of this Court's decision in *MacDonald*, which dealt exclusively with whether the pretrial denial of a speedy-trial-based motion to dismiss an indictment could be directly appealed to the relevant geographic circuit court. See 435 U.S., at 856–57.

That direct-appeal analysis is in no way transferable to the mandamus context, however, because the key questions for each form of relief—whether a direct appeal will lie and whether mandamus relief will issue—are assessed using different units of analysis. Specifically, whereas appealability must be decided on a *categorical* basis,[12] mandamus petitions (as already discussed) must be evaluated based on the specific facts and circumstances of each petitioner's individual case.[13]

MacDonald itself reflects this dichotomy, in that it expressly rejected the suggestion that "'[a]ppeal rights ca[n] depend on the facts of a particular case.'" 435 U.S., at 857–58 n.6 (quoting *Carroll* v. *United States*, 354 U.S. 394, 405 (1957)), while also recognizing that its judgment about the unsuitability of speedy-trial

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[12] See *MacDonald*, 435 U.S., at 857–58 n.6; *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009) ("we do not engage in an individualized jurisdictional inquiry" (internal quotation marks omitted)); cf. *ibid.* ("As long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustic[e] averted, does not provide a basis for jurisdiction under § 1291" (alteration in original) (internal quotation marks omitted)).

[13] See *Roche*, 319 U.S., at 25–26.

determinations for mid-case review was a 50,000-foot assessment and that *some* cases would very likely break that mold. See 435 U.S., at 858 (observing that "*most* speedy trial claims . . . are best considered only after the relevant facts have been developed at trial" (emphasis added)); *id.*, at 860 ("The essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. *Normally*, it is only after trial that that claim may fairly be assessed" (emphasis added)).

This case aptly illustrates the evils that will be sown by the Fifth Circuit's erroneous transposition. The District Court has already made specific factual findings regarding the substantial actual prejudice that delay has caused Mr. Khoury's defense. See *supra*, at 12. Likewise, the government has already tried—and failed—to "affirmatively prov[e] that the delay left [Mr. Khoury's] ability to defend himself unimpaired." *Doggett*, 505 U.S., at 654 n.4. Requiring Mr. Khoury to endure an unconstitutional trial and conviction so that he may present to an appellate court the factual record, legal arguments, and judicial determination that have *already been made* would be a manifest injustice—precisely the sort of circumstance mandamus exists to prevent.

* * *

By adopting a one-size-fits-none rule for all mandamus petitions challenging the denial of a defendant's speedy-trial motion, the Fifth Circuit both ignored the fact-specific nature of the mandamus inquiry and badly misread one of this Court's core decisions on the scope of criminal defendants' rights to secure interlocutory review in criminal cases. To be sure, it will rarely be the case that a denial of a speedy-trial motion

will warrant mandamus relief. "Rarely, however, is not never," *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 664 (7th Cir. 2003), and mandamus relief is tailor-made for such rare and exceptional cases.

This Court's review is needed to restore the balance the Fifth Circuit's decision has disrupted.

B. The Fifth Circuit's Decision Dramatically Restricts the Availability of Mandamus Relief.

As this Court has emphasized, one important consideration in deciding whether to issue mandamus relief is whether the petitioner "ha[s] no other *adequate* means to attain the relief he desires." *Cheney*, 542 U.S., at 380 (emphasis added). The Fifth Circuit's decision wholly elides the requirement that the alternate means of securing relief be "adequate." Instead, the court merely noted that, "if necessary, [Mr. Khoury] can seek relief from the alleged speedy-trial violation after final judgment is entered." App. 3a. That formalistic focus on the technical availability of a later appeal, without assessing the *adequacy* of that path to review, will drastically curtail petitioners' access to mandamus relief.

As the present case aptly illustrates, there will inevitably be cases in which the possibility of a post-judgment appeal will not afford a petitioner an "adequate" channel for securing review of a district court decision.

Here, for example, the District Court has already concluded (and the Fifth Circuit did not dispute) that Mr. Khoury's defense has been irredeemably prejudiced by the almost decade-long delay between the issuance and unsealing of the Indictment against him, a delay that has seen at least a dozen defense

witnesses die, has let other witnesses' memories fade, has impaired Mr. Khoury's ability to testify credibly in his own defense, and has deprived him of the ability to preserve (and compel others to preserve) key documents, such as accounting and project-approval records, which could have been used to dispute the government's kickback allegations. App. 11a–12a, 182a, 275a.[14]

If, as this Court has held, depriving a party of his right to a jury trial is an injury that justifies resort to mandamus relief, see *In re Simons*, 247 U.S. 231, 239 (1918), so too should subjecting a defendant to a trial that is a "trial" in name only, see *Washington* v. *Texas*, 388 U.S. 14 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury, so it may decide where the truth lies").[15] Indeed, the United States has

[14] Mr. Khoury identified by name, work relationship, and content of the expected testimony of 13 defense witnesses who died between October 2009 and May 2019. App. 275a, 277a.

[15] The illusory nature of the trial and near-certainty of its outcome also distinguish this case from those that merely seek to use the writ of mandamus as a substitute for an interlocutory appeal. See *Roche*, 319 U.S., at 30 (noting that the length, cost, and inconvenience of a trial were the sorts of burdens "Congress contemplated in providing that only final judgments should be reviewable" and that mandamus could not be used merely to "thwart" that judgment). Instead, Mr. Khoury's circumstances most closely track those of decisions like *United States Alkali Export Association* v. *United States*, 325 U.S. 196 (1945), where the Court recognized that mandamus *may* issue where, as here, a petitioner points not only to garden-variety litigation burdens but also to the presence of legal issues that are important, novel, recurring, or difficult to review through standard channels. *Id.*, at 204 (holding that "[t]he hardship imposed on petitioners by a

recently contended that mandamus was appropriate because no other adequate means were available to spare the government from having to endure an "unjustified trial." See *In re United States of America*, et al., No. 18-73014, Doc. 1, at 14 (9th Cir. Nov. 5, 2018); see also *id.*, at 28 ("Mandamus is warranted to correct the district court's egregious errors because the government has 'no other adequate means' to obtain relief from the. . . impending trial").

Other circuits have likewise identified circumstances where other paths to review, though technically available, were not "adequate" and therefore did not preclude mandamus relief. See, *e.g.*, *United States* v. *Fokker Servs. B.V.*, 818 F.3d 733, 747–49 (D.C. Cir. 2016) (availability of post-judgment appeal precluded use of collateral-order appeal but did not bar government's mandamus challenge to district court's rejection of deferred prosecution agreement because post-judgment appellate review would be "inadequate"); *In re Nat'l Presto Indus.,* 347 F.3d, at 663 (concluding that post-judgment appeal would be an inadequate mechanism for securing review of a denial of a Section 1404(a) venue-transfer motion); *In re Apple, Inc.*, 602 F.3d 909, 912 (8th Cir. 2010) (same).

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long postponed appellate review, *coupled with*" the interest in avoiding other legal wrongs—there, the desire to avoid violating a congressional primary-jurisdiction delegation to the Federal Trade Commission—supported issuing the writ (emphasis added)); see also 16 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 3934.1 (3d ed., Apr. 2020 update) (noting the utility of writ review "to settle an important question in a particular case" "without establishing rules of appealability that will bring a flood of less important appeals in their wake").

The adequacy requirement is a vital part of the mandamus inquiry. This Court should grant review to ensure that it remains so.

II. THIS CASE IS AN IDEAL VEHICLE BECAUSE MR. KHOURY SATISFIES ALL REMAINING REQUIREMENTS FOR MANDAMUS RELIEF.

The Fifth Circuit's error is not merely an academic one. Indeed, absent the Fifth Circuit's erroneous categorical bar, Mr. Khoury would have been entitled to mandamus relief because he satisfies each of the traditional criteria for granting mandamus relief: (1) the absence of an "adequate" alternative channel of review; (2) a "clear and indisputable" right to the writ; and (3) a showing that mandamus is "appropriate under the circumstances." See *Cheney*, 542 U.S., at 380–81.

1. As already discussed, Mr. Khoury has no adequate alternative path to securing review of the District Court's denial of his speedy-trial motion. Interlocutory appellate review is unavailable, see *MacDonald*, 435 U.S., at 859, and post-judgment review would be inadequate, see *supra*, at 19.

2. Mr. Khoury's right to relief is "clear and indisputable." See *Cheney*, 542 U.S., at 380–81. The sole ground on which the District Court denied Mr. Khoury's speedy-trial motion was its conclusion that, because he "strongly suspected" that he had been charged by federal authorities, he was responsible for the entire period of the delay in unsealing his indictment. App. 13a.

Yet that conclusion conflicts with clear precedent from both this Court and the Fifth Circuit. Indeed, *Barker* itself recognized that "[a] defendant has no

duty to bring himself to trial." 407 U.S., at 527. The Fifth Circuit's own precedents agree, underscoring that a defendant has no obligation to surrender himself to authorities absent actual knowledge of the pendency of charges. *United States* v. *Molina-Solorio*, 577 F.3d 300, 306 (5th Cir. 2009) ("[Molina-Solorio] likely could have surmised that, as a fugitive he would be brought to justice once apprehended[,] [but] the law does not require [him] to assume the existence of, and ask for a speedy trial on, a charge *he is not actually aware of*" (emphasis added)).

Nor is the actual-knowledge requirement unique to the Fifth Circuit. See, *e.g.*, *United States* v. *Velazquez*, 749 F.3d 161, 179 (3d Cir. 2014) (weighing second *Barker* factor, noting that defendant's "lawyer's inquiry [regarding the government's pursuit of his client] does not diminish any governmental negligence in failing to pursue him, or to even contact his lawyer again"); *United States* v. *Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008) ("Mendoza was unaware of the indictment, so he did not know that he needed to return. And it was not Mendoza's responsibility to contact the government during the investigation"); *United States* v. *Ingram*, 446 F.3d 1332, 1337 (11th Cir. 2006) (second *Barker* factor favors defendant because "[t]here is no evidence [he] knew of the indictment or the arrest warrant"); *United States* v. *Brown*, 169 F.3d 344, 349 (6th Cir. 1999) (second *Barker* factor weighted against government because it failed to prove defendant was aware of indictment).

The District Court's decision cannot be reconciled with this precedent; Mr. Khoury's right to relief from that decision is clear and indisputable.[16]

Moreover, to the extent the District Court's decision reflects an acceptance of the government's insistence that Mr. Khoury "fled" the U.S. in 2004, that finding is devoid of record support and is therefore clearly erroneous—not least because Mr. Khoury's departure from the United States *preceded* the first public disclosure of an investigation into Kellogg, which, in turn preceded by more than *four years* his indictment in November 2008. *Supra*, at 7–9. In fact, by the time the investigation of Kellogg became public in March 2004, the uncontested facts show that Mr. Khoury was already residing in the Middle East in order to pursue business interests there. By that time, he had:

- Obtained a UAE trade license for his employer (November 2002), App. 57a;
- Obtained a UAE work permit for himself (May 2003), App. 58a;
- Obtained a UAE residency permit for himself (June 2003), App. 59a;
- Traveled to the U.S. to sign divorce papers (February 2004), App. 65a–70a; and

[16] Even if the actual-knowledge rule were not so firmly established, that would have not detract from Mr. Khoury's clear and indisputable right to mandamus relief. As this Court's own decisions show, the clarity of the petitioner's right is assessed only *after* the Court resolves any threshold issues of law that are in dispute. See *Mallard* v. *U.S. District Court for So. Dist. of Iowa*, 490 U.S. 296, 309 (1989) (internal quotation marks omitted) (finding mandamus requirements satisfied based on its conclusion, on an issue of first impression, that the statute in question did not authorize the district court action under review).

- Returned to his already-established residency in the Middle East, see ROA.20-20126.64–65.

Importantly, the District Court described the foregoing factual recitation as "not controvert[ed]" by the government. *Khoury*, 2018 WL 2864413, at *1 n.2. As a consequence, there is simply no basis for the District Court's subsequent finding that Mr. Khoury retreated to Lebanon in order to avoid prosecution, *four years* before he was actually charged under seal.

In the same vein, the government's public assertion during the Stanley plea hearing that Mr. Khoury was at that time only a "*potential* defendan[t]"[17] confirmed for Mr. Khoury that, as of September 2008, he had *not* been charged with any crime, and he therefore reasonably expected that the prosecutors who *maligned* him publicly would also *charge* him publicly—or not at all. Neither the government nor the District Court has explained how, or at what point thereafter, he should have divined that he had been indicted under seal. Indeed, virtually all of the (supposedly) "credible evidence" of Mr. Khoury's "stron[g] susp[icion]" of his indictment cited by the District Court (*i.e.*, residing in Lebanon since early 2004 and his identification as the LNG Consultant in Mr. Stanley's charging documents) preceded the government's representation during the Stanley plea proceedings that he had *not* been charged.

[17] App. 122a (emphasis added); see also App. 6a ("In September 2008, [Stanley] pleaded guilty to . . . one count of conspiracy to commit mail and wire fraud in connection with 'kickbacks allegedly paid to Mr. Stanley *by an unindicted consultant*" (emphasis added)).

The record is therefore clear that Mr. Khoury never fled from prosecution in the United States and that he cannot be held responsible for the government's delay in notifying him of the charges or seeking his arrest.

What is equally clear from the record is that the government operated with inexcusable lethargy in pursuing Mr. Khoury. The sum total of its activities in pursuit of Mr. Khoury consisted of (1) sending a diffusion notice to 12 countries (but not the one in which the government knew him to be residing) in May 2009, which confirmed for the government that he was not traveling outside of his native Lebanon; and (2) a renewal of that diffusion notice following the denial of Mr. Khoury's first motion to unseal in March 2015. App. 141a. The government did not contact Mr. Khoury through counsel to notify him of the charges and request his surrender. It did not notify the Lebanese government, either via a formal extradition request or a less formal request for information and assistance concerning his activities and whereabouts. And it did not, when all else had failed and it became clear that Mr. Khoury was not traveling outside Lebanon, unseal the Indictment.

The District Court's error in blessing these activities as "reasonable diligence" appears to stem from its disregard of this Court's instruction that the diligence inquiry is a context-dependent one: actions that may constitute reasonable diligence in one set of circumstances (*e.g.*, in the immediate wake of an indictment) may constitute inexcusable neglect in other circumstances (*e.g.*, several fruitless years later).

Put differently, even if the District Court were correct that the government acted diligently in the immediate wake of obtaining the Indictment, it should have judged the government's dogged adherence to a

wait-and-see strategy more harshly as time passed, and as the presumptive prejudice from such a strategy continued to grow. See *Barker*, 407 U.S., at 522 ("'[t]he right of a speedy trial is necessarily relative'" and "'depends upon circumstances'" (internal quotation marks omitted)); *Doggett*, 505 U.S., at 657 (discussing second *Barker* factor: "Thus, our toleration of [governmental] negligence varies inversely with its protractedness."); *id.*, at 652–53 ("For six years, the Government's investigators made no serious effort to test their progressively more questionable assumption that Doggett was living abroad . . .").[18]

Accordingly, whatever the validity of the government's initial sealing decision may be, its concealment of the charges against Mr. Khoury became wholly inexcusable, at the absolute latest, by the time he filed his first motion to unseal and dismiss in 2014. By that point, eight years had passed since he had last visited the U.S., and it had been five years since the government confirmed he was not traveling outside Lebanon. See App. 53a, 141a. Mr. Khoury's U.S. passport had also expired. App. 279a. Given (on the one hand) the remote chance that he would accidentally stumble into the government's waiting arms and (on the other) the "extraordinary" six-year delay that had already taken place, *Barker*, 407 U.S., at 533,

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[18] See also *United States* v. *Bergfeld*, 280 F.3d 486, 489–90 (5th Cir. 2002) (five-year delay was "official negligence" because government interest in sealing indictment "diminished as the years passed and the Defendant's interest in a speedy trial increased"); *United States* v. *Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008) ("After *Doggett*, the government was required to make some effort to notify Mendoza of the indictment, or otherwise continue to actively attempt to bring him to trial, or else risk that Mendoza would remain abroad while the constitutional speedy-trial clock ticked").

the government's refusal to undertake additional, active steps to apprehend him—*e.g.*, requesting his extradition from Lebanon, engaging with his counsel regarding the possibility of a surrender, or even simply unsealing the Indictment—was indefensible.

By turning a blind eye to the government's escalating burden to justify its sealing of the Indictment, the District Court avoided any assessment of what portion of the post-indictment delay should have been charged to the government. Courts regularly conduct such segmentation when assessing the second *Barker* factor. See, *e.g.*, *United States* v. *Avalos*, 541 F.2d 1100, 1111–14 (5th Cir. 1976) (parsing periods attributable to deliberate government decisions, negligence, and legitimate delay); *United States* v. *Reynolds*, 231 F. App'x 629, 631 (9th Cir. 2007) ("evidence of attempts to apprehend Reynolds during, at most, six of the total fifty-six months of delay").

Given the District Court's findings on the other three *Barker* factors—most importantly, its finding of actual prejudice to Mr. Khoury's defense—*any* finding other than a total assignment of the delay to him would necessarily have yielded the conclusion that his speedy-trial rights were violated. See *Avalos*, 541 F.2d, at 1116 ("[A] showing of actual prejudice to the conduct of the defense will weigh heavily against the government . . . *even when the three remaining factors are not weighted heavily in favor of the accused*" (emphasis added)). Indeed, this Court has gone even further, indicating that where a defendant demonstrates actual prejudice, even diligence by the government will, at some point, cease to insulate an indictment from a speedy-trial dismissal. See *Doggett*, 505 U.S., at 656 ("if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest,

his speedy trial claim would fail . . . . *so long as Doggett could not show specific prejudice to his defense*" (emphasis added)).

In light of the foregoing, the District Court manifestly erred by charging the entire period of post-indictment delay to Mr. Khoury based exclusively on his "suspicion" that he had been indicted. Mr. Khoury's right to relief is clear and indisputable.

3. Mandamus relief is appropriate under the circumstances of this case. To begin with, the right Mr. Khoury seeks to vindicate is of foundational importance to our criminal justice system. "[T]he right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment; . . . [t]he history of the right . . . and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina*, 386 U.S. 213, 223–26 (1967).

Moreover, the sole ground cited by the District Court for attributing responsibility for the delay to Mr. Khoury is that he "suspected" he was charged. App. 13a. Yet that rationale is not only contradicted by the record, see *supra*, but also inconsistent with the principle that the "primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial," *Barker*, 407 U.S., at 529.

* * *

Simply put, the Fifth Circuit's categorical bar on pre-judgment mandamus review of speedy-trial claims is the lone, thin reed precluding Mr. Khoury from obtaining mandamus relief. This Court's review is needed to eliminate that bar, both in this case and in future ones.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 7, 2020

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed May 12, 2020]

No. 20-20126

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SAMIR RAFIC KHOURY,

Defendant-Appellant

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

Before HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges. PER CURIAM:

IT IS ORDERED that Appellee's opposed motion to dismiss the appeal for lack of jurisdiction is GRANTED.

IT IS FURTHER ORDERED that Appellant's incorporated motion for leave to carry the motion to dismiss the appeal for lack of jurisdiction with the case is DENIED.

IT IS FURTHER ORDERED that Appellant's unopposed motion for leave to file corrected brief and record excerpts is DENIED AS MOOT.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed June 16, 2020]

No. 20-20126

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAMIR RAFIC KHOURY,

Defendant-Appellant.

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

Before HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges. PER CURIAM:

IT IS ORDERED that the opposed motion for clarification of the May 12, 2020 court order is GRANTED.

As clarification, Appellant's alternative request for mandamus relief is DENIED. A writ of mandamus should only be issued where: (1) the petitioner has no other adequate means to attain relief; (2) the right to the writ is clear and indisputable; and (3) the writ is appropriate under the specific circumstances. *United States v. Williams*, 400 F.3d 277, 280–81 (5th Cir. 2005).

Appellant's request fails on the first prong. In *United States v. MacDonald*, the Supreme Court explained that "most speedy trial claims . . . are best considered only after the relevant facts have been developed at trial." 435 U.S. 850, 858 (1978). Unlike with the Double Jeopardy Clause, "the Speedy Trial Clause does not, either on its face or according to the decisions of th[e] Court, encompass a 'right not to be tried' . . . . It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial." *Id.* at 861. As the Court emphasized, "[p]roceeding with the trial does not cause or compound the deprivation already suffered." *Id.* Accordingly, if necessary, Appellant can seek relief from the alleged speedy-trial violation after final judgment is entered.

The same is true for Appellant's claim that his indictment should be dismissed as time barred. Every court that has been asked the question has answered that 18 U.S.C. § 3282 "does not guarantee a 'right not to be tried' and that denials of motions to dismiss indictments on statute-of-limitations grounds are, therefore, not immediately appealable." *United States v. Weiss*, 7 F.3d 1088, 1090 (2d Cir. 1993); *see also, e.g.*, *United States v. Garbi-Bazain*, 22 F.3d 17, 18–19 (1st Cir. 2000) (relying on the reasoning of the Second, Third, Sixth, and Ninth Courts of Appeals to conclude that § 3282 does not create a right that "would be irretrievably lost if review were postponed until trial is complete" (quoting *Flanagan v. United States*, 465 U.S. 259, 266 (1984))). Because Appellant can attain the relief he seeks on appeal after final judgment, he is not entitled to the extraordinary remedy of a writ of mandamus.

IT IS FURTHER ORDERED that the unopposed motion for an extension of time to file a motion for reconsideration 14 days from the date of our ruling on this motion is GRANTED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed December 6, 2019]

Criminal Action No. 4:08-CR-0763

UNITED STATES OF AMERICA

v.

SAMIR RAFIC KHOURY

MEMORANDUM AND ORDER

Before the Court is Defendant's Renewed Motion to Dismiss. (Doc. No. 37). Defendant argues that the Court should dismiss the pending indictment "on Speedy Trial and statute of limitations grounds." (Doc. No. 37 at 42). The Court determines that neither ground justifies dismissal of the indictment.

I. Background

Mr. Khoury is a naturalized citizen of the United States, and a native of Lebanon. (Doc. No. 1, ¶1). He worked for The M.W. Kellogg Company ("Kellogg") in the Middle East from 1977 through 1988. (Doc. No. 1, ¶1). In 1988, he switched to working as a consultant for various firms including Kellogg, and later Kellogg's successor, Kellogg, Brown & Root, Inc. ("KBR"). (Doc. No. 1, ¶1). That same year, Mr. Khoury moved his residence to Cleveland, Ohio. (Doc. No. 1, ¶1). Ohio remained Mr. Khoury's permanent residence until he

relocated to Lebanon in 2004, around the same time that it became known that KBR was being investigated for violations of the Foreign Corrupt Practices Act ("FCPA"). (Doc. No. 38 at 3–4.) Mr. Khoury has not left Lebanon since, with one exception: a 2006 trip to the U.S. to speak with prosecutors. (Doc. No. 37 at 4–5, 38).

In September 2008, Mr. Albert Jackson Stanley, the former CEO of KBR, pleaded guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit mail and wire fraud in connection with "kickbacks" allegedly paid to Mr. Stanley by an unindicted consultant. *United States v. Albert J. Stanley*, No. 4:08-cr-0597 (S.D. Tex. 2008) (Ellison, J.) (Doc. No. 9, ¶ 22). He was subsequently sentenced to 30 months imprisonment and ordered to pay $10.8 million in restitution. *Stanley*, No. 4:08-cr-0597 (Dkt. Entry February 23, 2012). Although Mr. Khoury was not identified by name in the indictment, he claims that the personal details given during the proceedings made it obvious to him and others in his industry that he was the consultant to whom the government was referring. (Doc. No. 37 at 18–19). When asked by Mr. Khoury's attorney, the government refused to confirm or deny whether an indictment had been or would be filed against him. (Doc. No. 11 at 2).

On November 24, 2008, a grand jury returned an indictment charging Mr. Khoury with conspiring to commit mail and wire fraud. (Doc. No. 1, ¶¶ 2–3, 5–7). The indictment alleged that Mr. Khoury paid approximately $11 million in kickbacks to Mr. Stanley in exchange for providing lucrative consulting fees to Mr. Khoury's company. (Doc. No. 1, ¶¶ 2–3, 5–7). The indictment was placed under seal when it was returned. (Doc. No. 5).

In January 2009, the government entered Mr. Khoury's arrest warrant into the National Crime Information Center ("NCIC") database to alert border officials in the event Mr. Khoury attempted to re-enter the United States. (Doc. No. 38-1, ¶ 4). In May 2009, the government issued an INTERPOL Wanted Person Diffusion to twelve countries (not including Lebanon) through the U.S. National Central Bureau for Interpol. (Doc. No. 37-2 at 4). The government later issued another Diffusion to the twelve countries in 2015, and an INTERPOL Red Notice in 2019. (Doc. No. 38 at 15–16.) An Interpol Red Notice alerts foreign governments to the issuance of a U.S. arrest warrant, while a Diffusion Notice, which is less formal than a Red Notice, may be sent to select countries to obtain assistance in locating, arresting and detaining a wanted subject. *About Notices*, INTERPOL, https://www.interpol.int/How-we-work/Notices/About-Notices (last visited Sept. 25, 2019).

In December 2014, Mr. Khoury moved to unseal and dismiss the indictment he suspected was pending against him, but the motions were denied. (Doc. No. 11 at 10); *see also United States v. Khoury*, 4:14-mc-2884 (Dec. 12, 2014). Mr. Khoury next brought a civil suit challenging his public identification as an unindicted co-conspirator in federal court in the *Stanley* case. *See Doe v. United States*, 4:15-MC-2414 (Aug. 20, 2015). The Fifth Circuit in that case held that the civil suit was time-barred. *Doe v. United States*, 853 F.3d 792 (5th Cir. 2017). In 2017, Mr. Khoury brought another action to unseal and dismiss the indictment that he believed to be pending against him. *United States v. Khoury*, 4:17-mc-2553. This Court granted the motion to unseal the indictment on July 9, 2018. *Khoury*, 4:17-mc-2553 (Doc. No. 25). At that point, Mr. Khoury refiled his motion to dismiss in his criminal case.

United States v. Khoury, 4:08-cr-0763 (Doc. No. 11). In November 2018, the Court declined to apply the fugitive disentitlement doctrine (Dkt. Entry Nov. 29, 2018), which is an equitable doctrine allowing a court discretion to refuse to consider the merits of a defendant's motion or appeal when the defendant is a fugitive from justice. *Bagwell v. Dretke*, 376 F.3d 408, 410 (5th Cir. 2004). In March 2019, the Court ordered that the government provide Mr. Khoury with further evidence about its attempts to bring him to trial. (Doc. No. 26). Mr. Khoury's Renewed Motion to Dismiss (Doc. No. 37), now before the court, incorporates that evidence. After a hearing on the Renewed Motion to Dismiss, the Court requested and received supplemental briefing on the availability of extradition of dual nationals from Lebanon. (Doc. Nos. 44, 45, 46). Having considered the parties' briefing, the evidence, and the applicable law, the Court denies Mr. Khoury's Renewed Motion to Dismiss. (Doc. No. 37).

II. Discussion

Mr. Khoury argues that the Court should dismiss the inditement against him on two grounds. First, he argues that the decade-long delay in prosecution has deprived him of his Sixth Amendment right to a speedy trial. Second, he argues that the indictment is time-barred by 18 U.S.C. § 3282. The Court finds neither argument persuasive.

A. Speedy Trial

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. Amend. VI. Excessive delay in prosecuting a defendant after he is indicted or arrested violates this Sixth Amendment right. *Barker v. Wingo*, 407 U.S. 514 (1972); *Doggett v.*

United States, 505 U.S. 647 (1992). Mr. Khoury argues that the roughly decade-long delay in prosecuting his case is excessive and that his motion to dismiss should therefore be granted.

Courts evaluate speedy trial claims by analyzing the *Barker* factors: (1) the length of the delay; (2) whether the delay is attributable to the government or the defendant; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered any prejudice from the delay. 407 U.S. at 530. None of the factors is "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id*. at 533.

Barker factors (1), (3), and (4) favor Mr. Khoury. The government concedes under factor (1) that "the passage of more than nine years between the return and unsealing of the indictment triggers a speedy trial analysis and weighs in Defendant's favor." (Doc. No. 38 at 9); *see also United States v. Cardona*, 302 F.3d 494, 497 (5th Cir. 2002) ("Because of the extraordinary delay of over five years, this factor weighs heavily in Cardona's favor."). Factor (3) also weighs in Mr. Khoury's favor. Mr. Khoury asserted his right to a speedy trial in December 2014 when he moved both to unseal and dismiss on speedy trial grounds the indictment that he surmised was pending against him. (Doc. No. 37 at 8–9). Finally, Mr. Khoury has made a showing of actual prejudice under factor (4) because at least a dozen potential defense witnesses have allegedly died since 2009. (Doc. No. 37, Exh. E). The delay has also hampered Mr. Khoury's ability to preserve documents and to testify credibly in his own defense about

an offense that allegedly occurred roughly twenty-five years ago.

However, "[t]he flag all litigants seek to capture is the second factor, the reason for delay." *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). In assessing this factor, "the conduct of both the prosecution and the defendant are weighed." *Barker*, 407 U.S. at 530. Here, the balance tips strongly in the government's favor. While the government has proceeded with "reasonable diligence," *Doggett*, 505 U.S. at 656, Mr. Khoury has purposefully evaded the government's efforts by remaining in Lebanon. Mr. Khoury thus bears the blame for the delay.

Mr. Khoury argues that the government failed to act with reasonable diligence because the only actions it took in the first six years after sealing the indictment were in 2009 when it entered Mr. Khoury's arrest warrant into the NCIC database and issued an INTERPOL Diffusion. (Doc. No. 37 at 26). The government argues that it did everything it reasonably could have been expected to do, given that Mr. Khoury has resided in Lebanon since 2004. (Doc. No. 38 at 9). At the heart of the parties' dispute, lies the issue whether it was unreasonable for the government not to request Mr. Khoury's extradition.

As evidence that extradition was unavailable, the government has submitted a declaration from Jeffrey M. Olson, an Associate Director at the Office of International Affairs ("OIA"). (Doc. No. 44-1). Mr. Olson attests that it would have been futile to request Mr. Khoury's extradition because "[t]he United States and Lebanon do not have a bilateral extradition treaty," and "Article 32 of the Lebanese Criminal Code prohibits the extradition of Lebanese Citizens, including [dual citizens]." (Doc. No. 44-1, ¶¶ 6–8). Article 32

provides that "[o]ffences falling within the territorial jurisdiction or the jurisdiction *rationae materiae* or *ratione personae* of Lebanese law . . . may not give rise to extradition," while Article 20 defines jurisdiction *ratione personae* as jurisdiction over "any Lebanese national who, acting outside Lebanese territory . . . commits a felony or misdemeanor that is punishable under Lebanese law." LEB. PENAL CODE ARTS. 20, 32 (Doc. No. 45-1). Mr. Olson's explains that his understanding of Article 32 is "based on OIA's communications with Lebanese government officials" and that he is "unaware of any instances in which Lebanon has agreed to extradite to the United States any person deemed to be a Lebanese citizen or dual citizens of Lebanon and another country." (Doc. No. 44-1, ¶¶ 6–8). Additionally, the government submitted a declaration from Tom Heinemann, Assistant Legal Advisor in the State Department, in which Mr. Heinemann states that it is also his understanding "that Article 32 of the Lebanese Criminal Code prohibits the extradition of Lebanese nationals" and that this understanding is "based on public representations of the Government of Lebanon . . . and on direct communications between Lebanon and the United States with respect to past extradition requests." (Doc. 46, Exh. B).

In response, counsel for Mr. Khoury has helpfully provided two declarations from experts on Lebanese extradition law. One is from Judge Afif Chamseddine, member of the Appeals Chamber of the Special Tribunal for Lebanon in The Hague (Doc. No. 45, Exh. B), the other from Judge Hatem Madi, the former Public Prosecutor of Lebanon's Court of Cassation (Doc. No. 45, Exh. C). Judge Chamseddine concludes that the phrase "may not give rise to" in Article 32 is discretion-laden and that it is thus "possible to extradite a foreign national," but only "in light of the decision-making and

the assessment of the Lebanese authorities in each case separately." (Doc. No. 45, Exh. B). Judge Madi agrees that Article 32 does not "explicit[ly] and direct[ly]" prohibit the extradition of Lebanese citizens, and concludes that a request to extradite a Lebanese citizen is "subject to the decision of the Lebanese government, which has the sole right to accept it or to reject it . . . based on its absolute discretionary authority[.]" (Doc. 45, Exh. C).

The Court need not settle the parties' dispute over how to interpret Article 32. Even assuming that Article 32 reserves to the Lebanese government discretion to extradite Lebanese citizens, the record contains no indication that the Lebanese government is willing to exercise its discretion in this manner. Neither party has cited to a single instance in which the Lebanese government has agreed to extradite a Lebanese citizen to the United States. Further, both Mr. Olson and Mr. Heinemann attest that past conversations with Lebanese officials left them with the clear understanding that extradition is unavailable. The government thus had good reason to conclude that requesting Mr. Khoury's extradition would have been an exercise in futility. "[W]here our government has a good faith belief supported by substantial evidence that seeking extradition from a foreign country would be futile, due diligence does not require our government to do so." *U.S. v. Corona-Verbera*, 509 F.3d 1105, 1114–15 (9th Cir. 2007); *see also U.S. v. Tchibassa*, 452 F.3d 918, 924–25 (D.C. Cir. 2006) (defendant "was more to blame than the government for the initial delay because he maintained his residence in Zaire, beyond the government's diplomatic reach," and the government is not required to pursue "extraordinary measures" where no extradition treaty exists). Under the circum-

stances, the government demonstrated reasonable diligence.

Mr. Khoury further argues that "[t]he government's tactical decision to deny Mr. Khoury notice of the indictment, and affirmative actions to prevent unsealing, make the government solely responsible for the delay." (Doc. No. 39 at 4). But the government's reasonable decision to seal the indictment did not leave Mr. Khoury unaware of his indictment. *Cf. United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999) (holding that the government "failed to prove that Brown was actually culpable in causing the delay in his case" because it "did not present credible evidence that Brown was aware of the issuance of the indictment"). In this case, the government has provided credible evidence that, even during the period the indictment was sealed, Mr. Khoury strongly suspected his indictment and chose to remain in Lebanon as a result. The government points to evidence that Mr. Khoury moved to Lebanon in 2004, around the time the DOJ began its investigation (Doc. No. 16-1); that Mr. Khoury has not been back since, except for one trip in 2006 under the terms of a safe passage letter issued as part of the investigation (Doc. No. 16-1); that by September 2008, Mr. Khoury was aware that he was implicated as a co-conspirator (Doc. No. 37 at 6–7); and that by 2014, Mr. Khoury had filed a motion to unseal and dismiss the indictment he presumed was pending against him (4:14-mc-02884, Doc. No. 1). Indeed, Mr. Khoury claims that he and others in the industry could readily tell that he was the unidentified consultant referred to in Mr. Stanley's indictment issued in 2008. (Doc. No. 37 at 18).

Collectively, these facts constitute credible evidence that Mr. Khoury remained in Lebanon purposely to

evade prosecution during the roughly ten-year period in question. "[A] defendant who intentionally evades the government's efforts to bring him to trial is culpable in causing the delay." *United States v. Ingram*, 446 F.3d 1332, 1337–38 (11th Cir. 2006) (internal citations omitted). Thus, "the prejudice growing from such delay cannot be weighed in his favor." *Brown*, 169 F.3d at 349. The Court therefore determines that the balance of *Barker* factors weighs in the government's favor. Mr. Khoury's Sixth Amendment right to a speedy trial has not been violated.

B. Statute of Limitations

Title 18 includes a general five-year statute of limitations for non-capital federal crimes.

1. The *Sharpe* Exception

"A sealed indictment will not relate back to the time of its filing for limitations purposes if the defendant can demonstrate that substantial actual prejudice occurred between the sealing and the unsealing." *Sharpe*, 995 F.2d at 51. Mr. Khoury argues that, because he was prejudiced by the government's decision to seal his indictment, his indictment was not "found" for purposes of § 3282 until it was unsealed on July 9, 2018. (Doc. 37 at 39–40). Accordingly, Mr. Khoury argues that all counts in the indictment are time-barred because the § 3282 statute of limitations expired before July 9, 2018. (Doc. 37 at 39–40).

For the reasons stated in Section II.A, the Court agrees that Mr. Khoury suffered "substantial actual prejudice . . . between the sealing and the unsealing." *Sharpe*, 995 F.2d at 51. The government has argued persuasively, however, that the prejudice to Mr. Khoury is "self-inflicted." (Doc. No. 38 at 38). As

discussed above, the delay in Mr. Khoury's case was caused by his decision to retreat to Lebanon, not the government's decision to seal. The Court doubts that the Fifth Circuit intended for the *Sharpe* exception to extend to cases involving self-inflicted prejudice. Applying the rule rather than the exception, the Court therefore finds that Mr. Khoury's indictment was "found" when it was filed and sealed on November 24, 2008.

Mr. Khoury argues that this Court should recognize an exception for instances in which the indictment was sealed for an improper purpose or an inappropriate amount of time. *See e.g.*, *United States v. Gigante*, 436 F. Supp. 2d 647, 654 (S.D.N.Y. 2006); *United States v. Sherwood*, 38 F.R.D. 14 (D. Conn. 1964). The Court agrees that "the government's ability to toll the statute of limitations by sealing and indictment is not unlimited." *Sharpe*, 995 F.2d at 52 n.5. Under the circumstances, however, the government's decision to seal the indictment was of reasonable purpose and length. In particular, it was reasonable to keep the indictment sealed to increase the likelihood that Defendant would venture outside Lebanon where he could be apprehended.

2. Section 3292 Suspension

Counts Two, Three, Nine and Ten allege conduct that occurred between December 8, 2000 and August 24, 2001. (Doc. No. 1). The indictment was filed and sealed on November 24, 2008. (Doc. No. 1). Thus, absent tolling of the § 3282 statute of limitations, Counts Two, Three, Nine and Ten would have been time-barred at the time of indictment.

The government relies on the suspension provision in § 3292 to argue that the counts are not time-barred. (Doc. No. 38 at 34). Section 3292 provides:

> (a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense *shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence* and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.
>
> (2) The court shall rule upon such application not later than thirty days after the filing of the application.
>
> (b) Except as provided in subsection (c) of this section, *a period of suspension under this section shall begin on the date on which the official request is made* and end on the date on which the foreign court or authority takes final action on the request.
>
> (c) The total of all periods of suspension under this section with respect to an offense—
>
> (1) *shall not exceed three years*; and
>
> (2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

> (d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

18 U.S.C. § 3292 (emphasis added). In Mr. Khoury's case, the government made an official request for evidence to a foreign country on September 30, 2004, and in November 2006 applied for and received an order suspending the limitations period. (Doc. 38 at 34). Final action on the request occurred in July 2008. (Doc. 38 at 34).

Relying on § 3292, the government argues that Counts Two, Three, Nine and Ten are not time-barred because the five-year limitations period was suspended starting on September 30, 2004, the date the government requested foreign aid. *See United States v. Bischel*, 61 F.3d 1429, 1434 (9th Cir. 1995) ("[T]he statute plainly contemplates that the starting point for tolling the limitations period is the official request for evidence, not the date the § 3292 [application] is made or granted"). The suspension lasted for the statutory maximum of three years because final action on the request was not received until July 2008. *See* 18 § 3292(c)(1) (The period of suspension "shall not exceed three years"). Thus, the limitations period for each count was suspended between September 30, 2004 and September 30, 2007. Once that three-year suspension is added to the original five-year limitations period, it is clear that Counts Two, Three, Nine and Ten are not time-barred.

Mr. Khoury argues that the government's reasoning is flawed because, although the government requested foreign aid on September 30, 2004, it waited until November 2006 to apply for a court order suspending the limitations period pursuant to § 3292. By then, the argument goes, there was no statute of limitations to "suspend" because the five-year statute of limitations on Counts Two, Three, Nine and Ten had expired between December 8, 2005 and August 24, 2006. (Doc. No. 37 at 34). In support of this argument, Mr. Khoury points to *United States v. Kozeny*, in which the Second Circuit held that "the plain language of [§ 3292] requires that an application to suspend the running of the statute of limitations be filed before the limitations period has expired." 541 F.3d 166, 174 (2d Cir. 2008). The Ninth Circuit has held otherwise however. *See Bischel*, 61 F.3d at 1434 (rejecting Defendant's argument that a § 3292 order cannot "revive" an expired period of limitations). The Fifth Circuit has not addressed whether § 3292 suspension is appropriate when the government makes an official request for foreign evidence before the statute of limitation has run, but applies for suspension of the statute of limitations after it has run. The issue is a close one. The Court determines, however, that the text of § 3292 favors the government's view that the application for suspension may be filed any time prior to filing of the indictment, so long as the official request for evidence is made while the statute of limitations is still running. Again, § 3292 provides in relevant part:

> *Upon application of the United States, filed before return of an indictment*, indicating that evidence of an offense is in a foreign country, the district court . . . shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance

> of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country. . . . [A] period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

18 U.S.C. § 3292 (emphasis added). The Court hesitates to read the phrase "filed before return of an indictment" to mean, as Mr. Khoury would have it, "filed before return of an indictment and before expiration of the un-tolled statute of limitations." The Court therefore agrees with the government's interpretation of § 3292 and holds that Counts Two, Three, Nine and Ten are not time-barred.

III Conclusion

The Court DENIES Defendant's Renewed Motion to Dismiss. (Doc. No. 37).

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 6th day of December 2019.

/s/ Keith P. Ellison
HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed February 24, 2020]

Criminal Action No. 4:08-Cr-763

UNITED STATES OF AMERICA

vs.

SAMIR RAFIC KHOURY

MEMORANDUM AND ORDER

On December 6, 2019, the Court issued a Memorandum and Order (Doc. No. 47), denying Defendant Samir Khoury's Renewed Motion to Dismiss (Doc. No. 37). Defendant has filed a Motion for Rulings on Constitutional Issues not Addressed in December 6, 2019 Memorandum and Order. (Doc. No. 48). Defendant asks the Court to rule on the following constitutional issues:

(1) Whether prosecutors violated Khoury's Fifth Amendment right to due process in 2008 by publicly accusing him of a crime in a criminal proceeding without providing him a public forum for vindication.

(2) Whether prosecutors had a Sixth Amendment duty to notify Mr. Khoury of the charges no later than November 2009 when pre-trial delay became presumptively prejudicial or, alternatively, in February 2014 when the government,

by its own admission, confirmed that Mr. Khoury was not traveling outside Lebanon.

The Court found it unnecessary to reach issue (1) in its December 6th Memorandum and Order. After considering Mr. Khoury's motion, the Court continues to find the alleged Fifth Amendment due process violation irrelevant to its Sixth Amendment speedy trial analysis.

Mr. Khoury argues that his due process claim is relevant because it bears on the second *Barker* factor, which looks at the reason for the delay. Specifically, he argues that "because sealing the indictment violated due process, the sealing also made the government exclusively responsible under the second *Barker* factor for the nearly ten years resulting delay." (Doc. 48 at 6).

However, even assuming, without deciding, that Mr. Khoury's due process right to a public forum for vindication was violated, that second *Barker* factor weighs against him. The violation of an accused's due process right to a public forum for vindication may make the need for a speedy trial more pressing. *See United States v. Briggs*, 514 F.2d 794, 798 (5th Cir. 1975) ("The public ignominy of being accused of crime is one of the factors underlying the Sixth Amendment right to speedy trial."). But the issue of who caused the delay—the government or the defendant—is a separate issue. The Court found, and continues to find, that Mr. Khoury caused the delay because "Mr. Khoury strongly suspected his indictment and chose to remain in Lebanon as a result," with the purpose of "evadi[ng] prosecution." (Doc. 47 at 8).

Mr. Khoury further argues that the court should rule on his alleged due process violation because it is relevant to his argument that the indictment counts

are time-barred by the five-year statute of limitations imposed by 18 U.S.C. § 3282(a). He argues: "A sealing that violates Due Process is indisputably improper, so the Indictment was 'found' only when it was unsealed." (Doc. 48 at 6). However, Mr. Khoury has cited to no case in which a court has dismissed an indictment as untimely because its sealing deprived the accused of a forum of vindication in violation of the Fifth Amendment. The Court declines to create such a novel exception in this case.

Regarding issue (2), the Court concludes it has adequately addressed the issue in its December 6th Memorandum and Order. (Doc. 47). In that Order, the Court held that "[u]nder the circumstances, the government demonstrated reasonable diligence." (Doc. 47 at 7). This holding implies that, under the circumstances, reasonable diligence did not require the government to notify Mr. Khoury of the charges against him. Indeed, this Court held that "it was reasonable to keep the indictment sealed to increase the likelihood that Defendant would venture outside Lebanon where he could be apprehended." (Doc. 47 at 10–11). The Court therefore construes the second half Mr. Khoury's Motion (Doc. 48) as a motion for reconsideration of these holdings.

Mr. Khoury cites to several cases in support of his claim that "sealing of indictments, or other delay in notifying a defendant of criminal charges, can no longer be justified when pre-trial delay approaches one year." (Doc. 48 at 6). However, none of the cases that Mr. Khoury cites supports such a bright line rule. In each case cited, the defendant was unaware of the pending indictment, and so would have benefited from notice by the government. Here, in contrast, the Court previously found that Mr. Khoury "strongly suspected

his indictment and chose to remain in Lebanon as a result." (Doc. 47 at 8). This difference matters because, as one of the opinions cited by Mr. Khoury states, "a defendant who evades prosecution is culpable in causing the delay, and the prejudice growing from such delay cannot be weighed in his favor." *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999).

Finally, Mr. Khoury argues that that reasonable diligence at least required the government to notify Mr. Khoury "in February 2014 when the government, by its own admission, confirmed that Mr. Khoury was not traveling outside Lebanon." (Doc. 48 at 10). The alleged "admission" is the government's statement that Mr. Khoury's decision to allow his U.S. passport to expire by 2014 "further confirmed his continued intention to avoid U.S. jurisdiction." (Doc. 38 at 23). If anything, however, the lapse of Mr. Khoury's U.S. passport supports the Court's prior holding that "it was reasonable to keep the indictment sealed to increase the likelihood that Defendant would venture outside Lebanon where he could be apprehended," (Doc. 47 at 10–11), because it confirms that was the governments only prospect for securing Mr. Khoury's presence for trial.

The Motion for Rulings on Constitutional Issues (Doc. No. 48) is DENIED.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 24th day of February, 2020.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed February 19, 2015]

Case No. 14-mc-2884

UNITED STATES OF AMERICA

vs.

SAMIR KHOURY

ORDER

Whereas Samir Khoury filed on December 12, 2014, a "Motion by Samir Khoury to Dismiss the Indictment as Time-Barred or, Alternatively, for Violation of His Right to a Speedy Trial"; and an Order was issued on December 13, 2014, directing that the Motion to Dismiss and related documents remain under seal and that the United States "provide any sealed indictment to counsel for the defendant"; and the United States filed on December 24, 2014, a "Motion for Reconsideration, in Part, of Court Order to Produce 'Any Sealed Indictment' to Counsel for Samir Khoury,"

It is hereby ORDERED that the United States' Motion for Reconsideration is GRANTED in so far as the United States is not required to "provide any sealed indictment to counsel for the defendant"; and it is further ORDERED that Samir Khoury's Motion to Dismiss the Indictment is DENIED.

It is also hereby ORDERED that this Order, Samir Khoury's Motion to Dismiss and related documents, and the February 4, 2015 court transcript are and shall remain SEALED until further order of this Court.

Signed: Houston, Texas on February 19, 2015.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed July 9, 2018]

No. 4:17-MC-2553

MISCELLANEOUS ACTION

UNITED STATES OF AMERICA

vs.

SAMIR KHOURY

ORDER

Pending before the Court is the Motion of Samir Khoury to Unseal and Dismiss the Indictment for Violation of His Right to a Speedy Trial, or as Time-Barred ("Motion").[1] Mr. Khoury believes that he is the subject of a sealed indictment, and he moves to unseal and dismiss that indictment, without knowing for certain that it exists.

On June 11, 2018, the Court issued a Memorandum and Order on Mr. Khoury's Motion. (Doc. No. 22.) The Court addressed arguments regarding the unsealing of the indictment, but not arguments regarding the dismissal of the indictment. The Court agreed to

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[1] The Motion appears with redactions at Docket Number 1, and without redactions at Docket Number 4-2. The Court has previously ordered the redacted version unsealed, upon Mr. Khoury's unopposed motion to do so. (Doc. No. 12.)

review, in camera, any evidence that the Government wished to adduce in opposition to Mr. Khoury's Motion. The Government then filed an Ex Parte Notice under seal. (Doc. No. 23.)

Mr. Khoury also moves to unseal the Government's Ex Parte Notice. (Doc. No. 24.) The Court GRANTS Mr. Khoury's motion to unseal the Government's Ex Parte Notice.

In its Ex Parte Notice, the Government withdraws its opposition to the unsealing of the indictment and arrest warrant in *United States v. Samir Khoury,* No. 4:08-cr-763. The Government remains opposed to Mr. Khoury's motion to dismiss the indictment. *(See* Doc. No. 23 at 2 n.2.)

The Court GRANTS IN PART Mr. Khoury's Motion, and orders the indictment and arrest warrant in *United States v. Samir Khoury,* No. 4:08-cr-763, to be unsealed.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 9th day of July, 2018.

/s/ Keith P. Ellison
HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of The Clerk

Lyle W. Cayce
Clerk

Tel. 504-310-7700
600 S. Maestri Place,
Suite 115
New Orleans, LA 70130

July 13, 2020

MEMORANDUM TO COUNSEL
OR PARTIES LISTED BELOW:

No. 20-20126 USA v. Samir Khoury
USDC No. 4:08-CR-763-1

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Jann M. Wynne
Jann M. Wynne, Deputy Clerk
504-310-7688

Mr. David Benjamin Gerger
Mr. Charles S. Leeper
Ms. Carmen Castillo Mitchell
Mr. John Alexander Romano
Mr. Jeremy Raymond Sanders

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-20126

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

SAMIR RAFIC KHOURY,
Defendant-Appellant

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

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:

(X) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Don. R. Willett
UNITED STATES CIRCUIT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed November 24, 2008]

Criminal No. 4:08 CR 763

18 U.S.C. § 1349
18 U.S.C. § 1341
18 U.S.C. § 1343
18 U.S.C. § 1346

UNITED STATES OF AMERICA

Plaintiff,

v.

SAMIR RAFIC KHOURY,

Defendant.

INDICTMENT

The Grand Jury charges:

COUNT 1

Conspiracy to Commit Mail and Wire Fraud
(18 U.S.C. § 1349)

I. Introduction

At all times material to this Indictment, unless otherwise stated:

1. Defendant SAMIR RAFIC KHOURY was a citizen of the United States and a citizen of Lebanon. From in or about 1988, until in or about February

2004, when he moved to Lebanon, Khoury's primary residence was in Cleveland, Ohio. From in or about 1977, until in or about 1988, KHOURY was an employee of The M.W. Kellogg Company ("Kellogg"). In or about 1988, KHOURY resigned from Kellogg and became a consultant to Kellogg and subsequently Kellogg's successor, Kellogg, Brown & Root, Inc. ("KBR"), among other firms.

2. Before September 1998, Kellogg was a wholly owned subsidiary of Dresser Industries, Inc. ("Dresser"), a publicly traded U.S. corporation. In September 1998, Halliburton Company ("Halliburton") merged with Dresser, and Dresser's Kellogg subsidiary was merged with Halliburton's Brown & Root construction subsidiary to form KBR. Kellogg and subsequently KBR were engaged in the business of providing engineering, procurement, and construction ("EPC") services around the world, including designing and building liquefied natural gas ("LNG") production plants, ethylene production plants, and other petrochemical production plants. At all times relevant to this Indictment, Kellogg and KBR were incorporated in Delaware and headquartered in Houston, Texas. Halliburton was incorporated in Delaware and headquartered in Dallas, Texas, until 2002, when it became headquartered in Houston, Texas.

3. Albert Jackson Stanley ("Stanley") was a resident of Houston, Texas. From in or about March 1991, until in or about June 1995, Stanley was Executive Vice President of Kellogg. From in or about June 1995, until in or about 1997, Stanley was President of Kellogg. From in or about 1997, until September 1998, Stanley was Chairman and Chief Executive Officer of Kellogg. From on or about September 29, 1998, to on or about March 31, 2001, Stanley was President and

Chief Executive Officer of KBR. From on or about April 1, 2001, until he was terminated on or about June 16, 2004, Stanley was the Chairman of KBR, first as an employee and then, after January 1, 2004, pursuant to a consulting agreement.

4. As an officer and employee of Kellogg, STANLEY owed a fiduciary duty of loyalty, fidelity, and allegiance to Kellogg and Dresser. As an officer and employee of KBR, STANLEY owed a fiduciary duty of loyalty, fidelity, and allegiance to KBR and Halliburton. Under his consulting agreement with Halliburton, STANLEY owed a fiduciary duty of loyalty, fidelity, and allegiance to KBR and Halliburton.

5. Gulf Commercial Agencies ("GCA") was a British Virgin Islands corporation established in or about 1993 that KHOURY used as a corporate vehicle for his consulting business. Bank accounts for GCA and for an acquaintance (the "GCA Nominee Owner") were established in Switzerland. The GCA Nominee Owner and others served as the nominal owners and directors of GCA and as the signatories for GCA's and the GCA Nominee Owner's bank accounts. KHOURY caused GCA to enter into a series of consulting agreements with Kellogg and KBR. KHOURY caused GCA's consulting contracts to be signed in the name of the GCA Nominee Owner rather than in Khoury's own name. GCA's activities and its bank accounts were in fact controlled by and for the benefit of KHOURY.

6. The GCA agreements with Kellogg and KBR generally provided for GCA to receive much larger fees than KHOURY previously had received from Kellogg. At least five of the agreements between GCA and Kellogg or KBR provided for a fixed $10 million success fee if the LNG plant project covered by the agreement was awarded to Kellogg or KBR. From in or

about January 1996, until in or about December 2003, Kellogg and KBR paid GCA approximately $34 million in consulting fees in connection with EPC contracts that Kellogg or KBR won to design and/or build LNG plants in the Sultanate of Oman, the Federal Republic of Nigeria, Qatar, Malaysia, the Republic of Indonesia, and the Arab Republic of Egypt.

7. In return for Stanley assisting KHOURY in obtaining lucrative consulting fees from Kellogg and KBR, KHOURY paid Stanley kickbacks of approximately $4 million from consulting fees that Kellogg had paid to a KHOURY-controlled consulting company in Lebanon (the "Lebanese Consulting Company") in connection with an LNG project in Malaysia and of approximately $7 million from consulting fees that Kellogg and KBR had paid to GCA in connection with an LNG project in Nigeria and another LNG project in Malaysia.

II. The Conspiracy and the Scheme to Defraud

8. Beginning no later than in or about December 1991, and continuing to in or about 2004, in the Southern District of Texas, and elsewhere, defendant KHOURY did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree, with Stanley and with others, known and unknown to the Grand Jury, to commit offenses against the United States of America, to wit: to devise and attempt to devise a scheme and artifice to defraud and obtain money and property from Kellogg, KBR, and others by means of false and fraudulent pretenses, representations, and promises, and to defraud Kellogg, Dresser, KBR, and Halliburton of their rights to their employee's honest services, and did knowingly use the mails and interstate wires for the purpose of executing

such scheme and artifice, in violation of Title 18, United States Code, Sections 1341, 1343, and 1346.

III. Purpose of the Conspiracy and Scheme to Defraud

9. The purpose and object of the conspiracy was for KHOURY and Stanley to unjustly enrich themselves by obtaining money and property falsely and fraudulently from Kellogg, KBR, and others in the form of consulting fees which were paid, directly or indirectly, to KHOURY and portions of which, in turn, were paid by KHOURY to Stanley as "kickbacks."

IV. Manner and Means of the Conspiracy and Scheme to Defraud

10. KHOURY and Stanley employed various manner and means to carry out the conspiracy, including but not limited to the following:

a. Stanley caused Kellogg and KBR to enter into lucrative consulting agreements with KHOURY or companies designated and controlled by KHOURY in connection with various LNG projects around the world.

b. Pursuant to the consulting agreements, KHOURY or companies designated and controlled by KHOURY were paid tens of millions of dollars in "success" fees on LNG projects obtained by Kellogg and KBR.

c. KHOURY paid kickbacks to Stanley out of the consulting fees that Kellogg and KBR had paid KHOURY or companies designated and controlled by KHOURY.

d. KHOURY and Stanley concealed from Kellogg and KBR that KHOURY was paying kick-

backs to Stanley out of consulting fees that Kellogg and KBR had paid KHOURY or companies designated and controlled by KHOURY.

e. KHOURY and Stanley caused the kickbacks to be routed through Swiss bank accounts, including through accounts held in the names of nominees and shell companies, in order to conceal their scheme.

V. Overt Acts

11. In furtherance of the conspiracy and to achieve its purpose and object, at least one of the co-conspirators committed or caused to be committed, in the Southern District of Texas, and elsewhere, the following overt acts, among others:

a. On or about December 23, 1991, Stanley signed a Kellogg approval request form for a $9 million consulting agreement with the Lebanese Consulting Company in connection with an LNG project in Malaysia.

b. On or about January 3, 1992, Stanley signed the Kellogg approval form authorizing a $9 million consulting agreement between Kellogg and the Lebanese Consulting Company in connection with an LNG project in Malaysia.

c. On or about April 6, 1992, Stanley signed a new Kellogg approval request form for the consulting agreement with the Lebanese Consulting Company increasing the fee to $15 million.

d. On or about April 7, 1992, Stanley signed the Kellogg approval form authorizing the $15 million consulting agreement between Kellogg and the Lebanese Consulting Company in connection with an LNG project in Malaysia.

e. On or about April 7, 1992, Stanley caused Kellogg to sign a $15 million consulting agreement with the Lebanese Consulting Company in connection with an LNG project in Malaysia.

f. On or about April 25, 1992, Stanley approved on Kellogg's behalf a $1.5 million "Finder's Agreement" between the Lebanese Consulting Company and another company controlled by KHOURY.

g. On or about May 18, 1992, the Lebanese Consulting Company received in its Swiss bank account a $5 million wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

h. On or about May 21, 1992, the Lebanese Consulting Company wire transferred $1,374,750 to a Swiss bank account controlled by Stanley.

i. On or about June 30, 1992, the Lebanese Consulting Company received in its Swiss bank account a $1,502,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

j. On or about July 6, 1992, the Lebanese Consulting Company wire transferred $412,936.63 to a Swiss bank account controlled by Stanley.

k. On or about September 30, 1992, the Lebanese Consulting company received in its Swiss bank account a $624,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

l. On or about September 30, 1992, the Lebanese Consulting Company wire transferred $171,515.86 to a Swiss bank account controlled by Stanley.

m. On or about December 31, 1992, the Lebanese Consulting Company received in its Swiss bank account a $718,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

n. On or about January 7, 1993, the Lebanese Consulting Company wire transferred $197,307.62 to a Swiss bank account controlled by Stanley.

o. On or about March 31, 1993, the Lebanese Consulting Company received in its Swiss bank account a $716,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

p. On or about March 31, 1993, the Lebanese Consulting Company wire transferred $196,850.22 to a Swiss bank account controlled by Stanley.

q. On or about June 30, 1993, the Lebanese Consulting Company received in its Swiss bank account a $947,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

r. On or about July 2, 1993, the Lebanese Consulting Company wire transferred $260,347.93 to a Swiss bank account controlled by Stanley.

s. On or about September 30, 1993, the Lebanese Consulting Company received in its Swiss bank account a $993,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

t. On or about October 5, 1993, the Lebanese Consulting Company wire transferred $273,011.75 to a Swiss bank account controlled by Stanley.

u. On or about December 31, 1993, the Lebanese Consulting Company received in its Swiss bank account an $896,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

v. On or about January 4, 1994, the Lebanese Consulting Company wire transferred $246,283.79 to a Swiss bank account controlled by Stanley.

w. On or about March 31, 1994, the Lebanese Consulting Company received in its Swiss bank account a $901,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

x. On or about April 7, 1994, the Lebanese Consulting Company wire transferred $247,659.96 to a Swiss bank account controlled by Stanley.

y. On or about May 5, 1994, Stanley signed a Dresser code of conduct certification in which he failed to disclose any of the millions of dollars of kickbacks he had received from KHOURY.

z. On or about June 30, 1994, the Lebanese Consulting Company received in its Swiss bank account a $901,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

aa. On or about July 6, 1994, the Lebanese Consulting Company wire transferred $247,717.31 to a Swiss bank account controlled by Stanley.

bb. On or about September 30, 1994, the Lebanese Consulting Company received in its Swiss bank account a $901,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

cc. On or about October 4, 1994, the Lebanese Consulting Company wire transferred $247,704.99 to a Swiss bank account controlled by Stanley.

dd. On or about December 30, 1994, the Lebanese Consulting Company received in its Swiss bank account a $901,000 wire transfer from Kellogg pursuant to the consulting agreement for the Malaysia LNG project.

ee. On or about January 5, 1995, the Lebanese Consulting Company wire transferred $247,717.09 to a Swiss bank account controlled by Stanley.

ff. On or about August 18, 1995, Stanley signed a Dresser code of conduct certification in which he failed to disclose any of the millions of dollars of kickbacks he had received from KHOURY.

gg. On or about January 22, 1996, Stanley signed a consulting agreement between Kellogg and GCA which provided, among other things, that Kellogg would pay GCA a $10 million success fee in connection with the LNG project in Nigeria.

hh. On or about January 24, 1996, Stanley signed the Kellogg approval form authorizing a $10 million consulting agreement between Kellogg and GCA for the LNG project in Nigeria.

ii. On or about February 5, 1996, Stanley sent a facsimile from Houston, Texas, to KHOURY in London, England, stating that the first payment to GCA under its consulting agreement for Nigeria should be made by wire transfer the next day.

jj. On or about February 7, 1996, KHOURY received in GCA's bank account in Switzerland a $5 million wire transfer from Kellogg pursuant to

the consulting agreement for the Nigeria LNG project.

kk. On or about February 14, 1996, KHOURY wire transferred $1.2 million from one of his Swiss bank accounts to a Swiss bank account controlled by Stanley.

ll. On or about June 4, 1996, KHOURY received in GCA's bank account in Switzerland a $2.5 million wire transfer from Kellogg pursuant to the consulting agreement for the Nigeria LNG project.

mm. On or about June 25, 1996, KHOURY wire transferred $375,000 from his Swiss bank account to a Swiss bank account controlled by Stanley.

nn. On or about September 18, 1996, Stanley caused to be opened a Swiss bank account in the name of Amal Development Inc., a Panama corporation ("Amal").

oo. On or about November 27, 1996, KHOURY received in GCA's bank account in Switzerland a $2.5 million wire transfer from Kellogg pursuant to the consulting agreement for the Nigeria LNG project.

pp. On or about December 12, 1996, KHOURY wire transferred $375,000 from his Swiss bank account to a Swiss bank account controlled by STANLEY.

qq. On or about May 23, 1997, Stanley signed a Dresser code of conduct certification in which he failed to disclose any of the millions of dollars of kickbacks he had received from KHOURY.

rr. On or about April 20, 1998, Stanley signed a Dresser code of conduct certification in which he

failed to disclose any of the millions of dollars of kickbacks he had received from KHOURY.

ss. On or about August 19, 1998, Stanley signed the Kellogg approval form authorizing a $10 million consulting agreement between Kellogg and GCA for a new phase of an LNG project in Malaysia.

tt. On or about August 19, 1998, Stanley signed a consulting agreement between Kellogg and GCA which provided, among other things, that Kellogg would pay GCA a $10 million success fee if an EPC contract to build a new phase of an LNG plant in Malaysia was awarded to Kellogg's consortium.

uu. On or about March 19, 1999, KHOURY sent the executed consulting agreement between Kellogg and GCA for the new phase of the Malaysia LNG project via Federal Express from Ohio to the legal department of Kellogg in Houston, Texas.

vv. On or about November 12, 1999, Stanley submitted his Halliburton code of conduct certification in which he failed to disclose any of the millions of dollars of kickbacks that he had received from KHOURY.

ww. On or about December 3, 1999, Stanley signed a letter addressed to GCA increasing the success fee for the Malaysia LNG project to $13.3 million.

xx. On or about December 17, 1999, Stanley signed the KBR approval form authorizing a $3.3 million increase in GCA's consulting fee for the LNG project in Malaysia.

yy. On or about December 24, 1999, KHOURY received in GCA's bank account in Switzerland a $2.5 million wire transfer from KBR pursuant to the consulting agreement for the Malaysia LNG project.

zz. On or about December 27, 1999, GCA wire transferred $2.5 million to a Swiss bank account that KHOURY had opened in an acquaintance's name.

aaa. On or about December 27, 1999, KHOURY caused $2.5 million to be wire transferred from the acquaintance's Swiss bank account to another Swiss bank account that KHOURY controlled (the "Nominee Swiss Account").

bbb. On or about January 18, 2000, KHOURY caused $1 million to be wire transferred from the Nominee Swiss Account to the Swiss bank account of Amal Development for the benefit of Stanley.

ccc. On or about February 14, 2000, KHOURY received in GCA's bank account in Switzerland a $825,000 wire transfer from KBR pursuant to the consulting agreement for the Malaysia LNG project.

ddd. On or about July 20, 2000, KHOURY received in GCA's bank account in Switzerland a $3.325 million wire transfer from KBR pursuant to the consulting agreement for the Malaysia LNG project.

eee. On or about August 28, 2000, GCA wire transferred $1.25 million to the Swiss bank account of Amal Development for the benefit of Stanley.

fff. On or about October 2, 2000, Stanley submitted his Halliburton code of conduct certification

in which he failed to disclose any of the millions of dollars of kickbacks he had received from KHOURY.

ggg. On or about December 8, 2000, KHOURY received in GCA's bank account in Switzerland a $3.325 million wire transfer from KBR pursuant to the consulting agreement for the Malaysia LNG project.

hhh. On or about January 16, 2001, GCA wire transferred $1.25 million to the Swiss bank account of Amal Development for the benefit of Stanley.

iii. On or about June 1, 2001, Stanley, as Chairman of KBR, signed the KBR approval form authorizing a $10 million consulting agreement between KBR and GCA for an LNG project in Yemen.

jjj. On or about June 1, 2001, Stanley, as Chairman of KBR, signed the KBR approval form authorizing a $10 million consulting agreement between KBR and GCA for an LNG project in Egypt.

kkk. On or about June 6, 2001, KHOURY received in GCA's bank account in Switzerland a $3.325 million wire transfer from KBR pursuant to the consulting agreement for the Malaysia LNG project.

lll. On or about July 26, 2001, KBR signed a consulting agreement between KBR and GCA which provided, among other things, that KBR would pay GCA a $10 million success fee if an LNG project in Egypt was awarded to KBR's consortium.

mmm. On or about August 2, 2001, GCA wire transferred $3.27 million from GCA's Swiss bank account to the Nominee Swiss Account.

nnn. On or about August 6, 2001, KHOURY caused $1.25 million to be wire transferred from the Nominee Swiss Account to the Swiss bank account of Amal Development for the benefit of Stanley.

ooo. On or about August 20, 2001, Stanley signed a consulting agreement between KBR and GCA which provided, among other things, that KBR would pay GCA a $10 million success fee if an LNG project in Yemen was awarded to KBR's consortium.

ppp. On or about September 24, 2001, Stanley submitted his Halliburton code of conduct certification in which he failed to disclose any of the millions of dollars of kickbacks he had received from KHOURY.

qqq. On or about January 16, 2002, GCA submitted an invoice to KBR for $2.5 million pursuant to the consulting agreement for the Egypt LNG project.

rrr. On or about February 19, 2002, KHOURY received in GCA's bank account in Switzerland a $2.5 million wire transfer from KBR pursuant to the consulting agreement for the Egypt LNG project.

sss. On or about May 15, 2002, GCA submitted an invoice to KBR for $2.5 million pursuant to the consulting agreement for the Egypt LNG project.

ttt. On or about June 5, 2002, Stanley caused an email to be sent to the sales person responsible

for an LNG project in Indonesia notifying the sales person that he would be contacted by KHOURY and instructing him to give KHOURY his full cooperation.

uuu. On or about June 5, 2002, KHOURY received in GCA's bank account in Switzerland a $2.5 million wire transfer from KBR pursuant to the consulting agreement for the Egypt LNG project.

vvv. On or about November 20, 2002, GCA submitted an invoice to KBR for $2.5 million pursuant to the consulting agreement for the Egypt LNG project.

www. On or about December 19, 2002, KHOURY received in GCA's bank account in Switzerland a $2.5 million wire transfer from KBR pursuant to the consulting agreement for the Egypt LNG project.

xxx. On or about April 15, 2003, in Houston, Texas, Stanley signed a consulting agreement between KBR and GCA which provided, among other things, that KBR would pay GCA a $10 million success fee if an LNG project in Indonesia was awarded to KBR's consortium.

yyy. On or about April 24, 2003, KHOURY caused a KBR employee to send from Houston, Texas, to KHOURY in London, United Kingdom, the executed consulting agreement for the LNG project in Indonesia.

zzz. On or about July 29, 2003, KHOURY received in GCA's bank account in Switzerland a $2.5 million wire transfer from KBR pursuant to

the consulting agreement for the Egypt LNG project.

aaaa. In or about early 2004, KHOURY and Stanley discussed cover stories they could use to explain Stanley's receipt of payments from companies controlled by KHOURY.

All in violation of Title 18, United States Code, Section 1349.

COUNTS 2-8

Wire Fraud
(18 U.S.C. §§ 1343, 1346, and 2)

12. Paragraphs 1 through 7 and 9 through 11 are realleged and incorporated by reference as if set forth fully herein.

13. On or about the dates set forth below, in the Southern District of Texas and elsewhere, defendant KHOURY, and others, known and unknown to the Grand Jury, having devised a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and to deprive Kellogg, Dresser, KBR, and Halliburton of their intangible rights to their employee's honest services, for the purpose of executing such scheme and artifice, transmitted and caused to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures, and sounds, including the following:

Count	Date	From/To	Substance
2	12/08/00	Houston/Scranton	Wire re: transfer of $3.325M to GCA
3	6/7/01	Houston/Scranton	Wire re: transfer of $3.325M to GCA
4	2/15/02	Houston/New York	Wire re: transfer of $2.5M to GCA
5	6/5/02	Houston/Jakarta	Email from Stanley re: Khoury
6	6/5/02	Houston/New York	Wire re: transfer of $2.9M to GCA
7	12/18/02	Houston/New York	Wire re: transfer of $2.5M to GCA
8	7/29/03	Houston/New York	Wire re: transfer of $2.5M to GCA

All in violation of Title 18, United States Code, Sections 1343, 1346, and 2.

COUNTS 9-11

Mail Fraud
(18 U.S.C. §§ 1341, 1346, and 2)

14. Paragraphs 1 through 7 and 9 through 11 are realleged and incorporated by reference as if set forth fully herein.

15. On or about the dates set forth below, in the Southern District of Texas and elsewhere, defendant KHOURY, and others, known and unknown to the

Grand Jury, having devised a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and to deprive Kellogg, Dresser, KBR, and Halliburton of their intangible right to their employee's honest services, for the purpose of executing such scheme and artifice, caused to be deposited for delivery by interstate carrier the following:

Count	Date	From/To	Interstate Carrier	Substance
9	7/27/01	Houston/Ohio	Federal Express	GCA agreement for Egypt project
10	8/24/01	Houston/Ohio	Federal Express	GCA agreement for Yemen project
11	4/24/03	Houston/London	DHL	GCA agreement for Indonesia project

All in violation of Title 18, United States Code, Sections 1341, 1346, and 2.

Forfeiture Allegations

16. Paragraphs 1 through 7, 9 through 11, 13, and 15 are realleged and incorporated by reference as if set forth fully herein.

Upon conviction of one or more of the offenses in violation of Title 18, United States Code, Sections 1341, 1343, and 1346 alleged in Counts 2 through 11 of this Indictment, defendant KHOURY shall forfeit to the United States, pursuant to Title 28, United States Code, Section 2461, and Title 18, United States Code, Section 981(a)(1)(C), all property, real and personal, which constitutes or is derived from proceeds traceable to the violations, including but not limited to the following:

Approximately $49 million in United States Currency, all interest and other return thereon, and all property traceable thereto.

If any of the property described above as being subject to forfeiture, as a result of any act or omission of defendant KHOURY,

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to or deposited with a third person;

(3) has been placed beyond the jurisdiction of the Court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty,

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), incorporated by Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of defendant KHOURY up to the value of the above forfeitable property.

All pursuant to Title 18, United States Code, Section 2461, and Title 18, United States Code, Section 981(a)(1)(C), and Rule 32.2 of the Federal Rules of Criminal Procedure.

A TRUE BILL

ORIGINAL SIGNATURE ON FILE

Foreperson

STEVEN A. TYRRELL, CHIEF
FRAUD SECTION
CRIMINAL DIVISION
U.S. DEPARTMENT OF JUSTICE

By: /s/ William J. Stuckwisch
William J. Stuckwisch
D.C. Bar No. 457278
Patrick F. Stokes
Maryland State Bar
Trial Attorneys
Fraud Section, Criminal Division
U.S. Department of Justice
1400 New York Avenue, N.W., Room 3428
Washington, DC 20005
Tel: (202) 353-2393
Fax: (202) 514-0152

APPENDIX I

UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed April 23, 2015]

No. 15-98003

SEALED APPELLEE I

Plaintiff-Appellee

v.

SEALED APPELLANT I,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas
Misc. No. 4:14-Mc-2884
(Hon. Keith P. Ellison)

DECLARATION OF SAMIR KHOURY

I, Samir Khoury, in accordance with the provisions of 28 U.S.C. § 1746, declare as follows:

1. I am a native of Beirut, Lebanon. I was born on February 22, 1954. I resided in Lebanon with my family from 1954 until 1971. After living elsewhere in the Middle East, Africa, Europe and the United States for a period of years, I returned to Lebanon in 2004 and have been a permanent resident of my native country since that time.

2. I began living in the United States in 1971 for purposes of attending college.

3. I attended college at Cleveland State University in Cleveland, Ohio from 1971 to 1975. I graduated from Cleveland State University in 1975 with a Bachelor of Chemical Engineering degree, and a Bachelor of Arts (B.A.) in French.

4. In 1976, while attending graduate school in Cleveland, I became a naturalized citizen of the United States.

5. I left the United States in 1977 to work overseas as a full-time employee of The M.W. Kellogg Company ("Kellogg"), an engineering and construction company based in Houston, Texas.

6. From 1977 until 1988. I held a number of international sales-based positions for Kellogg, and during that time I resided in various countries in the Middle East, Africa, or in London. Throughout my tenure at Kellogg, I was involved primarily in seeking and obtaining Engineering, Procurement and Construction ("EPC") contracts on behalf of Kellogg in areas of interest to the company, namely oil refineries, chemical fertilizer plants, petrochemical plants, and liquefied natural gas ("LNG") plants in the Middle East and Africa.

7. In 1988, I resigned from Kellogg to pursue a career as an independent consultant, offering my expertise to companies engaged in the provision of EPC services worldwide. My consulting company, and other consulting companies with which I was associated, were subsequently retained by Kellogg, and/or its successor, Kellogg Brown & Root (KBR), to represent them in the pursuit and performance

of LNG projects in the Middle East, Africa, and the Far East.

8. In early 2004, I returned home to Lebanon to attend to personal family matters. Since that time I have lived in Lebanon, either in Beirut or in the small town of Broummana where my elderly parents reside, which is located some ten miles outside of Beirut. Since 2004 I have traveled to the United States only once, as described below.

9. In the summer of 2006 I traveled to the United States at the request of the U.S. Department of Justice ("DOJ") and, represented by U.S. legal counsel, was interviewed by prosecutors and investigators. Thereafter, I returned to my home in Lebanon and have not traveled outside of Lebanon since that time.

10. In October 2008, Charles S. Leeper of Drinker Biddle & Reath, LLP assumed responsibility as my U.S. legal counsel. At that time I authorized Mr. Leeper to provide additional information that I had received to the DOJ. No further communications were initiated by the DOJ.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 22nd day of APRIL, 2015.

/s/ Samir Khoury
Samir Khoury

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed August 20, 2018]

Crim. No. 08-cr-763
[Related to Misc. No. 17-mc-2553]

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMIR KHOURY,

Defendant.

DECLARATION OF CHARLES S. LEEPER

I, Charles S. Leeper, pursuant to the provisions of 28 U.S.C. § 1746, declare as follows:

1. I am counsel for Samir Khoury in the above-captioned case. Attached hereto as Exhibits A-E are true and correct copies of the following documents:

A: Trade License for Gulfbridge Ltd. issued by the Government of Dubai on November 5, 2002;

B: Work Permit issued by the United Arab Emirates ("UAE") Ministry of Interior to Mr. Khoury on May 27, 2003;

C: Residence Permit issued by the UAE to Mr. Khoury on June 11, 2003;

D: Affidavit of Mr. Khoury in Cuyahoga County Court of Common Pleas, Domestic Relations Division, in the Matter of Sylvia V. Korey v. Samir R. Korey, dated February 18, 2004; and

E. Agreed Judgment Entry in Cuyahoga County Court of Common Pleas, Domestic Relations Division, in the Matter of Sylvia V. Korey v. Samir R. Korey, dated February 18, 2004.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 20th day of August, 2018.

/s/ Charles S. Leeper
Charles S. Leeper

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سلطة المنطقة الحرة لجبل علي
Jebel Ali Free Zone Authority

حكومة دبي
Government of Dubai

رخصة تجارية
TRADING LICENCE

LICENCE NO.	03656	الرخصة رقم	٠٣٦٥٦
LICENSEE	Gulfbridge Limited	صاحب الرخصة	جلفبرج لمتد
OPERATING NAME	Gulfbridge Limited	الاسم التجاري	جلفبرج لمتد
ADDRESS	The Geneva Place, Third Floor Waterfront Drive, Road Town Tortola, British Virgin Islands United Kingdom	العنوان	جينيفا بليس الطابق الثالث ووترفرونت، رود تاون تورتولا، بريتش فيرجن ايلاندز المملكة المتحدة
ACTIVITY	Trading in Petrochemicals, Equipments and Related Parts (for Oil & Gas Industry)	النشاط	تجارة البتروكيميائيات ومعداتها وقطع غيارها (لصناعات النفط والغاز)
MANAGER	Samir R Korey	المدير	سمير آر خوري
ISSUE DATE	05/11/2002	تاريخ الأصدار	٢٠٠٢/١١/٥
VALID TILL	04/11/2004	تاريخ الأنتهاء	٢٠٠٤/١١/٤

حكومة دبي
الرئيس
CHAIRMAN

CN : 03656

(PO)

20-20126.186

EXHIBIT A

57a

United Arab Emirates

MINISTRY OF INTERIOR

eral Directorate for Naturalization and Residence

دولة الإمارات العربية المتحدة

وزارة الداخلية

الإدارة العامة للجنسية والإقامة

187584 Gulfbrokers

NTRY PERMIT No. : 7028500/201/2003 — دخـــول رقـــم :

ate & place of issue : 27/05/2003 DUBAI — يخ ومحل الاصدار :

EMPLOYMENT/I — عـــمـــل / هـــ

owed to Enter U. A. E. to : — ز بدخول دولة الامارات العربية المتحدة الى :

ll Name : Mr. SAMIR R KOREY — سم الكامل :

ationality : AMERICAN — نسيـــة :

ace of Birth : LEBANON — ـل الميلاد :

ate of Birth : 22/02/1954 — يخ الميلاد :

o. of Passport: 207483273 — م

ofession : GENERAL MANAGER — ـــة :

companied by — افقـــون

ife : None — وجـه :

ildren : None — نـاء :

None

Sponsor الكفيـــل

ame : JEBEL ALI FREE ZONE AUTHORITY — سم :

ddress : 8813000 P. O. Box 17000 2/2/10544 — ـوان :

OTES : — بيـه

- Validity of Permit : 60 days from date of Issue
- Duration of Stay : 30 days from the date of entry. Persons entering for employment/Residence should report to the Administration within the duration of stay.
- This permit becomes invalid if any alteration occurs in details
- Bearer of Visit/Residence permit not allowed to work paid or unpaid

صلاحية الاذن ٦٠ يوماً من تاريخه
مدة الاقامة ٣٠ يوما من تاريخ الدخول وعلى القادمين للعمل او الاقامة مراجعة الادارة خلال تلك المدة .
يبطل هذا الاذن اذا ظهر اي كشط او تعديل في تفاصيله.
لايجوز لحامل إذن دخول للزيارة/الإقامة العمل بأجر أو بدون أجر .

9246/2

20-20126.188

EXHIBIT B

58a


Entries / Entrées / Entradas
VISAS
Departures / Sorties / Salidas
UNITED ARAB EMIRATES
RESIDENCE
دولة الإمارات العربية المتحدة
إقامة
جديد
الملف : 201/2003/7028500
جهة الإصدار : دبي
الاسم : سمير رفيق كوري
عدد المرافقين :
رقم الجواز : 207483273
المهنة : مدير عام
الكفيل :
تاريخ الانتهاء : 2006/06/10
تاريخ إصدار الإقامة : 2003/06/11
التوقيع :
تعتبر الإقامة لاغية اذا تجاوز حاملها الاقامة خارج دولة الامارات مدة ستة اشهر
Residence Permit becomes invalid if bearer resides out of the U.A.E. for more than six months.

EXHIBIT C

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EXHIBIT D

In the Court of Common Pleas
Division of Domestic Relations

Case Number_____

JUDGE_____

_____

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

_____

SYLVIA V. KOREY
Plaintiff

3450 Roundwood Road, Hunting Valley, OH 44022
Address

SAMIR R. KOREY
Defendant

3450 Roundwood Road, Hunting Valley, OH 44022
Address

_____

AFFIDAVIT

PARENTING PROCEEDING INFORMATION

Samir R. Korey, being duly sworn, states the following answers to the questions set out herein relevant to the parenting of the minor child(ren), to wit (names and birthdates)

Stephanie A. (DOB: 7/25/87) and Alexandra J. (DOB: 1/18/89).

NOTES: (1) If you need more space to answer any questions, please use a separate sheet and attach it to the back.

(2) If the answers to the following questions are not the same for all children, a separate affidavit must be filed for each child.

1. Beginning with the child(ren)'s present address, state the places where the child(ren) lived within the last five years, and the names and present addresses of the persons with whom the child(ren) lived during that period.

Places and Dates	Persons and Present Addresses
AT 3450 Roundwood Road, Hunting Valley, OH 44022	WITH mother and father
FROM birth TO present	AT
AT	WITH
FROM TO	WITH

2. Have you participated as a party, witness, or in any other capacity in any other litigation in this or any other slate that concerned the allocation, between the parents of the same child, of parental rights and responsibilities for the care of the child and the designation of the residential parent and legal custodian of the child or that otherwise concerned the custody of the same child?

NO

3. State any information you have about any parenting proceeding concerning the child(ren) pending in a court of this or any other state. Include the case

number, the name of the court and the address of the court.

NONE

4. State the name and address of any person who is not a party to this proceeding and has physical custody of the chid(ren) or claims to be a parent of the child who is designated the residential parent and legal custodian of the child or to have visitation rights with respect to the chlld(ren) or to be a person other than a parent of the child who has custody or visitation rights with respect to the child(ren) (O.R.C. 3109.27(A) (3).

NONE

5. State whether you have previously been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child or have previously been determined, In a case in which a child has been adjudicated an abused child or a neglected child, to be the perpetrator of the abusive or neglectful act that was the basis of the adjudication (O.R.C. 3109.27(A) (4).

NO

6. State whether you have been convicted of or pleaded guilty to a violation of O.R.C. 2919.25 (criminal domestic violence) Involving a victim who at the time of the offense was a member of the family or household that is the subject of this proceeding. Further, have you been convicted of or pleaded guilty to any other offense involving a victim who at the time of the offense was a member of the family or household that is the subject of this

proceeding and caused physical harm to the victim in the commission of that offense?

NO

I understand that I have a continuing duty to inform the court of any parenting proceeding concerning the child(ren) in this or any other state of which I obtain information during this proceeding and to notify the child support agency of any change in the information listed on this form.

/s/ [Illegible]
AFFIANT

Sworn to and subscribed before me this 18th day of February, 2004.

/s/ Heather Anderson
NOTARY PUBLIC

[STAMP]

EXHIBIT E

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
CUYAHOGA COUNTY, OHIO

CASE NO. D- 297387
JUDGE Anthony J. Russo

SYLVIA V. KOREY

Plaintiff,

vs.

SAMIR R. KOREY

Defendant.

AGREED JUDGMENT ENTRY
(DIVORCE DECREE)

This cause came on for hearing this 20th day of April, 2004, and was duly heard before *Anthony J. Russo*, Judge of the Domestic Relations Division of the Court of Common Pleas, upon the Plaintiff's Complaint, Defendant having failed to file an Answer, although duly served with process according to law.

Upon due consideration thereof the Court finds the Plaintiff was a resident of the State of Ohio for more than six (6) months and a bona fide resident of Cuyahoga County for more than ninety (90) days, both immediately proceeding the filing of this Complaint; the parties married as alleged and four children were born as issue of the marriage, to-wit: Jamie A. (DOB 2/24/81); Kristen A. (DOB: 11/17/82); Stephanie A. (DOB: 7/25/87) and Alexandra *J.* (DOB: 1/18/89).

The Court further finds that the Plaintiff has established the cause of incompatibility and that by reason thereof that she is entitled to divorce from the Defendant.

The Court further finds that the parties have, prior to this hearing, entered into a Separation Agreement which is fair, just and equitable, and orders said agreement, a copy of which is attached hereto and for identification purposes marked as Exhibit "A," be incorporated herein as if fully rewritten and its terms ordered into execution.

The Court further finds that Defendant stipulates, by execution of his Agreed Judgment Entry, that he has not been represented by counsel, that he had a full opportunity and was advised to retain counsel, that he voluntarily and knowingly waived the right to counsel and that Roger L. Kleinman. acted solely as legal counsel for Plaintiff and not as legal counsel to Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the marriage contract heretofore existing between the parties be and is hereby dissolved and set aside and the terms of the attached Separation Agreement ordered into execution.

The Court finds the following group health insurance health care policies, contracts, and plans are available at a reasonable cost to the Obligor:

Available to:	Insurer
Defendant/Obligor	Medical Mutual of Ohio

The Court finds that Obligor has health insurance available at a reasonable cost through a group health insurance or health care policy, contract or plan

offered through Obligor's employer or through another group health insurance or health care policy, contract or plan. The health insurance coverage is not available at a more reasonable cost through a group health insurance or health care policy, contract or plan available to the Obligee.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that no later than 30 days after the issuance of this order the Obligor obtain health insurance coverage for and designate as covered dependents under any health insurance or health care policy, contract or plan the following children:

Full Name	Address	Date of Birth
Stephanie A.	3450 Roundwood Road Hunting Valley, OH 44022	07/25/87
Alexandra J.	3450 Roundwood Road Hunting Valley, OH 44022	01/18/89

✯

IS FURTHER ORDERED, ADJUDGED AND DECREED that the Obligor supply the Obligee with information regarding the benefits, limitations and exclusions of the health insurance coverage, copies of any insurance forms necessary to receive reimbursement, payment of other benefits under the health insurance Coverage, and a copy of any necessary

---

* It Is Further Ordered Adjudged and Decreed that the Plaintiff/Obligee shall not receive, nor shall Defendant/Obligor pay, child support for the minor children in consideration of the unequal division of the marital estate.

/s/ Sylvia Korey

insurance cards; that the Obligor submits a copy of this Order to the insurer at the time application is made to enroll the child and that the Obligor, no later than 30 days after the issuance of this Order, furnishes written proof to the CSEA that the foregoing orders have been satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that co-payments/deductible costs required under. the health insurance or health care policy; contract shall be paid as follows: Obligee/Plaintiff shall pay all costs.

Reimbursement for out-of-pocket medical, hospital, dental, or prescription expenses paid for the minor children shall be made to:

Name: Sylvia V. Korey

Address: 3450 Roundwood Road
Hunting Valley, Ohio 44022

The insurer that provides the health insurance coverage for the child may continue making payments for medical, optical, hospital, dental, or prescription services directly to any health care provider in accordance with the applicable health insurance or health care policy, contract, or plan.

If the Obligor or Obligee is required to obtain health insurance coverage pursuant to the child support order for the child and if the Obligor or Obligee fails to obtain health insurance coverage the child support enforcement agency shall comply with Chapter 3119 of the Revised Code to obtain a court order requiring the Obligor or Obligee to obtain the health insurance coverage.

The employer of the Obligor or Obligee required to obtain health insurance coverage is required to release

to the other parent or the child support enforcement agency upon written request. any necessary information on the health insurance coverage, including, but not limited to, the name and address of the insurer and any policy, contract, or plan number, and to otherwise comply with Chapter 3119 of the Revised Code and any court order issued under this section.

If the person required to obtain health care insurance coverage for the child subject to this child support order obtains new employment and the health insurance coverage for the child is provided through the previous employer, the agency shall comply with the requirements of Chapter 3119 which may result in the issuance of a notice requiring the new employer to take whatever action is necessary to enroll the child in health care insurance coverage provided by the new employer.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Obligee immediately inform the Court if health insurance coverage for the child becomes available at a reasonable cost through a group health insurance or health care policy, contract or plan offered by the Obligee's employer or through any other group health insurance or health care policy, contract or plan available to the Obligee:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Obligee immediately notify the C.S.E.A of any reason for which the support order should terminate, including but not limited to, death, marriage, emancipation (age 18 or high school completion/termination), incarcerations, enlistment in Armed Services, deportation, or change of legal or physical custody. of the child.

The following information is provided for the use of the Cuyahoga Support Enforcement Agency in accord-

ance with Section 2301.34 to 2301.41 and Chapter 3119 of the Ohio Revised Code:

OBLIGEE: NAME:	Sylvia V. Korey
RESIDENCE ADDRESS:	3450 Roundwood Road Hunting Valley, OH 44022
MAILING ADDRESS:	Same
S.S.#:	272-56-8441
DOB:	12/21/54
OBLIGOR: NAME:	Samir R. Korey
RESIDENCE ADDRESS:	3450 Roundwood Road Hunting Valley, OH 44022
MAILING ADDRESS:	Same
S.S.#:	275-56-9973
DOB:	2/22/54

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties equally pay the costs of this proceeding, for which judgment is rendered and execution may issue.

IT IS SO ORDERED.

/s/ Anthony J. Russo
JUDGE
JUDGE ANTHONY J. RUSSO

APPROVED:

/s/ Samir R. Korey
SAMIR R. KOREY

/s/ Sylvia V. Korey
SYLVIA V. KOREY

/s/ Roger L. Kleinman
Roger L. Kleinman (0022272)
Attorney for Sylvia V. Korey

[FILING STAMP]

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. H-08-597
18 U.S.C. § 371 (Counts 1 & 2)

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALBERT JACKSON STANLEY,

Defendant.

FILED UNDER SEAL
August 29, 2008

UNSEALED PER ARREST
September 3, 2008

INFORMATION

The United States charges:

General Allegations.

At all times material to this Information, unless otherwise stated:

1. The Foreign Corrupt Practices Act of 1977, as amended, Title 15, United States Code, Sections 78dd-1, *et seq*. ("FCPA"), was enacted by Congress for the purpose of, among other things, making it unlawful for certain classes of persons and entities to act corruptly

in furtherance of an offer, promise, authorization, or payment of money or anything of value to a foreign government official for the purpose of securing any improper advantage, or of obtaining or retaining business for, or directing business to, any person.

Relevant Entities and Individuals

The Defendant and His Employer

2. Defendant ALBERT JACKSON STANLEY was a United States citizen and a resident of Houston, Texas. From in or about March 1991, until in or about June 2004, STANLEY served in various capacities as an officer and/or director of "EPC Contractor A" and its successor company, "EPC Contractor A1." STANLEY was a "domestic concern" and an officer, employee, and agent of a "domestic concern" within the meaning of the FCPA, Title 15, United States Code, Section 78dd-2.

3. Both EPC Contractor A and EPC Contractor A1 were engaged in the business of providing engineering, procurement, and construction ("EPC") services around the world, including designing and building liquefied natural gas ("LNG") production plants. Both were incorporated in Delaware and headquartered in Houston, Texas. As such, both were "domestic concerns" within the meaning of the FCPA, Title 15, United States Code, Section 78dd-2.

The Joint Venture, Its Members, and Related Entities

4. "Joint Venture" was a four-company joint venture consisting of EPC Contractor A and then EPC Contractor A1, and three other companies referred to herein as "EPC Contractor B," "EPC Contractor C," and "EPC

Contractor D." The Steering Committee of Joint Venture consisted of high level executives from each of the four joint venture companies, including STANLEY. Pursuant to a joint venture agreement, the Steering Committee made major decisions on behalf of Joint Venture, including whether to hire agents to assist Joint Venture in winning EPC contracts, whom to hire as agents, and how much to pay the agents. Profits, revenues, and expenses, including the cost of agents, were shared equally among the four joint venture partners.

5. "U.K. Subsidiary" was a corporation organized under the laws of the United Kingdom. U.K. Subsidiary was 55% owned by EPC Contractor A and then EPC Contractor A1, and 45% owned by EPC Contractor D.

6. Joint Venture operated through three Portuguese corporations based in Madeira, Portugal: "Madeira Company 1," "Madeira Company 2," and "Madeira Company 3." Madeira Company 1 and Madeira Company 2 each were owned equally by the four joint venture companies. Madeira Company 3, the entity that Joint Venture used to enter into consulting agreements with Joint Venture's agents, was 50% owned by U.K. Subsidiary, 25% owned by EPC Contractor B, and 25% owned by EPC Contractor C.

The Joint Venture's Agents

7. "Consultant A" was a citizen of the United Kingdom and a resident of London, England. Joint Venture hired Consultant A to help it obtain business in Nigeria, including by offering to pay and paying bribes to high-level Nigerian government officials. Consultant A was an agent of Joint Venture and of each of the joint venture companies.

8. "Consulting Company A" was a Gibraltar corporation that Consultant A used as a corporate vehicle to sign agent contracts with and receive payments from Joint Venture. Before Joint Venture stopped paying Consulting Company A in January 2004, Joint Venture paid Consulting Company A over $130 million for use in bribing Nigerian government officials. Consulting Company A was an agent of Joint Venture and of each of the joint venture companies.

9. Consulting Company B was a global trading company headquartered in Tokyo, Japan. Joint Venture hired Consulting Company B to help it obtain business in Nigeria, including by offering to pay and paying bribes to Nigerian government officials. Before Joint Venture stopped paying Consulting Company B in June 2004, Joint Venture paid Consulting Company B over $50 million for use in bribing Nigerian government officials. Consulting Company B was an agent of Joint Venture and of each of its member companies.

The Nigerian Government Entities

10. The Nigerian National Petroleum Corporation ("NNPC") was a government-owned company charged with development of Nigeria's oil and gas wealth and regulation of the country's oil and gas industry. NNPC was a shareholder in certain joint ventures with multinational oil companies. NNPC was an entity and instrumentality of the Government of Nigeria, within the meaning of the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1)(A) and 78dd-2(h)(2)(A). Officers and employees of NNPC were "foreign officials," within the meaning of the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1)(A) and 78dd-2(h)(2)(A).

11. Nigeria LNG Limited ("NLNG") was created by the Nigerian government to develop an LNG facility

on Bonny Island, Nigeria ("the Bonny Island Project") and was the entity that awarded the related EPC contracts. The largest shareholder of NLNG was NNPC, which owned 49% of NLNG. The other owners of NLNG were multinational oil companies. Through the NLNG board members appointed by NNPC, the Nigerian government exercised control over NLNG, including but not limited to the ability to block the award of EPC contracts. NLNG was an entity and instrumentality of the Government of Nigeria, within the meaning of the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1)(A) and 78dd-2(h)(2)(A). Officers and employees of NLNG were "foreign officials," within the meaning of the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1)(A) and 78dd-2(h)(2)(A).

The Bonny Island Project

12. Between 1995 and 2004, Joint Venture was awarded four EPC contracts to build the Bonny Island Project. The Bonny Island Project was constructed in four phases, with each phase corresponding to an EPC contract. An LNG "train" is the infrastructure necessary to pipe raw natural gas from wellheads, convert the raw gas to purified LNG, and deliver that LNG to a tanker. The first phase of the Bonny Island Project consisted of two trains (Trains 1 and 2), the second phase consisted of one train (Train 3), the third phase consisted of two trains (Trains 4 and 5), and the fourth phase consisted of one train (Train 6). The first EPC contract, covering Trains 1 and 2, was awarded to Joint Venture through a competitive international tender. The other three EPC contracts were awarded to Joint Venture on a sole-source, negotiated basis. The four EPC contracts awarded to Joint Venture collectively were valued at over $6 billion.

COUNT 1

Conspiracy to Violate the Foreign
Corrupt Practices Act
(18 U.S.C. § 371)

13. Paragraphs 1 through 12 are realleged and incorporated by reference as though fully set forth herein.

14. From at least in or around August 1994, though in or around June 2004, in the Southern District of Texas, and elsewhere, defendant ALBERT JACKSON STANLEY did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree with Joint Venture, EPC Contractor B, EPC Contractor C, EPC Contractor D, officers and employees of the foregoing, Consultant A, Consulting Company A, Consulting Company B, and others, known and unknown, to commit offenses against the United States, that is, being a domestic concern and an officer, employee, and agent of EPC Contractor A and then EPC Contractor A1, both domestic concerns, to willfully make use of the mails and means and instrumentalities of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, and authorization of the payment of any money, offer, gift, promise to give, and authorization of the giving of anything of value to any foreign official for purposes of: (i) influencing acts and decisions of such foreign official in his official capacity; (ii) inducing such foreign official to do and omit to do acts in violation of the lawful duty of such official; (iii) securing an improper advantage; and (iv) inducing such foreign official to use his influence with a foreign government and instrumentalities thereof to affect and influence acts and decisions of such government and instrumentalities, in order to assist STANLEY, Joint Venture, and others in obtaining and retaining

business for and with, and directing business to, Joint Venture and others, in violation of Title 15, United States Code, Section 78dd-2(a).

Purpose of the Conspiracy

15. The purpose and object of the conspiracy was to make corrupt payments to officials of the executive branch of the Government of Nigeria, officials of NNPC, officials of NLNG, and others in order to obtain and retain business related to the Bonny Island Project.

Manner and Means of the Conspiracy

16. STANLEY and his co-conspirators employed various manner and means to carry out the conspiracy, including but not limited to the following:

a. STANLEY and his co-conspirators held so-called "cultural meetings" in which they discussed, among other things, the use of particular agents to pay bribes to officials of the Government of Nigeria in order to secure their support for Joint Venture to obtain and retain contracts to build the Bonny Island Project.

b. STANLEY and his co-conspirators agreed that Joint Venture would hire Consulting Company A to pay bribes to high-level Nigerian government officials, including top-level executive branch officials, and Consulting Company B to pay bribes to lower level Nigerian government officials, including employees of NLNG, in exchange for the officials' assistance in obtaining and retaining contracts to build the Bonny Island Project.

c. STANLEY and his co-conspirators caused Madeira Company 3 to execute consulting contracts with Consulting Company A and Consulting Company B providing for the payment of tens of

millions of dollars in consulting fees in exchange for vaguely described marketing and advisory services, when in fact the primary purpose of the contracts was to facilitate the payment of bribes to Nigerian government officials.

d. Prior to NLNG's award to Joint Venture of the various EPC contracts, STANLEY and other co-conspirators met with three successive holders of a top-level office in the executive branch of the Government of Nigeria and negotiated with the office holders' representatives regarding the amount of the bribes that Joint Venture would pay to the Nigerian government officials.

e. STANLEY and his co-conspirators caused wire transfers totaling approximately $132 million from Madeira Company 3's bank account in Amsterdam, The Netherlands, to bank accounts in New York, New York, to be further credited to bank accounts in Switzerland and Monaco controlled by Consultant A for Consultant A to use to bribe Nigerian government officials,

f. On behalf of Joint Venture and the four joint venture companies, Consultant A wire transferred bribe payments to or for the benefit of various Nigerian government officials, including officials of the executive branch of the Government of Nigeria, NNPC, and NLNG, and for the benefit of a political party in Nigeria.

g. STANLEY and his co-conspirators caused wire transfers totaling over $50 million from Madeira Company 3's bank account in Amsterdam, The Netherlands, to Consulting Company B's bank account in Japan for Consulting Company B to use to bribe Nigerian government officials.

Overt Acts

17. In furtherance of the conspiracy and to achieve its purpose and object, at least one of the co-conspirators committed or caused to be committed, in the Southern District of Texas, and elsewhere, the following overt acts, among others:

a. On or about August 3, 1994, the U.K. Subsidiary salesperson responsible for the Bonny Island Project ("Salesperson A") sent a facsimile from London, England, to STANLEY in Houston, Texas, and to other co-conspirators stating, among other things, that STANLEY and other top executives of the joint venture companies had agreed to send a message "to the top man that we are ready to do business in the customary manner" and to ask Consulting Company B to secure support from the key individuals at the working level of NLNG.

b. On or about November 2, 1994, Consultant A told Salesperson A that he had spoken with a senior official of the Ministry of Petroleum, that Consultant A's fee would be $60 million, that the first top-level executive branch official of the Government of Nigeria would get $40-45 million of that fee, that other Nigerian government officials would get $15-20 million of that fee, and that there would be a meeting between STANLEY and the first top-level Nigerian executive branch official before any written agreement between Joint Venture and Consultant A.

c. On or about November 30, 1994, STANLEY and other co-conspirators met in Abuja, Nigeria, with the first top-level executive branch official of the Government of Nigeria to verify that the official was satisfied with Joint Venture using Consultant

A as its agent and to confirm that the official wanted Joint Venture to negotiate with the senior official of the Ministry of Petroleum the bribes to Nigerian government officials.

d. On or about March 20, 1995, Madeira Company 3 entered into an agreement with Consulting Company A providing, among other things, that Madeira Company 3 would pay $60 million to Consulting Company A if Joint Venture was awarded a contract to construct Trains 1 and 2 of the Bonny Island Project.

e. On or about December 15, 1995, Madeira Company 3 wire transferred $1.542 million to Consulting Company A, via a correspondent bank account in New York, New York, in payment of Consulting Company A's first invoice under the consulting agreement for Trains 1 and 2.

f. On or about April 9, 1996, Madeira Company 3 entered into an agreement with Consulting Company B whereby it agreed to pay Consulting Company B $29 million for assisting Joint Venture in winning the contract to build Trains 1 and 2 of the Bonny Island Project.

g. On or about May 1, 1997, STANLEY and other co-conspirators met in Abuja, Nigeria, with the first top-level executive branch official of the Government of Nigeria and requested that the official designate a representative with whom Joint Venture should negotiate the bribes to Nigerian government officials in exchange for the first top-level executive branch official's support of the award of the Train 3 EPC contract.

h. On or about February 28, 1999, STANLEY and other co-conspirators met in Abuja, Nigeria,

with a second top-level executive branch official of the Government of Nigeria to request that the official designate a representative with whom Joint Venture should negotiate the bribes to Nigerian government officials in exchange for the second top-level executive branch official's support o' the award of the Train 3 EPC contract.

i. On or about March 5, 1999, STANLEY and other co-conspirators met in London, England, with the representative designated by the second top-level executive branch official of the Government of Nigeria to negotiate the bribes to Nigerian government officials in exchange for the award of the Train 3 EPC contract.

j. On or about March 18, 1999, Madeira Company 3 entered into an agreement with Consulting Company A providing, among other things, that Madeira Company 3 would pay $32.5 million to Consulting Company A if Joint Venture was awarded a contract to construct Train 3 of the Bonny Island Project.

k. On or about March 13, 2000, Madeira Company 3 entered into a consulting agreement with Consulting Company B promising to pay it $4 million in connection with Train 3.

l. On or about November 11, 2001, STANLEY and a salesperson from EPC Contractor A1 met in Abuja, Nigeria, with a third top-level executive branch official of the Government of Nigeria and an NNPC official to request that the top-level executive branch official designate a representative with whom Joint Venture should negotiate the bribes to Nigerian government officials in exchange for the

third top-level executive branch official's support of the award of the Trains 4 and 5 EPC contract.

m. On or about December 24, 2001, Madeira Company 3 entered into an agreement with Consulting Company A providing, among other things, that Madeira Company 3 would pay $51 million to Consulting Company A if Joint Venture was awarded a contract to construct Trains 4 and 5 of the Bonny Island Project.

n. On or about June 14, 2002, STANLEY and other members of Joint Venture's Steering Committee authorized Joint Venture to enter into an agreement with Consulting Company B for Trains 4 and 5 of the Bonny Island Project.

o. On or about June 28, 2002, Madeira Company 3 entered into an agreement with Consulting Company A providing, among other things, that Madeira Company 3 would pay $23 million to Consulting Company A if Joint Venture was awarded a contract to construct Train 6 of the Bonny Island Project.

p. On or about June 15, 2004, Madeira Company 3 wire transferred $3 million to Consulting Company B via a correspondent bank account in New York, New York, in payment of one of Consulting Company B's invoices under the agreement for Trains 4 and 5. All in violation of Title 18, United States Code, Section 371.

COUNT 2

Conspiracy to Commit Mail and Wire Fraud
(18 U.S.C. § 371)

18. Paragraphs 2 and 3 are realleged and incorporated by reference as though fully set forth herein.

19. "LNG Consultant" was ,a citizen of the United States and a citizen of Lebanon. From in or about 1977, until in or about 1988, LNG Consultant was a salesperson employed by EPC Contractor A responsible for LNG and other projects in the Middle East. In or about 1988, LNG Consultant resigned from EPC Contractor A and became a consultant to EPC Contractor A and subsequently EPC Contractor A1, among other firms. At various times after 1988, LNG Consultant used corporate vehicles for his consulting business.

20. With the assistance of STANLEY, LNG Consultant obtained, directly or indirectly, a series of lucrative consulting agreements with EPC Contractor A and EPC Contractor A1. These agreements generally provided for the payment of a fixed $10 million success fee if the LNG plant project covered by the agreement was awarded to EPC Contractor A/EPC Contractor A1.

21. Beginning no later than in or about December 1991, and continuing to in or about 2004, in the Southern District of Texas, and elsewhere, defendant ALBERT JACKSON STANLEY did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree, with LNG Consultant and others, known and unknown, to commit offenses against the United States, that is, to devise and attempt to devise a scheme and artifice to defraud and obtain money and property from EPC Contractor A, EPC Contractor A1, and others by means of false and fraudulent pretenses, representations, and promises, and to defraud EPC Contractor A and EPC Contractor A1 of their right to their employees' honest services, and knowingly use the mails and interstate wires for the purpose of executing such scheme and artifice, in violation of

Title 18, United States Code, Sections 1341, 1343, and 1346.

Purpose of the Conspiracy

22. The purpose and object of the conspiracy was for STANLEY and LNG Consultant to unjustly enrich themselves by obtaining money and property falsely and fraudulently from EPC Contractor A, EPC Contractor A1, and others in the form of consulting fees which were paid, directly or indirectly, to LNG Consultant and portions of which, in turn, were paid by LNG Consultant to STANLEY as "kickbacks."

Manner and Means of the Conspiracy

23. STANLEY and his co-conspirators employed various manner and means to carry out the conspiracy, including but not limited to the following:

a. STANLEY caused EPC Contractor A and EPC Contractor A1 to enter into lucrative consulting agreements with LNG Consultant or companies designated and controlled by LNG Consultant in connection with various LNG projects around the world.

b. Pursuant to the consulting agreements, LNG Consultant or companies designated and controlled by LNG Consultant were paid tens of millions of dollars in "success" fees on LNG projects obtained by EPC Contractor A and EPC Contractor A1.

c. LNG Consultant paid kickbacks to STANLEY out of the consulting fees that EPC Contractor A and EPC Contractor A1 had paid LNG Consultant or companies designated and controlled by LNG Consultant.

d. STANLEY and LNG Consultant concealed from EPC Contractor A and EPC Contractor A1 that LNG Consultant was paying kickbacks to STANLEY out of consulting fees that EPC Contractor A and EPC Contractor A1 had paid LNG Consultant or companies designated and controlled by LNG Consultant.

e. STANLEY and LNG Consultant caused the kickbacks to be routed through Swiss bank accounts, including through accounts held in the names of nominees and shell companies, in order to conceal their scheme.

Overt Acts

24. In furtherance of the conspiracy and to achieve its purpose and object, at least one of the co-conspirators committed or caused to be committed, in the Southern District of Texas, and elsewhere, the following overt acts, among others:

a. On or about April 7, 1992, STANLEY signed the EPC Contractor A approval form authorizing a $15 million consulting agreement between EPC Contractor A and a company designated by LNG Consultant ("Lebanese Consulting Company") for an LNG project in Malaysia.

b. On or about May 21, 1992, Lebanese Consulting Company wire transferred $1,374,750 from its Swiss bank account to a Swiss bank account controlled by STANLEY.

c. On or about January 22, 1996, STANLEY signed a consulting agreement between EPC Contractor A and a company designated and controlled by LNG Consultant ("BVI Consulting Company") providing, among other things, that EPC

Contrctor A would pay BVI Consulting Company a $10 million success fee in connection with Trains 1 and 2 of the Bonny Island LNG project in Nigeria.

d. On or about February 14, 1996, LNG Consultant wire transferred $1.2 million from his Swiss bank account to a Swiss bank account controlled by STANLEY.

e. On or about August 19, 1998, STANLEY signed a consulting agreement between EPC Contractor A and BVI Consulting Company providing, among other things, that EPC Contractor A would pay BVI Consulting Company a $10 million success fee if an EPC contract to build an LNG plant in Malaysia was awarded to EPC Contractor A's consortium.

f. On or about June 1, 2001, STANLEY signed the EPC Contractor A1 approval form authorizing a $10 million consulting agreement between EPC Contractor A1 and BVI Consulting Company for an LNG project in Egypt.

g. On or about August 6, 2001, LNG Consultant caused $1.25 million to be wire transferred to a Swiss bank account controlled by STANLEY.

h. On or about August 20, 2001, STANLEY signed a consulting agreement between EPC Contractor A1 and BVI Consulting Company providing that EPC Contractor A1 would pay BVI Consulting Company a $10 million success fee if an LNG project in Yemen was awarded to EPC Contractor A1's consortium.

i. On or about April 13, 2003, in Houston, Texas, STANLEY signed a consulting agreement between EPC Contractor A1 and BVI Consulting Company

providing that EPC Contractor A1 would pay BVI Consulting Company a $10 million success fee if an LNG project in Indonesia was awarded to EPC Contractor A1's consortium.

j. On or about July 29, 2003, LNG Consultant received in BVI Consulting Company's bank account in Switzerland a $2.5 million wire transfer from EPC Contractor A1 pursuant to the consulting agreement for the Egypt LNG project.

k. In or about early 2004, STANLEY and LNG Consultant discussed cover stories they could use to explain STANLEY'S receipt of payments from Lebanese Consulting Company and BVI Consulting Company.

All in violation of Title 18, United States Code, Section 371.

STEVEN A. TYRRELL, CHIEF
FRAUD SECTION
CRIMINAL DIVISION
U.S. DEPARTMENT OF JUSTICE

By: /s/ William J. Stuckwisch
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APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed September 3, 2008]

Criminal No. H-08-597

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALBERT JACKSON STANLEY,

Defendant.

REDACTED PURSUANT TO
E-GOVERNMENT ACT OF 2002

PLEA AGREEMENT

The United States of America, by and through Steven A. Tyrrell, Chief of the Fraud Section, Criminal Division, United States Department of Justice, and William J. Stuckwisch and Patrick F. Stokes, Trial Attorneys, and the Defendant, Albert Jackson Stanley, by and through his counsel, Larry Veselka, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, state that they have entered into an agreement, the terms and conditions of which are as follows:

The Defendant's Agreement

1. The Defendant agrees to waive Indictment and to plead guilty to an Information (a copy of which is attached) charging him with two counts of conspiracy to commit an offense against the United States, in violation of Title 18, United States Code, Section 371. Count 1 of the Information charges the Defendant with conspiracy to violate the Foreign Corrupt Practices Act, in violation of Title 15, United States Code, Section 78dd-2. Count 2 of the Information charges the Defendant with a conspiracy to commit mail and wire fraud, in violation of Title 18, United States Code, Sections 1341, 1343, and 1346. The Defendant, by entering this plea, agrees that he is waiving any right to have the facts that the law makes essential to the punishment charged in the Information, or proven to a jury or proven beyond a reasonable doubt.

2. Defendant agrees that this plea agreement binds only the Criminal Division of the U.S. Department of Justice and the Defendant; it does not bind any United States Attorney or any other Division of the Department of Justice. Punishment Range

3. The statutory maximum penalty for each violation of Title 18, United States Code, Section 371, is imprisonment for a term of not more than five years and a fine of not more than $250,000, or twice the gross pecuniary gain to the Defendant or loss to the victim(s), whichever is greater. The combined statutory maximum term of imprisonment for the two counts is imprisonment for a term of not more than ten years. Additionally, the Defendant may receive a term of supervised release after imprisonment of up to three years on each count. Title 18, United States Code, Sections 3559(a)(4) and 3583(b)(2). The Defendant acknowledges and understands that should he violate

conditions of supervised release which may be imposed as part of his sentence, then the Defendant may be imprisoned for an additional term of up to two years, without credit for time already served on the term of supervised release prior to such violation. Title 18, United States Code, Sections 3559(a)(4) and 3583(e)(3). The Defendant understands that he cannot have the imposition or execution of the sentence suspended, nor is he eligible for parole.

Mandatory Special Assessment

4. Pursuant to Title 18, United States Code, Section 3013(a)(2)(A), immediately after sentencing, the Defendant will pay to the Clerk of the United States District Court a special assessment in the amount of one hundred dollars ($100.00) per count of conviction, for a total of two hundred dollars ($200.00). The payment will be by cashier's check or money order payable to the Clerk of the United States District Court, c/o District Clerk's Office, P.O. Box 61010, Houston, Texas 77208, Attention: Finance.

Restitution, Forfeiture, and Fines

5. This plea agreement is being entered into by the United States on the basis of the Defendant's express representation that the Defendant will make a full and complete disclosure of all assets over which the Defendant exercises direct or indirect control, or in which the Defendant has any financial interest.

6. The Defendant agrees to make complete financial disclosure to the United States by truthfully executing a sworn financial statement by the deadline set by the United States, or if no deadline is set, no later than sentencing. The Defendant agrees to authorize the release of all financial information requested by the

United States, including, but not limited to, executing authorization forms for the United States to obtain tax information, bank account records, credit history, and social security information. The Defendant agrees to discuss or answer any questions by the United States relating to the Defendant's complete financial disclosure.

7. The Defendant agrees to pay restitution to the victim(s) of Count 2 of the Information. The Defendant stipulates and agrees that as a result of his criminal conduct the victim, his former employer, incurred a monetary loss of $10.8 million. The Defendant and the United States agree to recommend that the Court order restitution of $10.8 million.

8. The parties contemplate that the United States will seek the transfer to the United States of certain of the Defendant's assets in the following bank accounts in Switzerland that have been frozen by the Swiss authorities and will seek to apply those assets to satisfy, in whole or in part, the Court's restitution order: Credit Suisse (ZH) account number [redacted], in the name of Kirton Investments Inc.; Credit Suisse (ZH) account number [redacted] in the name of Black Eagle Foundation; and Credit Suisse (ZH) account number [redacted] in the name of Meritco Investment S.A. Upon entering his guilty plea, the Defendant agrees to waive all rights in, interest in, and title to the aforementioned accounts, to take all steps as requested by the United States to facilitate the transfer of the assets in the aforementioned accounts to the United States and the application of the assets to restitution, and to testify truthfully in any related proceeding. The Defendant further agrees that the amount of restitution that can be paid using the assets in these accounts will be due and

payable as soon as the assets are transferred to the United States and available for restitution.

9. The Defendant further agrees to liquidate through an arms-length transaction his interest in the real property located at [redacted], that he holds through Kirton Investments Inc., within six months of the date of the entry of his guilty plea, which time period may be extended by the United States, and to pay all or that portion necessary of the proceeds of the transaction, net of any transaction costs, to satisfy his obligation to make restitution under this agreement. The United States agrees not to bring further charges based on the transactions required by this paragraph.

10. The Defendant understands that under the *United States Sentencing Guidelines*, the Court may order the Defendant to pay a fine to reimburse the government for the costs of any imprisonment or term of supervised release. To the extent that the Court orders restitution consistent with paragraph 7, the United States agrees to recommend that the Court not impose a fine.

Cooperation

11. The parties understand this agreement carries the potential for a motion for departure under Section 5K1.1 of the *United States Sentencing Guidelines*. The Defendant understands and agrees that whether such a motion is filed will be determined solely by the United States through the Fraud Section of the Criminal Division of the United States Department of Justice. Should the Defendant's cooperation, in the sole judgment and discretion of the United States, amount to "substantial assistance," the United States reserves the sole right to file a motion for departure

pursuant to Section 5K1.1 of the *United States Sentencing Guidelines*. The Defendant understands and agrees that the United States will request that sentencing be deferred until his cooperation is complete. During that time, the Defendant agrees to persist in his plea of guilty through sentencing and to fully cooperate with the United States as described below.

12. The Defendant understands and agrees that "fully cooperate," as used herein, includes providing all information relating to any criminal activity known to the Defendant, including providing assistance to foreign authorities at the direction of the United States. The Defendant understands that this includes providing information about all state, federal, and foreign law offenses about which he has knowledge. In that regard:

(a) Defendant agrees to testify truthfully as a witness before a grand jury or in any other judicial or administrative proceeding when called upon to do so by the United States, including in a proceeding in a foreign jurisdiction. Defendant further agrees to waive his Fifth Amendment privilege against self-incrimination for the purpose of this agreement;

(b) Defendant agrees to voluntarily attend any interviews and conferences as the United States may request on reasonable notice;

(c) Defendant agrees to provide truthful, complete and accurate information and testimony and understands any false statements made by the Defendant to the Grand Jury or at any court proceeding (criminal or civil), or to a government agent or attorney can and will be prose-

cuted under the appropriate perjury, false statement or obstruction statutes;

(d) Defendant agrees to provide to the United States all documents in his possession or under his control relating to all areas of inquiry and investigation.

(e) Should the recommended departure, *if any*, *not meet the Defendant's expectat*ions, the Defendant understands he remains bound by the terms of this agreement and cannot, for that reason alone, withdraw his plea.

Waiver of Appeal

13. The Defendant is aware that Title 18, United States Code, Section 3742 affords a Defendant the right to appeal the sentence imposed. Additionally, the Defendant is aware that Title 28, United States Code, Section 2255, affords the right to contest or "collaterally attack" a conviction or sentence after the conviction or sentence has become final. If the Court accepts the plea agreement pursuant to Rule 11(c)(1)(C) and sentences the Defendant to the agreed-upon sentence as set forth in paragraph 19, the Defendant agrees to waive the right to appeal the sentence imposed or the manner in which it was determined, and the Defendant waives the right to contest his conviction or sentence by means of any post-conviction proceeding.

14. In agreeing to these waivers, the Defendant is aware that a sentence has not yet been determined by the Court. The Defendant is also aware that any promise, representation, or estimate of the possible sentencing range under the Sentencing Guidelines that he may have received from his counsel, the United States, or the Probation Office is a prediction, not a promise, and is not binding on the United States,

the Probation Office, or the Court, other than as provided in paragraph 19. The Defendant further understands and agrees that the *United States Sentencing Guidelines* are "effectively advisory" to the Court. *United States v. Booker,* 125 S.Ct. 738 (2005). Accordingly, the Defendant understands that, although the Court must consult the *United States Sentencing Guidelines* and must take them into account when sentencing the Defendant, the Court is not bound to follow the *United States Sentencing Guidelines* and is not required to sentence the Defendant within the calculated guideline range. However, if the Court accepts this plea agreement, the Court is bound by the sentencing provision in paragraph 19.

15. The Defendant understands and agrees that all waivers contained in the agreement are made in exchange for the concessions made by the United States in this plea agreement. If the Defendant instructs his attorney to file a notice of appeal of his sentence or of his conviction, or if the Defendant instructs his attorney to file any other post-conviction proceeding attacking his conviction or sentence, the Defendant understands that the United States will seek specific performance of the Defendant's waivers in this plea agreement of the Defendant's right to appeal his conviction or sentence and of the Defendant's right to file any post-conviction proceedings attacking his conviction or sentence.

The United States' Agreements

16. The United States agrees that, except as provided in this agreement, no further criminal charges will be brought against the Defendant for any act or offense in which he participated in his capacity as an officer and/or employee of EPC Contractor A or EPC Contractor A1, or for any act or offense relating to the

Defendant's transactions with or use of the proceeds of the conspiracies charged, provided such conduct was disclosed to the United States by the Defendant prior to the date the Defendant executes this agreement.

United States' Non-Waiver of Appeal

17. The United States reserves the right to carry out its responsibilities under guidelines sentencing. Specifically, the United States reserves the right:

(a) to bring its version of the facts of this case, including its evidence file and any investigative files, to the attention of the Probation Office in connection with that office's preparation of a presentence report;

(b) to set forth or dispute sentencing factors or facts material to sentencing;

(c) to seek resolution of such factors or facts in conference with the Defendant's counsel and the Probation Office;

(d) to file a pleading relating to these issues, in accordance with U.S.S.G. Section 6A1.2 and Title 18, United States Code, Section 3553(a); and

(e) to appeal the sentence imposed or the manner in which it was determined.

Sentence Determination

18 The Defendant is aware that the sentence will be imposed after consideration of the *United States Sentencing Guidelines* and *Policy Statements*, which are only advisory, as well as the provisions of Title 18, United States Code, Section 3553(a). The United States and the Defendant agree that the applicable

Sentencing Guidelines range exceeds 84 months' imprisonment.

19. Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the United States and the Defendant agree that a term of imprisonment of 84 months is the appropriate disposition of the case. The Defendant understands that, if the Court rejects the plea agreement, the Court must (i) inform the parties that the Court rejects the plea agreement, (ii) advise the Defendant personally that the Court is not required to follow the plea agreement and give the Defendant the opportunity to withdraw the plea, and (iii) advise the Defendant personally that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the defendant than the plea agreement contemplated. The Defendant agrees that he will not seek a sentence below 84 months' imprisonment, and the Defendant understands that except under the circumstances described in paragraph 20 below, the Court will be required to impose a sentence of 84 months' imprisonment if the Court accepts the plea agreement.

20. If the Defendant provides truthful, complete, and accurate information to the United States and fully cooperates with the United States pursuant to the plea agreement, then the United States in its sole and exclusive discretion may move the Court, pursuant to Section 5K1.1 of the *United States Sentencing Guidelines* and Title 18, United States Code, Section 3553(e), to depart downward from the 84-month agreed-upon sentence set forth in paragraph 19. The Defendant agrees that he will not move for a downward departure on any grounds and that no such grounds are applicable.

Rights at Trial

21. The Defendant represents to the Court that he is satisfied that his attorneys have rendered effective assistance. The Defendant understands that by entering into this agreement, he surrenders certain rights as provided in this plea agreement. The Defendant understands that the rights of a defendant include the following:

(a) If the Defendant persisted in a plea of not guilty to the charges, the Defendant would have the right to a. speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the Defendant, the United States, and the court all agree.

(b) At a trial, the United States would be required to present witnesses and other evidence against the Defendant. The Defendant would have the opportunity to confront those witnesses and his attorney would be allowed to cross-examine them. In turn, the Defendant could, but would not be required to, present witnesses and other evidence on his own behalf. If the witnesses for the Defendant would not appear voluntarily, he could require their attendance through the subpoena power of the court.

(c) At a trial, the Defendant could rely on a privilege against self-incrimination and decline to testify, and no inference of guilt could be drawn from such refusal to testify. However, if the Defendant desired to do so, he could testify on his own behalf.

Factual Basis for Guilty Plea

22. The Defendant is pleading guilty because he is guilty of the charges contained in Counts 1 and 2 of the Information. If this case were to proceed to trial, the United States would prove each element of the offenses charged in the Information beyond a reasonable doubt(The Defendant understands that the United States would submit testimony and physical and documentary evidence that would establish the following facts, among others:

The Defendant

a. At all times relevant to the Information, STANLEY was a United States citizen and a resident of Houston, Texas. STANLEY and his co-conspirators committed acts in furtherance of the schemes described below in Houston, Texas. From in or about March 1991, until in or about June 2004, STANLEY served in various capacities as an officer and/or director of EPC Contractor A[1] and its successor company, EPC Contractor A1.

The Bonny Island Bribery Scheme

b. At all times relevant to the Information, STANLEY was one of the executives at EPC Contractor A and then EPC Contractor A1 with

[1] This factual basis refers to persons and entities, such as EPC Contractor A, using the same terms as are used in the Information to which STANLEY is pleading guilty. STANLEY has reviewed the "Relevant Entities and Individuals" section of the Information (paragraphs 2-l2) and admits the facts alleged therein based on his personal knowledge and/or admits that the government would be able to prove the facts alleged therein at a trial.

responsibility for obtaining the EPC contracts to build the Bonny Island Project, a series of four contracts awarded between 1995 and 2004 (corresponding to Trains 1 and 2; Train 3; Trains 4 and 5; and Train 6), collectively valued at over $6 billion, to build liquefied natural gas ("LNG") facilities on Bonny Island, Nigeria. STANLEY also was EPC Contractor A/EPC Contractor A1 's senior representative on the Steering Committee of Joint Venture. The Steering Committee made major decisions on behalf of Joint Venture, including authorizing the retention and compensation of agents.

c. STANLEY believed that support of Nigerian government officials, including top-level executive branch officials, high-level Petroleum Ministry officials, NNPC officials, and NLNG officials and employees, was necessary for the Bonny Island Project EPC Contracts to be awarded to Joint Venture. STANLEY also knew that it was unlawful under U.S. law to bribe foreign government officials.

d. In 1994, 1999, 2001, and 2002, STANLEY authorized the hiring of Consultant A and Consulting Company A by Joint Venture, expecting that Consultant A and Consulting Company A would pay bribes to high-level Nigerian government officials to assist Joint Venture, EPC Contractor A, EPC Contractor A1, and others in winning the EPC contracts to build the Bonny Island Project. In 1996, 1999, and 2001, STANLEY also authorized the hiring of Consulting Company B by Joint Venture, expecting that Consulting Company B would pay bribes to lower level Nigerian government officials to

assist Joint Venture, EPC Contractor A, EPC Contractor A1, and others in winning the EPC contracts to build the Bonny Island Project.

e. At crucial junctures in the life of the Bonny Island Project, STANLEY and others met with three successive holders of a top-level office in the executive branch of the Government of Nigeria to ask the office holder to designate a representative with whom Joint Venture should negotiate bribes to Nigerian government officials. On or about November 30, 1994, STANLEY and others met with the first such top-level executive branch official in Abuja, Nigeria, to ask the official to nominate a representative with whom Joint Venture should negotiate the fees that Joint Venture would pay Consulting Company A to pass on as bribes to Nigerian government officials. This top-level executive branch official designated a high-level official of the Ministry of Petroleum as his representative. Thereafter, as EPC Contractor A's senior representative on Joint Venture's Steering Committee, STANLEY authorized Joint Venture to enter into a consulting agreement with Consulting Company A providing for Joint Venture to pay it $60 million if the EPC contract for Trains 1 and 2 was awarded to Joint Venture. STANLEY intended that the $60 million fee would be used, in part, to pay bribes to Nigerian government officials.

f. On or about May 1, 1997, STANLEY and others again met in Abuja, Nigeria, with the top-level executive branch official to ask the official to nominate a representative with whom Joint Venture should negotiate bribes to Nigerian

government officials in exchange for the award to Joint Venture of an EPC contract to build Train 3. At the meeting, the top-level executive branch official designated a senior executive branch official as his representative.

g. On or about February 28, 1999, STANLEY and others met in Abuja, Nigeria, with a second top-level executive branch official. At the meeting, STANLEY asked the second top-level executive branch official to nominate a representative with whom Joint Venture should negotiate bribes to Nigerian government officials in exchange for the award to Joint Venture of an EPC contract to build Train 3. At the meeting, the second top-level executive branch official designated one of his advisers as his representative.

h. On or about March 5, 1999, STANLEY and other co-conspirators met at a hotel in London, England, with the adviser designated by the second top-level executive branch official to negotiate the amount of bribes to be paid to the second top-level executive branch official and other Nigerian government officials in exchange for the award to Joint Venture of an EPC contract to build Train 3. The amount negotiated with the representative formed the basis for the $32.5 million fee that Joint Venture promised to pay Consulting Company A. As EPC Contractor A1's senior representative on Joint Venture's Steering Committee, STANLEY authorized Joint Venture to enter into the consulting agreement with Consulting Company A, intending that the $32.5 million fee would be used, in part, to pay bribes to Nigerian government officials.

i. On or about November 11, 2001, STANLEY and other co-conspirators met in Abuja, Nigeria, with a third top-level executive branch official to ask the official to nominate a representative with whom Joint Venture should negotiate bribes to Nigerian government officials in exchange for the award to Joint Venture of an EPC contract to build Trains 4 and 5. At the meeting, the third top-level executive branch official designated a top-level official of NNPC as his representative. As EPC Contractor A1's senior representative on Joint Venture's Steering Committee, STANLEY authorized Joint Venture to enter into a consulting agreement with Consulting Company A providing for Joint Venture to pay it $51 million if the EPC contract for Trains 4 and 5 was awarded to Joint Venture. At the time, STANLEY intended that the $51 million fee would be used, in part, to pay bribes to Nigerian government officials.

j. In or about June 2002, STANLEY authorized Joint Venture to enter into a consulting agreement with Consulting Company A providing for Joint Venture to pay it $23 million if the EPC contract for Train 6 was awarded to Joint Venture. At the time, STANLEY intended that the $23 million fee would be used, in part, to pay bribes to Nigerian government officials.

The LNG Consultant Kickback Scheme

k. LNG Consultant was a salesperson at EPC Contractor A until in or about 1988, when he resigned as an employee and became a consultant to EPC Contractor A. In or about 1991, STANLEY and LNG Consultant agreed that (I) STANLEY would arrange for LNG Consultant

to receive lucrative consulting agreements with EPC Contractor A and, later, EPC Contractor A1, and (ii) LNG Consultant would "kick back" to STANLEY a portion of the consulting fees that LNG Consultant received from EPC Contractor A and EPC Contractor A1. STANLEY and LNG Consultant concealed the kickback scheme from EPC Contractor A, EPC Contractor A's parent company, EPC Contractor A1, and EPC Contractor A1's parent company. At the time, STANLEY knew that the codes of conduct of the parent companies of EPC Contractor A and EPC Contractor A1 prohibited these payments. STANLEY also knew that other officers and employees of EPC Contractor A, EPC Contractor A1, and their respective parent companies would not have approved consulting contracts with companies related to LNG Consultant if they had known about the kickback scheme.

l. During the ensuing years, as described below, LNG Consultant or companies he designated and controlled, with the assistance of STANLEY, obtained a series of lucrative consulting agreements with EPC Contractor A and EPC Contractor A1. These agreements generally provided for the payment of a fixed $10 million success fee if the LNG plant project covered by the agreement was awarded to EPC Contractor A/EPC Contractor A1.

m. In April 1992, STANLEY caused EPC Contractor A to enter into a consulting agreement for the Malaysia Dua LNG project with a Lebanese consulting company designated and controlled by LNG Consultant ("Lebanese Consulting

Company"), Pursuant to the consulting agreement, EPC Contractor A paid the Lebanese Consulting Company $15 million. LNG Consultant kicked back to STANLEY a total of $4.75 million by directing the Lebanese Consulting Company to wire transfer payments to a Swiss bank account controlled by STANLEY after receiving each installment payment from EPC Contractor A.

n. In January 1996, STANLEY caused EPC Contractor A to enter into a consulting agreement for Trains 1 and 2 of the Bonny Island Project with a second company designated and controlled by LNG Consultant ("BVI Consulting Company"). Pursuant to the consulting agreement, EPC Contractor A paid BVI Consulting Company $10 million. LNG Consultant kicked back to STANLEY a total of $1.95 million by wire transferring payments to a Swiss bank account controlled by STANLEY after receiving each installment payment from EPC Contractor A.

o. In or about August 1998, STANLEY caused EPC Contractor A to enter into a consulting agreement for the Malaysia Tiga LNG project with BVI Consulting Company. Pursuant to the consulting agreement, EPC Contractor A 1 , as the successor company to EPC Contractor A, paid BVI Consulting Company $13.3 million. LNG Consultant kicked back to STANLEY a total of $4.1 million by causing wire transfers to the Swiss bank account of Amal Development Inc., a Panama corporation controlled by STANLEY.

p. In or about June 2001, STANLEY caused EPC Contractor A1 to enter into consulting agreements for the Yemen LNG project and the Egypt LNG project with BVI Consulting Company. In or about April 2003, STANLEY caused EPC Contractor A1 to enter into a consulting agreement for the Indonesia LNG project with BVI Consulting Company. In each of these agreements, EPC Contractor A1 promised to pay BVI Consulting Company a success fee of $10 million. Pursuant to the agreement for the Egypt LNG project, EPC Contractor A1 paid BVI Consulting Company a total of $10 million between February 2002 and July 2003.

q. In or about 2004, STANLEY talked separately with LNG Consultant and with one of LNG Consultant's colleagues about potential cover stories that could be used to explain STANLEY's receipt of payments from the Lebanese consulting company and BVI Consulting Company.

Breach of Plea Agreement

23. If the Defendant should fail in any way to fulfill completely all of the obligations under this plea agreement, the United States will be released from its obligations under the plea agreement, and the Defendant's plea and sentence will stand. If at any time the Defendant retains, conceals or disposes of assets in violation of this plea agreement, or if the Defendant knowingly withholds evidence or is otherwise not completely truthful with the United States, then the United States may move the Court to set aside the guilty plea and reinstate prosecution. Any information and documents that have been disclosed by the Defendant, whether prior or subsequent to this

plea agreement, and all leads derived therefrom, will be used against the Defendant in any prosecution.

24. Whether the Defendant has breached any provision of this plea agreement shall be determined solely by the United States through the Fraud Section of the Criminal Division of the United States Department of Justice, whose judgment in that regard is final.

Complete Agreement

25. This written plea agreement, consisting of 23 pages, including the attached addendum of the Defendant and his attorney, constitutes the complete plea agreement between the United States, the Defendant, and his counsel. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. The Defendant acknowledges that no threats have been made against him and that he is pleading guilty freely and voluntarily because he is guilty.

26. Any modification of this plea agreement must be in writing and signed by all parties.

Filed at Houston, Texas, on 9/3, 2008.

/s/ Albert Jackson Stanley
Albert Jackson Stanley
Defendant

Subscribed and sworn to before me on September 3, 2008.

MICHAEL N. MILBY
UNITED STATES DISTRICT CLERK

By: /s/ [Illegible]
Deputy United States District Clerk

APPROVED:

STEVEN A. TYRRELL, CHIEF
FRAUD SECTION
CRIMINAL DIVISION
U.S. DEPARTMENT OF JUSTICE

/s/ William J. Stuckwisch
William J. Stuckwisch
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/s/ Larry Verelka
Larry Verelka
Attorney for Defendant Albert Jackson Stanley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. H-08-597

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALBERT JACKSON STANLEY,

Defendant.

PLEA AGREEMENT – ADDENDUM

I have fully explained to the Defendant his rights with respect to the Information. I have reviewed the provisions of the *United States Sentencing Guidelines* and I have fully and carefully explained to the Defendant the provisions of those Guidelines which may apply in this case. I have also explained to the Defendant that the Sentencing Guidelines are only advisory. Further, I have carefully reviewed every part of this plea agreement with the Defendant. To my knowledge, the Defendant's decision to enter into this agreement is an informed and voluntary one.

/s/ Larry Veselka — Sept. 3, 2008
Attorney for Defendant — Date

I have consulted with my attorney and fully understand all my rights with respect to the Information against me. My attorney has fully explained and I understand all my rights with respect to the provisions of the *United States Sentencing Guidelines* which may apply in my case. I have read and carefully reviewed every part of this plea agreement with my attorney. I understand this agreement and I voluntarily agree to its terms.

/s/ Albert Jackson Stanley	9/3/08
Defendant	Date

APPENDIX M

[1] THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. 08-597

UNITED STATES OF AMERICA

Versus

ALBERT JACKSON STANLEY

INITIAL APPEARANCE,
ARRAIGNMENT AND PLEA

BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

Houston, Texas 1:30 p.m.
September 3, 2008

Proceedings recorded by computer stenography
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Edward L. Reed
Official Court Reporter
515 Rusk, Suite 8016
Houston, Texas 77002 * 713-250-5594

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[2] APPEARANCES:

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Court Reporter:

EDWARD L. REED
UNITED STATES DISTRICT COURT
515 Rusk, Suite 8016
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[3] THE COURT: Good afternoon and welcome. We'll turn to the case of *United States versus Albert Jackson Stanley*. We'll take appearances of counsel beginning with the Government, please.

MR. STUCKWISCH: For the Government, William Stuckwisch and Patrick Stokes with the Justice Department, Criminal Division, Fraud Section.

THE COURT: Welcome.

MR. VESELKA: Larry R. Veselka and Lee Kaplan of Smyser Kaplan & Veselka, LLP, Your Honor. Also, Mr. George Tyson is assisting us, but he's out making a call to bring somebody down.

THE COURT: Welcome to all of you, too.

All right, this matter is before the Court on an information. We need to do an initial appearance and an arraignment. And I understand we'll also go over the terms of the Plea Agreement, which is fine. It's a little unorthodox, but we could do that.

Tell me how the Government plans to proceed. Do you wish me to go through the initial part of the arraignment, ask him whether he pleads guilty or not guilty?

MR. STUCKWISCH: I don't know that that's necessary, Your Honor. We understand that he plans to plead guilty. I would suggest going through the waiver [4] of indictment —

THE COURT: I'll do that for sure.

MR. STUCKWISCH: — initial appearance and moving on to taking the plea.

THE COURT: All right. Mr. Veselka, Mr. Kaplan, do you wish me to read the information or are you willing to waive that?

MR. VESELKA: We waive that, Your Honor, on behalf of Mr. Stanley.

THE COURT: All right. Mr. Stanley, do you wish to plead guilty, sir?

DEFENDANT STANLEY: Yes, sir.

THE COURT: And pursuant to the Plea Agreement, the plea is to what counts?

MR. STUCKWISCH: The plea is to Counts One and Count Two of the Information. Would you like me to describe the counts, Your Honor?

THE COURT: Well, I think he's waived the reading, so I assume you don't need a description of the charges, do you?

MR. VESELKA: No, Your Honor, we're familiar.

THE COURT: All right. Sir, do you understand — Mr. Stanley, do you understand that because you're proceeding under an information, you have not had your case submitted to a grand jury and you will not be [5] the subject of an indictment? Do you understand that, sir?

DEFENDANT STANLEY: Yes, sir.

THE COURT: Is that satisfactory to you, then?

DEFENDANT STANLEY: Yes.

THE COURT: All right. We have at least the terms of a bond to discuss, as well as the terms of the Plea Agreement. What I would like you to do, Mr. Stuckwisch, if you could summarize the terms of the Plea Agreement and make sure it's consistent with Mr. Stanley's understanding, as well as the understanding of Mr. Kaplan and Mr. Veselka. Maybe you can approach the rostrum. I think you could hear you better, if you did.

MR. STUCKWISCH: The Plea Agreement provides that Mr. Stanley will waive indictment and plead guilty to Counts One and Two of the Information, pursuant to Rule 11(c)(1)(C). The parties have agreed that a term of imprisonment of 84 months is the appropriate disposition of the case, subject only to a potential departure under Section 5K1.1 of the Sentencing Guidelines, upon a motion by the Government.

If the Court accepts the Plea Agreement and sentences Mr. Stanley in accordance with the terms of the agreement, the defendant agrees to waive his right to [6] appeal and to collaterally attack his conviction and his sentence.

The parties agree in the Plea Agreement to recommend to the Court that Mr. Stanley pay $10.8 million in restitution to the victim of Count Two of the Information. And the parties agree in the Plea Agreement to recommend to the Court — or I should say the Government agrees in the Plea Agreement to recommend that the Court not impose a fine on Mr. Stanley, to the extent that it imposes the restitution in the Plea Agreement.

THE COURT: Mr. Stanley, is that your understanding of the Plea Agreement, sir?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Mr. Veselka?

MR. VESELKA: Yes, Your Honor.

THE COURT: I don't know all the circumstances or even very many of them in this case. I understand that we're talking about large volumes of money. 84 months would strike me as very high for a first-time offender.

Can you tell me what pushed the Government to that length of incarceration, Mr. Stuckwisch, and whether there are any — under 3553, are there no less restrictive alternatives?

MR. STUCKWISCH: Just some background.

[7] THE COURT: Yes, sir.

MR. STUCKWISCH: Mr. Stanley is pleading to two separate conspiracies.

The first conspiracy is to violate the Foreign Corrupt Practices Act.

THE COURT: Right.

MR. STUCKWISCH: The second is to commit mail and wire fraud through a kickback scheme.

The Government, in determining what the appropriate sentence was, began, as we often do, with the Sentencing Guidelines, and we ran Guidelines calculations for both of the schemes.

The parties have not agreed on a Guidelines calculation, but the parties have agreed in the Plea Agreement that the Guidelines range exceeds the 84 months that we've agreed upon pursuant to 11(c)(1)(C).

According to the Government's calculation of the Guidelines, for, the scheme to bribe the foreign government officials in Count One, the Guidelines range far exceeds the 84 months. The bottom of the Guidelines range is upwards of 25 years.

For the second scheme, the kickback scheme, the bottom of the Guidelines range is six and a half years, and that goes above the 84 months that we agreed was an appropriate disposition of this case.

[8] THE COURT: Unless I have forgotten how to do multiplication, six and a half years would be what, 78 months?

MR. STUCKWISCH: That's correct, Your Honor. The Guidelines range calculated by the Government for Count Two would be 78 to 97 months.

THE COURT: So it is within that Guideline range?

MR. STUCKWISCH: It would be within the Guideline range on Count Two, and then —

THE COURT: I know, Count One would be a lot higher.

MR. STUCKWISCH: Correct.

THE COURT: And in terms of the purposes of punishment, do you think this is primarily as a matter of general deterrence? I doubt he's a continuing risk, is he?

MR. STUCKWISCH: No, Your Honor, we don't believe he's a continuing risk. It's both — it's general deterrence in the area of enforcement of the Foreign Corrupt Practices Act. A sentence such as this would send a message to other executives that foreign bribery is taken very seriously and penalties will be paid for violators of the Act.

In terms of Mr. Stanley himself, I should [9] note that his conduct here was egregious.

THE COURT: I'm concerned about the conduct. I'm concerned about it.

MR. STUCKWISCH: Yes, Your Honor.

THE COURT: Is this comparable to other sentences that have been imposed pursuant to the Foreign Corrupt Practices Act?

MR. STUCKWISCH: This would be the longest sentence to date in a Foreign Corrupt Practices Act.

THE COURT: That's what I wondered about. I know it's a growth industry, isn't it, Foreign Corrupt Practices Act? It's keeping a lot of white collar lawyers busy; is that fair?

MR. STUCKWISCH: I think that's fair.

I believe the previous longest sentence of an individual in an FCPA case was I believe 60-odd months here in Houston.

THE COURT: The distinguishing aspects of this one are the dollar volume and the far-ranging nature of the conspiracy?

MR. STUCKWISCH: Those are distinguishing factors, and Mr. Stanley's position at the company. He was the CEO and chairman of his company.

THE COURT: Was it a Halliburton subsidiary; is that right?

[10] MR. STUCKWISCH: We haven't identified the company in the public papers, Your Honor, because of Justice Department Guidelines about identifying uncharged wrongdoers.

THE COURT: Okay.

MR. STUCKWISCH: But if that's important to your consideration —

THE COURT: No, no. I know something about that corporation. He wasn't the chairman of the corporation. It's set forth in the Pretrial Report he was chairman of some subsidiary, I have to believe.

MR. STUCKWISCH: That's right, Your Honor, he was the chairman of a major global engineering and construction services company, business around the world, constructing, among other things, large liquefied natural gas plants, which were at issue in these projects.

This case is distinguishable also because of the wide range and high level of the officials, the foreign government officials whom were to be bribed.

This scheme is distinguish able from previous cases by the sophistication of the scheme, funneling the bribes through agents and *Swiss* bank accounts, other

foreign bank accounts, shell companies, nominee accounts.

[11] I think it's fair to say that this is the largest FCPA prosecution to date.

THE COURT: Well, I'm not trying to play defense counsel, I'm really not, but I'm concerned about this proceeding, as I am about all proceedings. But it appears Mr. Stanley was dealing with a substantial physical dependency during much of this time. Was that factored in?

MR. STUCKWISCH: Yes, Your Honor.

THE COURT: I know the Guidelines don't allow you to, but —

MR. STUCKWISCH: No, it was factored in, Your Honor. We considered not only his conduct here, but his personal circumstances, including his alcoholism and his current health. We've also considered our ongoing investigations and the needs of our investigation and our desire that Mr. Stanley cooperate —

THE COURT: All right. Do you think a 5K is realistic?

MR. STUCKWISCH: If Mr. Stanley provides substantial assistance, I think a 5K is realistic, yes, Your Honor. And we have every expectation that

Mr. Stanley is going to provide substantial assistance, to be perfectly honest. We wouldn't be doing the deal unless we believed that.

[12] THE COURT: But he's going to be sentenced today, or no?

MR. STUCKWISCH: No, Your Honor. We would propose —

THE COURT: Okay, just approve the Plea Agreement?

MR. STUCKWISCH: Approving the Plea Agreement and —

THE COURT: And postpone sentencing until you see whether you can file a 5K; is that right?

MR. STUCKWISCH: Yes, sir.

THE COURT: Very well, thank you very much. Mr. Veselka, do you want to add to any of that?

MR. VESELKA: Yes, Your Honor, briefly. May it please the Court.

Many of the issues that the Court has raised, obviously, were issues that Mr. Stanley very much thought of and brought to bear.

THE COURT: I'm sure he did.

MR. VESELKA: But it is an issue with regard to finality, getting on with his life. He's been cooperating for some time. There has been issues. He's appeared pursuant to Queen for a Day over a matter of years, and has made efforts to provide information to the [13] Government. So he's very hopeful that his continued cooperation will lead to a downward departure.

Yes, we would have preferred to try to arrange at a bargain that would have been at a lesser amount initially, subject to your acceptance. But because of the belief, the potential of what the downward departure could do, he was willing to accept this rather than risk ending up facing Guidelines that could effectively put him in for the rest of his life.

So, faced with that, he has accepted his condition and is willing to accept this and asks that the Court

accept the plea and sentencing will be put off until after —

THE COURT: No, I'm happy to do that.

The restitution amount, is that realistic, given the asset list?

MR. VESELKA: Let me describe, first, the asset list described in the Pretrial Services Report, we had mentioned it at the interview, but they did not put in the list. If the Court reviewed the Plea Agreement, there are —

THE COURT: I have not seen that, yeah.

MR. VESELKA: The Plea Agreement includes reference to there are funds held by nominee entities in Swiss accounts, and those funds have been frozen pursuant [14] to request for mutual assistance to the Swiss authorities for four and a half years, by French and then by the U.S. authorities.

THE COURT: Okay.

MR. VESELKA: He intends to try to relinquish those to the Government and allow the Government to get those funds out and to dispose of other assets over there to provide that, which is the only way it is in any way conceivable for him to try to come into the ability to meet the restitution.

He also has paid some $4.4 million of taxes and interest and penalty on those funds which have been frozen, which he as not had access to these four and a half years, out of assets here.

All of these are things we think at the 'final point of sentencing, under the statute with regard to restitution, though the amount of restitution is 10.8 million, which we both recommend, the Court, in determining

what to order to be paid at one time, would take into account what all gets moved over, what he has left, and then can order what kind of payment schedule, and those are all things that we would take up with you at that time once we see what all has been recovered.

THE COURT: All right. Well, is the restitution amount subject to a 5K motion also, or simply the time?

[15] MR. VESELKA: The time is all that I understand is on the 5K downward departure. The amount of restitution is one number. An order of payment of what to pay and when is at the discretion of the Court.

THE COURT: I understand that. I understand that.

Are the other individuals who may be named in his cooperation, generally speaking, U.S. nationals, or not?

MR. VESELKA: As to one of the counts, yes; and as to one of the counts, no.

MR. STUCKWISCH: Your Honor, if I just may —

THE COURT: Sure.

MR. STUCKWISCH: — add to that. Our ongoing investigation is broad and there are potential defendants, targets, both here and abroad. I believe the individual to which Mr. Veselka is referring in Count Two is actually a dual U.S. and foreign national.

MR. VESELKA: That's right, I had forgotten about his dual status.

THE COURT: Nobody asked me to seal this. Is this something that needs to be sealed?

MR. VESELKA: The Information was filed under seal, and there is —

THE COURT: No, the hearing or the Plea [16] Agreement or anything?

MR. VESELKA: There is a portion of the Plea Agreement that refers to specific account numbers and to property that's part of what's to be transferred over, if possible, and the Government and Mr. Stanley would ask that the Court only use a redacted version of that and keep under seal the full Plea Agreement that has the identification of those account numbers and property.

THE COURT: Okay, I'm happy to do that.

MR. VESELKA: There were one or two things in the Pretrial Report also, just spellings of names. I assume we can deal with that.

THE COURT: We can deal with that, not on the record.

MR. VESELKA: Any other questions?

THE COURT: Are you satisfied we've had an adequate initial appearance, then, Mr. Veselka?

MR. VESELKA: Yes, Your Honor.

THE COURT: Are you satisfied?

MR. STUCKWISCH: Yes, Your Honor.

THE COURT: Is there anything further anybody wishes to say about the Plea Agreement?

Okay. The Court will approve the Plea Agreement on the terms outlined and will make the redactions requested.

[17] As to the bond, does Pretrial want to be heard from on that?

PRETRIAL OFFICER FENDLEY: Yes, Your Honor.

THE COURT: Please identify yourself, if you would.

PRETRIAL OFFICER FENDLEY: Virginia Fendley, Pretrial Services. Your Honor, just what is prepared in the Pretrial Services Report.

THE COURT: And that's been agreed to?

PRETRIAL OFFICER FENDLEY: Your Honor, I presented it to defense and Government counsel and they noted no objection to anything.

THE COURT: Well, is it agreed to, then?

MR. VESELKA: The only issues, Your Honor, were that everybody has agreed that he be allowed to have travel restricted to the Continental United States. He has reason to travel between here and North Carolina and may have to be traveling to Washington, D.C. as part of his cooperation.

It says with prior approval of our itineraries. We just wanted him to make that. It wouldn't need court approval. We want him to be able to inform Pretrial Services, but he needs to be able to travel at the request of the Government and/or the SEC.

Also, they have suggested and the [18] Government has requested, if the Court so desires, that his bond have a co-surety by his daughter.

THE COURT: That's fine.

MR. VESELKA: 'And we would prefer that you not have to. But if the Court so wants it, that's fine. Mr. Tyson has called to ask that she come down here to do that, if we need that.

THE COURT: Well, Ms. Fendley, is the travel restriction okay if we just provide that he notify you rather than obtain permission from me?

PRETRIAL OFFICER FENDLEY: Yes, Your Honor. Just asking Pretrial Services' permission, Your Honor, that would be sufficient.

THE COURT: I, think what he's saying is he's notifying you that he's going to make the trip. So, kind of the reverse of presumption. If you have a problem with it, then you say, "No, he can't do that."

PRETRIAL OFFICER FENDLEY: Yes, sir, that would be sufficient.

THE COURT: I mean, given the assets that this defendant has and given the heavy incentive to cooperate, it seems to me an unsecured bond might be just on his own signature, I would think. I mean, I just do not see him as a flight risk.

PRETRIAL OFFICER FENDLEY: Yes, Your Honor.

[19] THE COURT: Okay.

MR. VESELKA: I guess I don't need to add anything, but he's been here for four years.

THE COURT: I know.

MR. VESELKA: We've even traveled out of the country to obtain documents to provide to the Government in return, so I see no serious flight risk, Your Honor.

THE COURT: Okay.

All right, anything else you want to do today other than execute the Plea Agreement?

[Court conferring with Ms. Vaught]

Okay, I'm reminded by my valued colleague that we probably do need to go through the usual Rule 11 allocution, which I'm willing to do. Anybody who wants to excuse themselves can do so.

It's fairly rote, but if you would make your way up here, please, sir.

We've already ascertained, Mr. Stanley, you wish to plead guilty to Counts One and Two; is that correct?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Before the Court can decide whether to accept a guilty plea, sir, it's necessary to provide you certain information and obtain certain information from you. Information obtained from you is obtained [20] under oath. Taking an oath is a serious matter. Any information you provide can later be used against you. Any information you provide that you know to be false can be the basis for further prosecution or further penalty.

Do you understand that?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Please raise your right hand.

[Defendant sworn by the case manager]

Okay, my first questions, sir, will deal with your understanding and your ability to understand what we're doing here today.

Let me ask, are you currently taking any prescription drugs?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Okay. Are there any prescription drugs that interfere with your thinking or understanding?

DEFENDANT STANLEY: No, Your Honor.

THE COURT: Okay. Other than treatment for dependency, have you had any — have you ever been treated for mental disease or mental disorder?

DEFENDANT STANLEY: No, sir.

THE COURT: Have you consumed any alcohol or illegal drugs in the last 24 hours?

DEFENDANT STANLEY: No, Your Honor.

THE COURT: Has anybody threatened you or [21] coerced or tried to force you to plead guilty?

DEFENDANT STANLEY: No, sir.

THE COURT: Conversely, other than the Government in plea negotiations, has been anybody offered you any advantage or any compensation or any bribe to get you to plead guilty?

DEFENDANT STANLEY: No, Your Honor.

THE COURT: Do you feel like you are entering your plea knowingly and voluntarily?

DEFENDANT STANLEY: Yes.

THE COURT: You have the right to be represented at all times by counsel. If you cannot afford counsel, one will be appointed for you at no expense. Have you been satisfied with the representation you've received?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Mr. Veselka, do you believe your client to be competent?

MR. VESELKA: Yes, Your Honor.

THE COURT: Is the plea in this case a result of negotiations between you and your client on one hand and the Government on the other hand?

MR. VESELKA: Yes, Your Honor.

THE COURT: Do you understand, Mr. Stanley, that you have the absolute right to proceed to a jury trial if you wish?

[22] DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: But if you continue to maintain your position that you wish to plead guilty, there is not going to be a jury trial, there's not going to be any further hearing on the issue of guilt or lack of guilt.

Do you understand that?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: By giving up your right to a jury trial, you are giving up other important rights that go with it. Those include the right to representation by a lawyer, the right to summon witnesses in your own defense and cross-examine adverse witnesses, the right against compulsory self-incrimination, the right to the presumption of innocence, and the right to require the Government to prove you guilty beyond a reasonable doubt.

Do you understand you have all those rights and others, too?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Sentencing in the Federal Criminal System is normally pursuant to a Sentencing Table that's been promulgated by the United States Sentencing Commission. It suggests ranges of different punishments based on a number of factors. The two most important are the seriousness of your offense and your criminal history, if any.

[23] Do you generally understand the concept of the Sentencing Table?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: In this case, the parties have proposed that the Court approve a specific sentence as part of the Plea Agreement. Although that sentence has been formulated with some reference to the sentencing table, the negotiations themselves produced a sentence probably at variance to that which would be calculated under the table.

You understand that, don't you?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Do you further understand that because of the way the Plea Agreement is written, you will have the opportunity to cooperate with the Government and possibly secure a less severe sentence at the time of the actual sentencing.

Do you understand that, sir?

DEFENDANT STANLEY: Yes.

THE COURT: Any period of incarceration, sir, will be followed by a period of supervised release. Supervised release will mean there will be certain reporting requirements to your probation officers, there will be certain limitations on your conduct. And in the worse of all circumstances, should you violate the terms [24] of your supervised release, you can actually be returned to an additional period in prison without any credit for time you've already served.

Do you understand that?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Mr. Veselka, do you want me to go over the elements of the offense, or are you willing to waive that?

MR. VESELKA: No, Your Honor, we'll waive that. He's very familiar.

THE COURT: Okay. Normally, we make a short proffer as to what the Government would have proved if the case had gone to trial. Can the Government do that?

MR. STUCKWISCH: Yes, Your Honor.

THE COURT: Please go slow for the court reporter and for me.

You may be seated.

MR. STUCKWISCH: The Government is prepared to prove the facts that are set forth in Paragraph 22 of the Plea Agreement, among others. I'll summarize those here.

With respect to Count One, the Government would prove that Stanley was an officer and director of a company referred to as EPC Contractor A, and that its successor company EPC Contractor Al, including CEO and then chairman of EPC Contractor Al. He was a U.S. [25] citizen and a resident of Houston.

Stanley's employer was part of a four-company Joint Venture that pursued and was awarded four contracts worth over $6 billion to build liquefied natural gas for LNG facilities on Bonny Island, Nigeria. Stanley was on the Steering Committee of that Joint Venture, which made major decisions on behalf of the Joint Venture.

The Government would prove that beginning in 1994, and continuing into 2004, Stanley agreed with others, including but not limited to employees of his company and the other Joint Venture companies, to pay bribes through two agents to a wide range of Nigerian Government officials in order obtain the contracts to build the LNG facilities. The Joint Ventures

paid the agents over $180 million for use in bribing Nigerian Government officials.

Stanley personally met with three successive holders of a top-level office of the executive branch of the Government of Nigeria to ask that the office holders designate representatives with whom the Joint Venture should negotiate the bribes. Stanley knew that it was unlawful for him to agree to bribing foreign government officials to obtain business, but willfully agreed with his co-conspirators to retain the agents to pay the [26] bribes.

During the conspiracy, Stanley and his co-conspirators knowingly committed overt acts in furtherance of the conspiracy, including in Houston, including having meetings and phone conversations and sending and receiving and executing documents.

With respect to Count Two, the Government would prove that beginning in 1991, and continuing into 2004, Stanley and a consultant to Stanley's employer agreed to a scheme to defraud Stanley's employer, whereby Stanley would help the consultants obtain lucrative consulting contracts with Stanley's employer, and the consultant would secretly pay Stanley a portion of the consulting fees as kickbacks. The consultant paid Stanley $10.8 million in kickbacks. Stanley and the consultant concealed the kickback scheme from Stanley's employer.

The Government would prove that Stanley knew that it was unlawful for him to agree to defraud his employer by taking secret kickbacks, but willfully agreed to do so.

During the conspiracy, Stanley and his co-conspirators knowingly committed overt acts in furtherance of this conspiracy, including in Houston,

including having meetings and phone conversations and [27] sending, receiving and executing documents.

THE COURT: Mr. Stanley, did you understand what the Government's lawyer said?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Is that true?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: I think we ought to, just to be sure, go over the maximum punishment, please. Or I can do it, if you want me to.

MR. STUCKWISCH: Your Honor —

THE COURT: Go ahead.

MR. STUCKWISCH: — Count One is 18 U.S.C. 371. The maximum penalty is, five years imprisonment or a $250,000 fine, plus a special assessment of a hundred dollars. The penalty on Count Two — penalties on Count Two, maximum penalties are the same. It's another Section 371 charge, so it's five years, $250,000, and special assessment of a hundred dollars.

THE COURT: You understand that, Mr. Stanley?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Well, are you saying, then, that the maximum sentence in this case would be 120 months, then, stacking the Count One and Count Two? Is that what you're saying?

MR. STUCKWISCH: Yes. Under this plea [28] agreement, the maximum sentence would be 120 months.

THE COURT: Okay.

Are you satisfied, Mr. Stuckwisch, we've had an adequate allocution? I'll ask him finally if he pleads guilty or not guilty.

MR. STUCKWISCH: Yes, Your Honor. Allocution, I'm satisfied with. I'm not sure whether Mr. Stanley has been advised of the authority to order restitution.

THE COURT: Well, why don't you do that. Why don't you do that.

MR. STUCKWISCH: Okay. On Count Two, because the victim suffered a pecuniary loss, restitution would be required under the Mandatory Victim Restitution Act.

And I think — I'm not sure also, but it should be noted on the record that in the Plea Agreement he is waiving his right to appeal his conviction.

THE COURT: I, thought we covered that in the Plea Agreement.

MR. STUCKWISCH: We may well have.

THE COURT: And do you understand that, Mr. Stanley?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Okay, all right.

Do you understand, sir, that under the protocol that the Government's counsel and your counsel [29] are proceeding, that what is presented to the Court is an agreed plea, including a proposed sentence, and the Court can either approve the sentence or reject it, but does not have the right to modify it? Do you understand that, sir?

DEFENDANT STANLEY: Yes, Your Honor.

THE COURT: Having heard everything you've heard, Mr. Stanley, do you wish to plead guilty or not guilty to Counts One and Two?

DEFENDANT STANLEY: Guilty, Your Honor.

THE COURT: Okay. Based on the testimony and based on the proposed Plea Agreement, the Court finds the defendant is competent, he's represented by competent counsel, there is an adequate factual basis for the plea, and the plea is knowingly and voluntary. Accordingly, the Court will find the defendant guilty as charged in Count One and Count Two of the information filed on or about August 29, 2008.

We normally announce a sentencing date, but I suppose we should defer that, or would you like a date months in the future that we can work with?

MR. STUCKWISCH: We would suggest just deferring, Your Honor.

THE COURT: Okay.

MR. VESELKA: That's fine, Your Honor.

[30] THE COURT: All right. Is there anything more we can do today?

MR. VESELKA: Your Honor, just out of precaution, if we did not make it clear enough, we addressed it earlier, but we would formally move and ask if the Government agrees that the Plea Agreement remain under seal and that only the redacted form of the Plea Agreement provided be available for public view.

MR. STUCKWISCH: Your Honor, we've prepared two versions of the Plea Agreement. One is redacted and one is for filing under seal, and we would join Mr. Veselka's —

THE COURT: Well, I normally hate keeping anything from the public, but with an ongoing investigation, I do understand the sensitivity, so I will agree to that.

Do you want to execute the Plea Agreement now, then?

MR. STUCKWISCH: Your Honor, just if I may?

THE COURT: Yes, sir.

MR. STUCKWISCH: Just to be clear on the record, the reason the Government is moving for the Plea Agreement — the unredacted Plea Agreement to be filed under seal is because of the account numbers and the property information that Mr. Veselka mentioned.

[31] The other version, the redacted version of the Plea Agreement would, of course, be public.

THE COURT: I understand that. I understand that.

MR. VESELKA: And the Court addressed earlier with regard to the bond, but I want to clarify that the travel will be subject to —

THE COURT: Notify the Pretrial Services. And unless Pretrial objects, he can make the requested trip. If Pretrial does object, we'll take it up then.

MR. VESELKA: And that there is no surety required — co-surety, excuse me?

THE COURT: No co-surety. Surety will be as proposed, no co-surety.

MR. VESELKA: Thank you.

THE COURT: Do you want the execute the Plea Agreement while I'm here, or are you finished with me?

MR. VESELKA: We're happy to, Your Honor.

THE COURT: Why don't we go ahead and do the Plea Agreement. Let's execute it here.

[Plea agreement executed]

All right, we've executed the Plea Agreements now.

I know you know this, but you have good lawyers, extremely good lawyers representing you and [32] extremely good lawyers representing the Government. Please listen to their advice. This Court has consistently been receptive to 5K motions filed on behalf of defendants who are first time offenders and non-violent offenders. So I've never, ever disagreed with the Government's motion under those circumstances.

We'll be in recess.

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled cause.

/s/ Ed Reed — 9-10-08
Edward L. Reed — Date
Official Court Reporter

APPENDIX N

[SEAL] U.S. Department of Justice
Criminal Division

Fraud Section *Washington, D.C. 20530*
April 12, 2019

By Electronic Mail

Charles S. Leeper, Esq
Drinker Biddle & Reath LLP
1500 K Street, NW
Suite 110
Washington, DC 20005-1209

Re: *United States v. Samir Khoury,*
No. 4:08-cr-763 (S.D. Tex)

Charlie:

We write in response to the Court's Order dated March 13, 2019, directing the Government to provide Defendant Khoury with five categories of information related to efforts to locate and apprehend him on the pending Indictment, and to apprehend defendants in other cases who are located outside the United States. *See* Doc. 36 ("Order").

The enclosed log of communications sets forth the information called for by the first three categories of the Order.

With respect to the fourth category, because the steps that are most appropriately taken to apprehend "a person of interest believed to be in a foreign jurisdiction" depend on the facts and circumstances of each unique case, there is not a standardized "policy of the

Department of Justice as to efforts that should be undertaken to apprehend a person of interest believed to be in a foreign jurisdiction." Order at 2. However, Chapter 9-15.000 of the Justice Manual, which is publicly available, sets forth general principles and procedures related to apprehending fugitives from abroad. Additionally, we have located an internal Department of Justice document that addresses certain issues and areas of caution that should be discussed with case agents and prosecutors concerning U.S. fugitives located in Lebanon, including potential consequences associated with certain steps to apprehend fugitives in Lebanon. We are not producing that document because it contains privileged information and because it does not set forth a Department of Justice policy on "efforts that should be undertaken to apprehend" fugitives believed to be located in Lebanon.

With respect to the fifth category, we have reviewed efforts to apprehend defendants located abroad that were undertaken in other prosecutions brought by our Office, *i.e.,* the Fraud Section's FCPA Unit. The decision on which steps to take to apprehend such individuals is case specific and based on several factors, including circumstances particular to the prosecution, to the defendant, and to the country where he or she may be located. As a general matter, the Department of Justice frequently issues INTERPOL notices and communications seeking the assistance of other INTERPOL member countries in locating and apprehending a defendant who is located abroad; such communications may be issued to law enforcement officials in all 194 INTERPOL member countries (Red Notice) or to a selected group of countries (Wanted Person Diffusion). In similar cases, the government has issued a Diffusion Notice when the case remains under seal and a defendant is believed to be located in

a country that will not extradite the defendant (for example, because the defendant is a citizen of that country), and a Red Notice when the defendant is in a country more likely to extradite him or her and/or when the case has been charged publicly. In some cases, the Department may hold off on immediately issuing an INTERPOL notice after indictment while other avenues for securing the defendant's presence are pursued (for example, where the government has issued a travel alert and is notified that the defendant has a planned trip to or through the United States). In addition, the Department considers whether to request extradition from the country where the defendant is located based, in part, on the relationship between the United States and that country, whether an extradition treaty exists between the United States and that country, and the country's policies on extradition (if any) that are applicable to the offenses and circumstances of the case and to the defendant in question.

Please let us know if you have any questions.

Sincerely,

/s/ John-Alex Romano
John-Alex Romano
Nikhila Raj
Trial Attorneys

cc: David Gerger (by email)

Enclosure (by email)

Date of Commu-nication	Title of Commu-nication	Description of Communication
7-May-09	Wanted Person Diffusion	Wanted person diffusion notice for Samir Rafic Khoury sent from Interpol Washington to 12 Foreign Interpol Counterparts in connection with attempts to apprehend Khoury
7-May-09	Wanted Person Diffusion	Wanted person diffusion notice for Samir Rafic Khoury sent from Interpol Washington to 12 Foreign Interpol Counterparts in connection with attempts to apprehend Khoury
10-May-09	Response from Foreign Interpol Counterpart	Message from Foreign Interpol Counterpart regarding records about Samir Rafic Khoury in response to requests by U.S. authorities to apprehend Khoury
20-May-09	Response from Foreign Interpol Counterpart	Message from Foreign Interpol Counterpart regarding records about Samir Rafic Khoury in response to requests by U.S. authorities to apprehend Khoury

10-Mar-15	Wanted Person Diffusion	Wanted person diffusion notice for Samir Rafic Khoury sent from Interpol Washington to 12 Foreign Interpol Counterparts in connection with attempts to apprehend Khoury
10-Mar-15	Wanted Person Diffusion	Wanted person diffusion notice for Samir Rafic Khoury from Interpol Washington to 12 Foreign Interpol Counterparts in connection with attempts to apprehend Khoury
10-Mar-15	Wanted Person Diffusion	Wanted person diffusion notice for Samir Rafic Khoury from Interpol Washington to 12 Foreign Interpol Counterparts in connection with attempts to apprehend Khoury
		Image of Samir Rafic Khoury circulated with Interpol notices
10-Mar-15	Wanted Person Diffusion uploaded to INTERPOL systems	Wanted person diffusion notice for Samir Rafic Khoury sent from Interpol Washington to 12 Foreign Interpol Counterparts in connection with attempts to apprehend Khoury

10-Mar-15	Wanted Person Diffusion	Wanted person diffusion notice for Samir Rafic Khoury sent from Interpol Washington to 12 Foreign Interpol Counterparts in connection with attempts to apprehend Khoury
17-Mar-15	Response from Foreign Interpol Counterpart	Message from Foreign Interpol Counterpart requesting information about Samir Rafic Khoury in response to requests by U.S. authorities to apprehend Khoury
11-Jan-19	Wanted Person Diffusion	Message from Interpol Washington to 12 Foreign Interpol Counterparts in response to requests by U.S. authorities to apprehend Khoury
12-Jan-19	Wanted Person Diffusion Cancellation	Message from Interpol Washington to 12 Foreign Interpol Counterparts regarding prior notice by U.S. authorities to apprehend Khoury
14-Jan-19	Red Notice	Notice for Samir Rafic Khoury requested by United States in connection with attempts to apprehend Khoury
14-Jan-19	Red Notice	Notice for Samir Rafic Khoury requested by United

		States in connection with attempts to apprehend Khoury
		Image of Samir Rafic Khoury circulated with Interpol notices
17-Jan-19	Response from Foreign Interpol Counterpart	Message from Foreign Interpol Counterpart to Interpol Washington requesting information in response to requests by U.S. authorities to apprehend Khoury
7-Mar-19	Response from Foreign Interpol Counterpart	Message from Foreign Interpol Counterpart to Interpol Washington requesting information in response to requests by U.S. authorities to apprehend Khoury
15-Mar-19	Response to Foreign Interpol Counterpart	Message from Interpol Washington to Foreign Interpol Counterpart regarding case in connection with attempts to apprehend Khoury
3-Apr-19	Response from Foreign Interpol Counterpart	Message from Foreign Interpol Counterpart to Interpol Washington regarding case in connection with attempts to apprehend Khoury

APPENDIX O

Charles S. Leeper
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202-842-8800 phone
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charlesleeper@dbr.com
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October 22, 2014

BY ELECTRONIC MAIL
Patrick F. Stokes
Deputy Chief, Fraud Section
Criminal Division
U.S. Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20005

Re: Samir Khoury

Dear Mr. Stokes:

Thank you for meeting today with my colleague Lee Roach and me in regard to our client, Samir Khoury. We discussed a variety of matters pertaining to Mr. Khoury, both during today's meeting and when I called you on October 6, but I will refer to only two of those matters in this letter.

First, I asked you to confirm that the Department of Justice ("DOJ") investigation which led to criminal charges being filed in U.S. District Court for the Southern District of Texas against Jack Stanley, Jeffrey Tesler, Wojciech Chodan, Kellogg Brown & Root LLC, and certain other companies, had been closed in regard

to Mr. Khoury. You advised us that you are unable to provide an affirmative response to this request.

Second, in view of your response to my first inquiry, I asked you whether: (1) the DOJ had obtained an indictment against Mr. Khoury, or otherwise charged him with criminal offenses; (2) there is a U.S. warrant outstanding for Mr. Khoury's arrest; (3) any notices had been issued by Interpol in respect to Mr. Khoury; and (4) the DOJ had made any requests of the authorities in Lebanon regarding Mr. Khoury since my last contact with the DOJ on his behalf in November 2008. You advised us that you are unable to respond to any of these enumerated inquiries.

We appreciate your consideration in permitting us to confirm these matters by way of this letter.

Very truly yours,

/s/ Charles Leeper
Charles S. Leeper

CSL

cc: Samir Khoury

APPENDIX P

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed January 12, 2015]

Case No: 14-mc-2884

UNITED STATES OF AMERICA

vs.

SAMIR KHOURY

GOVERNMENT'S RESPONSE TO MOTION BY SAMIR KHOURY TO DISMISS INDICTMENT

The United States of America, by and through undersigned counsel, respectfully submits this response to the motion by Samir Khoury to dismiss any indictment as time-barred or, alternatively, for a violation of his right to a speedy trial (hereinafter, "MTD"). Mr. Khoury, a citizen and resident of Lebanon, surmises an indictment has been returned against him under seal, has not been arrested, and has not submitted to the jurisdiction of this Court. Yet he seeks to invoke this Court's jurisdiction to determine whether such an indictment exists and, if so, to have it dismissed. In support thereof, Mr. Khoury files through counsel his lengthy MTD that fails to cite a single case to support his request for this extraordinary exercise of the Court's jurisdiction. The government respectfully submits

that Mr. Khoury's MTD should be denied because he is not properly before the Court.

I. Background

As Mr. Khoury acknowledges in his MTD, he was born and grew up in Lebanon, became a naturalized U.S. citizen while in graduate school in Ohio, raised a family in Ohio for approximately 13 years during which time Mr. Khoury frequently traveled overseas for his employment, and has been a resident of Lebanon since 2004. MTD at 5-6. Mr. Khoury, who was a former employee of The M.W. Kellogg Company ("Kellogg") based in Houston, admits he was the subject of a criminal investigation by the U.S. Department of Justice into, among other things, a kickback scheme with Albert Jackson Stanley, a former high-level executive officer of Kellogg and its successor company, Kellogg, Brown & Root, Inc. ("KBR"). *Id.* After Mr. Khoury left his position at Kellogg in 1988, he set up a consulting company and obtained lucrative consulting contracts with Kellogg and KBR through the assistance of Mr. Stanley. Mr. Khoury received payments under these consulting contracts of more than $48 million, and in return he caused payments to be made to Mr. Stanley of more than $10 million. As Mr. Khoury states in his MTD, Mr. Stanley pleaded guilty to charges related to foreign bribery and the kickback scheme that, he believes, relates to his dealings with Mr. Stanley. *Id.* at 5. Mr. Khoury also acknowledges that he engaged in disposition discussions with the government in or about 2007. *Id.* at 6. No plea agreement was reached. Mr. Khoury also acknowledges that he returned to Lebanon after meeting with U.S. prosecutors in 2006, and he has not returned to the United States since then. *Id.* at 6-7. Despite knowing of the plea agreement with Mr. Stanley since 2009, Mr. Khoury through

counsel next reached out to the government to discuss his criminal status in October 2014 because of "obstacles . . . in the conduct of his financial affairs in Lebanon" that he believes stemmed from contacts by the U.S. authorities with the Lebanese government in 2006. *Id.* at 7 n.5. Presumably, the "obstacles" relate at least in part to the suspect consulting funds he received from Kellogg and KBR.

Lebanon does not have an extradition treaty with the United States.

II. Argument

Mr. Khoury "suspect[s]" an indictment has been returned against him under seal. While beyond the reach of this Court in Lebanon, he has filed through counsel his MTD, in part, to ascertain whether a suspected indictment in fact exists and if so, to have it dismissed. While fashioned as a motion to dismiss "the indictment" as time-barred or as a violation of his speedy trial rights, he fails to address the threshold obstacles he must surmount: without legal authority or support, he seeks to have the Court exercise its jurisdiction to disclose or have the government disclose the existence or non-existence of an under seal indictment, and if one exists, to have it dismissed without himself having to appear before the Court or submit to its authority. The government respectfully requests that the Court deny Mr. Khoury's extraordinary motion for lack of standing.[1]

---

[1] The United States does not acknowledge the existence or non-existence of a sealed indictment charging Mr. Khoury with any crimes. It takes this position because an individual lacks legal authority to require the government to confirm the existence or non-existence of under seal charges against him. While the government disagrees with Mr. Khoury's analysis of the

Pursuant to Rule 6(e)(4) of the Federal Rules of Criminal Procedure, a court has discretionary authority to order that an indictment be kept under seal "until the defendant is in custody or has been released pending trial." The rule continues that "no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons."[2] Despite this rule that Mr. Khoury seemingly ignores, he points to no other rule or case to support the proposition that a court or the government must confirm the existence or non-existence of an under seal indictment. The government is not aware of any such authority. Requiring the government to disclose the existence or non-existence of an under seal indictment against an individual would undermine the legitimate authority of courts to place indictments under seal and would imperil the legitimate law enforcement purposes of seeking a sealing order in certain circumstances.

Even assuming *arguendo* the existence of an under seal indictment, Mr. Khoury again fails to point to legal authority supporting his motion to dismiss such indictment without his having appeared before the Court or submitted to its authority. Mr. Khoury does not address whether or how the principles underlying the "fugitive disentitlement doctrine" and its exceptions, *see, e.g., Bagwell v. Dretke,* 376 F.3d 408 (5th

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substantive legal issues in his MTD, and in some instances the interpretation or applicability of cases he cites, the government does not address herein those substantive legal points because the issues are not properly before the Court.

[2] A court may limit the period of time for sealing an indictment, *see, e.g., United States v. Upton,* 339 F.Supp.2d (D.Mass. 2004), and a court maintains supervisory authority over an order to seal an indictment and may periodically review the need to maintain an indictment under seal

Cir. 2004), might apply to his particular circumstances, and for good reason. The doctrine applies to "fugitives" where charges are known or publicly filed. The doctrine does not supply a basis for discovery of whether charges exist.

Here, Mr. Khoury skips these threshold jurisdictional issues and instead jumps straight to substantive issues that are generally, if at all, addressed *after* a defendant has *appeared* before a court on *public* charges. Mr. Khoury cites numerous cases that establish that a court *may* dismiss an under seal indictment as time-barred or for violating a defendant's right to a speedy trial under certain circumstances. *See, generally,* MTD at 7-29. The cases he relies upon involved instances where an indictment had been unsealed and defendants had appeared before a U.S. district court.[3] None of the cases cited by Mr. Khoury addresses, let alone supports, his request that the Court exercise jurisdiction over his MTD so that he can discover whether an under seal indictment exists and, while located in Lebanon beyond the Court's reach, seek to have any such indictment dismissed.

Mr. Khoury has failed to identify any basis for invoking the exercise of this Court's jurisdiction at this time. Should an indictment exist and should it be unsealed, Mr. Khoury may seek to test his jurisdictional and substantive legal theories at that time.

---

[3] In one case cited by Mr. Khoury, *United States v. Sherwood,* 38 F.R.D. 14, 16 (D.Conn. 1964), it appears that two of four defendants had been living overseas at the time the indictment was unsealed, and the opinion does not address whether they subsequently appeared before the court in order to move to dismiss the indictment. Because the court does not address jurisdiction, the government assumes the two overseas defendants made an appearance before the district court.

Therefore, the United States respectfully requests that the Court deny Mr. Khoury's MTD.

Respectfully submitted,

WILLIAM J. STELLMACH
Acting Chief, Fraud Section
Criminal Division
United States Department of Justice

BY: */s/ Patrick Stokes*
PATRICK F. STOKES
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CERTIFICATE OF SERVICE

This is to certify that a copy of United States' Response to Motion by Samir Khoury to Dismiss Indictment has been furnished to counsel of record by first-class and electronic mail.

By: /s/ Patrick F. Stokes
Patrick F. Stokes Deputy Chief

APPENDIX Q

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

14-MC-2884

UNITED STATES OF AMERICA

vs.

SAMIR KHOURY

Houston, Texas
February 4, 2015
10:28 a.m.

MISCELLANEOUS CONFERENCE HEARING

BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

PATRICK STOKES
U.S. DEPARTMENT OF JUSTICE
1400 New York Avenue NW
Bond Bldg., Room 3428
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202.305.4232

FOR THE DEFENDANT:

CHARLES S. LEEPER
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SAMY KHALIL AND DAVID GERGER
QUINN, EMANUEL, URQUHART & SULLIVAN
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Houston, Texas 77002
713.224.4400

[2] Court Reporter:

Johnny C. Sanchez, RPR, RMR, CRR
515 Rusk, #8004
Houston, Texas 77002
713.250.5581

Proceedings recorded by mechanical stenography. Transcript produced by computer-assisted transcription.

[3] THE COURT: Good morning and welcome. We are — I know time is of concern. We'll try to be efficient. I know you've been through it with Mr. Sanchez, but let's do it again. Appearances of counsel, beginning with the government, please.

MR. STOKES: Good morning, Your Honor. Patrick Stokes on behalf of the United States.

THE COURT: Thank you.

MR. STOKES: Nice to see you.

MR. LEEPER: Good morning. Charles Leeper on behalf of Samir Khoury.

THE COURT: Okay. On the first issue, I think with all respect due him, I do think I need to vacate Judge

Hughes' order. Does anybody want to speak in opposition to that? Please, go ahead.

MR. STOKES: Judge, for clarification, Judge Hughes' order to unseal or to provide — I'm sorry — to provide defense counsel a copy of the indictment.

THE COURT: Yes. I'm willing to entertain argument on that.

MR. STOKES: And, Your Honor, it may make some sense, there are some cases, I think, that are directly on point in this issue that were not flushed out in the briefing. I'm happy to go either before Mr. Leeper or after, but I think there is strong support that was not [4] brought to the Court's attention for the nature of the type of hearing today.

THE COURT: Well, it's your motion. So you should go first. And if you're in doubt — I'm sorry, Mr. Leeper.

MR. LEEPER: That's okay.

MR. STOKES: I thought it might be helpful to lay a little bit more context, as the Court is already aware of this. But certainly as we laid out, we don't believe that the defense motion has addressed threshold issues in particular whether or not the defense should be made aware of whether or not there's an indictment in the matter in this filed matter, and whether or not if so it should be shared with him.

And we do believe that, to the extent there are going to be discussions about that issue, that this is an ex parte matter, whether or not an indictment exists, and whether or not it should be unsealed is an ex parte matter for the Court, certainly, to inquire the government at whatever appropriate point the Court would like?

There's a line of cases that the defense cited at *U.S. v. Sharpe*, a Fifth Circuit case 1993, that didn't raise this proposition in the case.

THE COURT: Spell the case names for the [5] reporter.

MR. STOKES: Absolutely. It's *Sharpe* with an "E" at the end, S-H-A-R-P-E. And that is *995 F2d 49*. And the case, I'll just cut to the quick on it, points out that in addressing issues related to the sealing of an indictment, the timing of the unsealing statute of limitations issue, the Court points out that the government only needs to address these issues at a hearing after the indictment is unsealed.

There's a whole line of cases to that effect. And that, certainly, I believe strongly supports the point that the government raised in its motion for reconsideration, as well as in its response of sorts to the defense motion, recognizing that we did not engage on the substantive issues they raised. That we found ourselves in the position where the defense has skipped threshold issues. There is case law —

THE COURT: What is the best support, in your view, for the order that Judge Hughes entered requiring the government to provide a copy of the sealed indictment to somebody who may be innocent?

MR. STOKES: Your Honor, we don't think there is any support for it.

THE COURT: I didn't think so either.

MR. STOKES: And, in fact, I think the case [6] that I just cited, there's other cases I can mention that are not from the Fifth Circuit, but *Srulowitz* from the Second Circuit. I'll spell that. S-R-U-L-O-W-I-T-Z, *819 F2d 37*. *Shell* from the Ninth Circuit. S-H-E-L-L, *961*

F2d 138. There are a number of cases that make the similar point that issues about sealing in an indictment are addressed after an indictment is unsealed. There's — they don't directly deal with the issue that I laid before the Court in my motion, which is that there's no — we don't believe there's any support for the defense to file a motion without knowledge of whether or not there's an indictment to force the government to disclose whether or not there's an indictment. And this is an important point of principle for us.

So I do want to address just one point the defense raised, which is this is not a cat and mouse game for the government.

THE COURT: Isn't this covered by Rule 6(e)(4)?

MR. STOKES: Yes, we believe it is.

THE COURT: Do we need to get past that?

MR. STOKES: I don't believe we do, Your Honor.

THE COURT: Go ahead to your other point.

MR. STOKES: I'm sorry, Your Honor?

THE COURT: You said you had another point you wanted to make?

[7] MR. STOKES: Just on, I just wanted to give that context. I thought it would be helpful in addressing Judge Hughes' order, to the extent the Court wishes to hear about other aspects of the defense motion.

THE COURT: Let's hear from Mr. Leeper, and then if there's need to hear from you further, we'll give you enough time.

MR. STOKES: Thank you, Your Honor.

THE COURT: Thank you, everybody, for being here.

MR. LEEPER: Your Honor, thank you very much for permitting me to appear pro hac vice. It's a privilege, and I appreciate it. Which would you like me to address first, Your Honor? I actually think that the issues are intertwined.

THE COURT: I think they are. Let's talk about Judge Hughes' order first.

MR. LEEPER: Okay. Our position that the indictment must be dismissed in this case is grounded in three basic premises, all which have we believe have been validated by the record before the Court. And the first of those premises is that an indictment tolls the running of the statute of limitations only when one of the grounds recognized by courts construing Rule 6(e)(4), existed at [8] the time of the indictment and continued for the duration of the sealing.

And a corollary to that premise is that it's the government's burden to prove that the sealing was and remained necessary. The *Sharpe* case, which we cited, the government did not, provided, "The government must explain and support the legitimacy of its reasons for sealing." The Court then added, "The ability to toll the statute of limitations by sealing an indictment is not unlimited." That's at *95 F2d*, at Pages 52 and 51, Note 5.

Here, we have a situation where the government refuses to explain its reasons for the sealing and claims that the indictment may nevertheless remain sealed for an unlimited period of time. That position is flatly contrary to *Sharpe*, the language I just quoted from *Sharpe*, as well as the nine cases that we cited at table — at the table at Page 10 of our motion.

Our motion to dismiss showed that none of the traditional grounds recognized under 6(e)(4) for seal-

ing existed in this case at the time of sealing, much less for the ensuing six years. That's the state of the record. For example, there was no need to seal this indictment in 2009 because of a need to protect the identity of an informant. There was no need to seal the indictment because of a need to keep the investigation [9] secret. As Your Honor well knows, it was a very highly publicized investigation. There was no need to seal the indictment to locate the defendant. The government knew exactly where the defendant was. They knew I represented him, they knew how to reach him. And it certainly didn't need to be sealed to prevent the defendant fleeing from the United States.

The government knew that Mr. Khoury had been living in the Middle East since 2003, that he's been living in Beirut since 2004, was in Beirut in 2009, and that he had not traveled to the United States. So the Department of Justice had no reason to believe in 2009 that Mr. Khoury might be caught unawares at the border.

But then going on, Your Honor, after the initial sealing in 2009, as time passed, and Mr. Khoury did not travel, the government it was on notice that Mr. Khoury would not be available outside of Lebanon to be arrested. A mere hope that Mr. Khoury might travel to the United States is clearly insufficient to justify sealing as you approach the one-year anniversary of the sealing because that's when the prejudice in this case, as the law stands in this Circuit, becomes presumptively prejudicial.

Stated another way, when whatever explanation the government may have given to the Magistrate Judge in 2009 about the need for sealing, the passage of [10] time with no indication of travel by Mr. Khoury proved

that whatever validity that reason may have had in 2009 was no longer present, no longer existed.

Table 10 — table — the table we have at Page 10 of our brief lists nine cases where sealing periods ranging from two months to 21 months were found to be unreasonably long, ineffective to toll the statute of limitations, and the indictments were dismissed in those cases.

THE COURT: This is after it was sealed — after it was unsealed; right?

MR. LEEPER: Well, that's true, Your Honor, but I don't mean to be or sound trite, and this may be unavoidable if I call it a chicken and an egg situation.

THE COURT: It is. I see the circularity of it, yes.

MR. LEEPER: But the government's position, this much we know, the government's position that it can keep this indictment sealed for an unlimited time is flatly inconsistent with the *Sharpe* decision by the Fifth Circuit.

The cases we've cited at the table at Page 10 support our position, that where the government fails to prove the legitimacy of the seal at the time they're challenged — and we're challenging them now — and where they know where the defendant is and how to contact [11] him, their decision to keep that indictment under seal has consequences.

THE COURT: Okay.

MR. LEEPER: Could I be heard on the speedy trial point, quickly, Your Honor?

THE COURT: Yes, certainly.

MR. LEEPER: The second basic premise we've proven is that sealing does not suspend the running of

the limitations clock, which of course starts when the indictment is returned, whether or not sealing was proper. We don't need to get into a discussion on the speedy trial issue about whether the sealing was proper or remained proper, because the speedy trial clock continued to tick for all six years that we believe this indictment has been under seal. That is the holding in both *Bergfeld*, B-E-R-G-F-E-L-D, a decision of the Fifth Circuit, and *Heshelman*, H-E-S-H-E-L-M-A-N, a decision of the Sixth Circuit.

It follows, then, that where the government has the ability to notify the defendant and chooses not to do so, dismissal of the indictment is required as the delay becomes presumptively prejudicial.

Heshelman and *Mendoza*, a Ninth Circuit case that we cited on Page 24 of our motion, are very much on point. Both cases involve defendants who were indicted [12] while residing overseas, and the government knew how to reach those defendants but chose not to do so. Instead of notifying those defendants, they decided to do what the government did here, which is to play wait and see.

And in both of those cases, the government — excuse me — the Court dismissed the indictment on speedy trial grounds. And the *Mendoza* language is particularly informative. The *Mendoza* court said, "The government was required to make some effort to notify *Mendoza* of the indictment, or otherwise continue to actively attempt to bring him to trial, or else risk that *Mendoza* would remain abroad while the constitutional speedy trial clock ticked." The very same reason —

THE COURT: You make some very good arguments, Mr. Leeper. You really do. What's the best authority for what Judge Hughes did? What's the best authority

for requiring the government to unseal the indictment, if there is one?

MR. LEEPER: Sure. Rule 6(e) and all the cases that construe it. For example, one of the decisions that we cited in our opening brief, the *Sherwood* decision, said that 6(e)(4), "Is obviously intended to be exercised only for a reasonable and limited period during which prompt government action can accomplish its clearly stated purpose." That language apples at 38 FRD, Page 18. [13] If 6(e)(4), Your Honor, were construed as the government would have you construe it, to permit unlimited sealing of the indictment, it would render the statute of limitations meaningless. It would conflict with the law in this Circuit that the speedy trial clock continues to tick.

THE COURT: I just want to make sure I understand your argument before agreeing or disagreeing. Your argument is that Rule 6(e)(4) has a reasonableness component that's read into it?

MR. LEEPER: Yes, Your Honor. And we've cited all those cases at the table on Page 10 that so find, and the government, the government has not cited a single case that says an indictment can be — can remain sealed indefinitely.

Your Honor, I look at that motion to reconsider Judge Hughes' order that the government filed in December, and they didn't provide any grounds for maintaining the seal. Instead, they said, as Mr. Stokes said today, it's important as a matter of principle for the government to be permitted to play hide the ball, in so many words, to hide from defendants who inquire whether or not they've been charged. And neither in the motion for reconsideration, nor in his merits brief, did he explain why that's a legitimate principle.

[14] THE COURT: Why — did Judge Hughes — was Judge Hughes de facto deciding the indictment should be dismissed?

MR. LEEPER: No. I don't think Judge Hughes reached the merits. I think Judge Hughes was simply deciding that, given the unusual circumstance of this case, as both laid out in our motion, and as was apparent from the record, which of course Judge Hughes has access to, you have access to —

THE COURT: Yes.

MR. LEEPER: — Mr. Stokes has access to, but we don't, Judge Hughes put that together and said, You know, after six years in these circumstances where the government knew in 2009 and continuing throughout the ensuing six years where Mr. Khoury was, there couldn't possibly be any reason existing under 6(e)(4) to keep the indictment sealed.

THE COURT: But then what if there is an ongoing investigation and other people might be named —

MR. LEEPER: Yes.

THE COURT: — and unsealing the indictment might jeopardize their apprehension?

MR. LEEPER: No question about it, Your Honor. And if in 2009 that were the case, I would have expected the government to say so. But as Your Honor may recall, in [15] November — excuse me — September of 2008, Jack Stanley comes in here and stands right here and pleads guilty. In I think February of 2009, the government filed an information and KBR came in here and pled guilty.

THE COURT: I remember all that.

MR. LEEPER: And then, of course, you had fellows who were indicted under seal, Showdan (phonetic), and the other fellow whose name escapes me for the moment. And within months, the government unsealed those indictments.

So there was no circumstance that existed then, or that the government has pointed to in its pleadings, that it was necessary to keep Mr. Khoury's indictment, and Mr. Khoury's indictment alone, under seal, either to protect the informant or to protect the secrecy of the investigation, and so on.

I'm not here to quarrel with the ability of the government to ask the Court to seal indictments in appropriate cases. That's why I think that this "the sky is falling argument" that the government made in its pleading, that if Your Honor were to unseal this indictment, it would impair the ability of the government to obtain seals in other cases, that's just not so. Because in other cases, if they can make an appropriate showing that there is an informant who needs to be [16] protected, or an investigation that needs to be kept secret, there is plenty of authority that support the request and the Judge's action on that request to seal the indictment.

THE COURT: Okay. Thank you very much. Mr. Stokes, anything further you want to say?

MR. STOKES: Your Honor, just very briefly. And it's to touch on a point I had made, just to make clear. And I do feel like defense counsel and my arguments are like ships passing in the night.

THE COURT: I'm afraid that's right. I'm afraid they are.

MR. STOKES: But, Your Honor, to go back to the, what we believe is the threshold issue, I think the *Sharpe* case, again, the defense has cited it as a case directly on point. I think the piece of the quote, that is, that defense counsel hasn't been relying on that I think is certainly directly on point, is that the Court says, quote, in the context of discussing if there's an indictment and the government has to address the unsealing of that, the Court's quotes — or states, "The government only does so, however, at a hearing after the indictment is unsealed."

THE COURT: That's the point that I'm tripping on. Mr. Leeper makes good sense as a policy matter. I do [17] think it's troubling that if there is an indictment, the defendant — the government has kept it hidden all these years, I think that's very troubling. But I don't know what my authority is to unseal it. All of his arguments would apply very fourthly if an indictment does turn up in this case and I have to rule on it. But I don't know how I order — I'll come back to you. I'll come back to you.

MR. STOKES: And, Your Honor, so recognizing that — that our argument, the government's argument is in part a sequencing argument and there's a threshold issue —

THE COURT: Can you give me an end date?

MR. STOKES: And so, Judge, I think the point that I made at the outset is to the extent that the Court in any case has questions about whether an indictment exists and whether sealing is still appropriate, we believe those are issues for an ex parte hearing.

Mr. Leeper has stood here and channeled the government, channeled Judge Hughes. He doesn't actually — he's speaking in terms as if he has concrete

facts. He does not. And so — but the point we are making is that in this proceeding, in this courtroom, at this time, on his motion, we don't think there's a basis to go forward.

THE COURT: Now the next move is an ex parte conversation with you?

[18] MR. STOKES: We believe that's correct. And that's something then that, to the extent the Court wants and needs information, the government understands that in order for it to rule on what we believe is just a threshold issue, then we are certainly available to discuss it with the Court.

THE COURT: I hate ex parte anything, even wiretaps where it's clearly necessary because the wiretap would be useless without notice to the other side. I'm just really uncomfortable. I wouldn't know enough about this case to know whether the government's reasons are persuasive or not, unless I hear from somebody on the other side. Not that I have any doubt about your bona fides, but how am I going to know whether the reasons proffered ex parte are sufficient?

MR. STOKES: Sure. Again, Your Honor, I think there is sort of — there's just the preliminary question as to whether or not the government needs to disclose anything, and I think the Court having more information would certainly benefit the Court in making that determination. It may be the Court feels it needs additional information depending in the case —

THE COURT: Can you tell me anything about what category of reasons I would hear if we had ex parte communication? Would it be there are other potential [19] defendants who haven't been brought to book, or we're about on the lip of dropping the entire investigation, or it would jeopardize being able to apprehend

Mr. Khoury himself? Can you tell me what category of explanation I would hear?

MR. STOKES: Your Honor, again, we are struggling at just a basic level whether or not in an open courtroom with defense counsel here, we have to disclose whether there's an indictment —

THE COURT: Okay.

MR. STOKES: — and what the reasons are. And, again, the case law is very clear that the government does not. And so, we're not — certainly am not trying to thwart the Court's efforts.

THE COURT: No, I understand that. It's not personal. I know that. Okay. Thank you very much.

MR. STOKES: Thank you, Your Honor.

THE COURT: Mr. Leeper?

MR. LEEPER: Your Honor, it's certainly not clear at all that the government can keep an indictment sealed indefinitely. Mr. Stokes may say it, but he hasn't given you one case that says that.

Sharpe was a case where, it is true, the indictment had been unsealed, and these arguments about whether or not sealing was justified were made after the [20] fact. But the reason that *Sharpe* doesn't help Mr. Stokes at all is that the sealing period in *Sharpe* was six days.

THE COURT: I understand all that. I do.

MR. LEEPER: And as far as your authority, Your Honor, you are sort of figuratively scratching your head saying you weren't quite sure what your authority was.

THE COURT: I'm not.

MR. LEEPER: The government concedes in their opposition papers that, pursuant to 6(e)(4) of the Federal Rules of Criminal Procedure, a Court has discretionary authority to order that an indictment be kept under seal. But then in the footnote, they concede that the government maintain supervisory authority over an order to seal an indictment, and may periodically review the need to maintain —

THE COURT: Slowly. And may periodically. . .

MR. LEEPER: Review the need to maintain an indictment under seal. So you have the authority to require Mr. Stokes to provide a justification.

THE COURT: He's offering to do that. He's offering to do that.

MR. LEEPER: And I, too, am troubled by the ex parte nature of it, Your Honor, because — and, again, not with any disrespect to Mr. Stokes.

THE COURT: I know.

[21] MR. LEEPER: And, indeed, I think Mr. Stokes inherited this situation. So, believe me, I'm not criticizing Mr. Stokes. But we have knowledge of other facts that even Mr. Stokes doesn't. For example, we're going to be able to show actual prejudice here, Your Honor.

You know in the Fifth Circuit, as I said earlier, there's no requirement that we show actual prejudice when all the Barker factors weigh in favor of the defendant, or the delay exceeds five years. But let me make this representation to the Court. If Mr. Khoury stands charged with a Jack Stanley Count 2-like indictment charging a wire or a mail fraud against Kellogg KBR, I represent to you that we're going to be able to show that no fewer than a dozen KBR execu-

tives and consultants and agents and other people knowledgeable of these projects, who would have been available had this case gone to trial in 2009 to testify and provide exculpatory testimony for Mr. Khoury, have died in the six-year period that this indictment has been under seal.

THE COURT: Natural death, I trust?

MR. LEEPER: Yes. Yes. We're not blaming the governments for that. No. Natural death. But we can provide names, we can provide positions. And so, we're dealing here with a situation of actual prejudice, even though prejudice is presumed.

[22] THE COURT: And you don't doubt that when the government unseals the indictment, if there is one, you'll be able to make all those arguments?

MR. LEEPER: That's right.

THE COURT: Okay. So the question is unsealing. Okay. Let me give this further thought. You both made very good points and I appreciate having such able counsel before me. You came all the way from New York?

MR. LEEPER: Washington.

THE COURT: Washington.

MR. LEEPER: Please don't hold that against me.

THE COURT: You came from?

MR. STOKES: I came from Washington and I do hold that against him.

THE COURT: All right. I spent very happy part of my life in D.C.

(Recessed at 10:52 a.m.)

THE COURT: Let's go back on the record in the last case. This will confirm the parties' understandings that both the government and the defendant will have access to the transcript of this hearing.

MR. GERGER: Thank you, Your Honor. That's what we were going to ask you.

MR. STOKES: Thank you.

[23] THE COURT: Safe travels.

(Recessed at 10:58 a.m.)

COURT REPORTER'S CERTIFICATE

I, Johnny C. Sanchez, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/_____
Johnny C. Sanchez, CRR, RMR

APPENDIX R

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

4:17-MC-02553

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAMIR KHOURY,

Defendant.

Houston, Texas
March 22, 2018
2:06 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPEARANCES

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

[3] PROCEEDINGS

THE COURT: Good afternoon and welcome. I know you have just been through it with Ms. Malone, but for my benefit, let's start with appearances of counsel, beginning with the government.

MR. ROMANO: Good afternoon, Your Honor. John-Alex Romano from the Criminal Division of the

Department of Justice and at counsel table with me is Mr. John Pearson.

THE COURT: Welcome. Welcome.

MR. LEEPER: Good afternoon, Your Honor. Charles Leeper on behalf of Samir Khoury.

MR. GERGER: Good afternoon, Your Honor. David Gerger with Gerger and Khalil and Ashlee McFarlane who has just joined our firm.

THE COURT: You made a professional change then.

MR. GERGER: I did.

THE COURT: Welcome to all of you.

Okay. We received a good bit of material from Mr. Khoury, for which I thank you. We have heard much less from the government, but it is Mr. Khoury's motion, so we will begin with him.

Is there anything you would like to add to what is in the papers? I am familiar with the papers. You need not repeat what is in there.

MR. LEEPER: I appreciate that, Your Honor. By the [4] way, thank you for once again approving my application to appear before the Court pro hac. I appreciate the opportunity to appear here again.

THE COURT: Glad to have you.

MR. LEEPER: Your Honor, I believe the logic ladder that governs the disposition to our motion is pretty straightforward, and the first step in that logic ladder is the ascertainment of a critical fact, critical in the sense that it is determinative of the unsealing prong of our motion. If it exists, then I respectfully submit that the Court must grant our motion to unseal, and that fact is readily available to this Court; the fact is

the date of any sealed indictment that may pending against Mr. Khoury. The Court should take judicial notice of facts that in the language of Federal Rule of Evidence 201 can be, quote, accurately and readily determined from sources whose accuracy cannot reasonably be questioned. And I certainly believe that the date stamp on an indictment filed in this Court's records readily satisfies that reliability requirement. For that reason, it is no surprise that the Fifth Circuit has held in the MacMillan case that a court may take judicial notice of related proceedings and records in cases before the same court.

In its opposition papers, the government did not dispute the impropriety of this Court taking judicial notice of any sealed indictment. They noted —

[5] THE COURT: Let's assume that I'm willing to take notice of that.

MR. LEEPER: Okay. Then the second step in the ladder is that if the Court ascertains that the indictment has been pending for longer than one year, then the Barker inquiry is mandatory, and the Court must unseal the indictment to conduct that inquiry.

As Your Honor said in the McCoy case — and I'm now quoting: Once a defendant has made a showing that the delay experienced has reached the appropriate threshold, which is one year in this circuit, a court is required to examine the other factors in the test.

In addition to McCoy, we have cited other cases holding that the Barker analysis is mandatory, including Bergfeld, which is I believe the case Your Honor relied on in McCoy to reach that conclusion.

THE COURT: You are not persuaded that a challenge of the sealing of indictment is not cognizable until after the indictment has been unsealed?

MR. LEEPER: Not at all, Your Honor. The sole authority cited for that proposition is Sharpe. Sharpe was a case that involved an indictment that was sealed a mere six days.

THE COURT: Sharpe, for the court reporter, is S-H-A-R-P-E.

[6] Yes, sir.

MR. LEEPER: In addition to the fact that the Barker analysis is mandatory, there are at least three other compelling reasons why Mr. Khoury is entitled to unsealing relief now and that the Court should not defer —

THE COURT: Before we leave Sharpe, it may be just one authority, but it is Fifth Circuit and it's on point and it's not ancient. How do I get around that?

MR. LEEPER: It's not on point, Your Honor. The reason it is not on point is because Sharpe did not involve our facts. Sharpe involved a case where an indictment was sealed for six days. When it was unsealed and the defendants were arrested, the defendants moved to dismiss on statute of limitations grounds because the timing was quite important. The indictment in that case was returned the day before the statute ran. And the defendant's argument was that the sealing was ineffective for the six days, actually five, because the government had not made a showing at the time they sought the sealing of why the sealing was necessary. The government did not make a record at the time they made application to the magistrate judge for the sealing of their reasons. And so

the Fifth Circuit was holding only that the government does not have to make a record of the reasons for the sealing at the time they make the application. That speaks not at all to whether there is an absolute right on the part of the [7] government to seal an indictment of an individual whose whereabouts are exactly known. The identity of his counsel has long been known to the government indefinitely. In fact, Sharpe said just the opposite.

THE COURT: The reasoning of Sharpe that first we unseal, then we challenge the legitimacy of the sealing has been embraced by at least two other circuits, the Eighth and the Second.

MR. LEEPER: Neither of those cases, neither Sharpe or any of the other cases, consider the offsetting impact of the affirmative constitutional obligation that this Court has. It's not just held by the government. But as Your Honor said in McCoy, both the government and the Court have an affirmative constitutional obligation to give the defendant an opportunity to contest the charges in a timely manner.

THE COURT: Mr. Leeper, I'm extremely troubled by what the government has done. I'm just looking for some precedent that supports my instinct here. That's where I am. And you think it is Barker?

MR. LEEPER: Well, I will give you this. In addition to the fact that the Barker analysis is mandatory, after an indictment becomes presumptively stale, presumptively prejudicial, which is at the conclusion of one year, you have got the affirmative constitutional obligation that Your Honor has to give my client a timely trial. You have got the fact [8] that the weight of that obligation increases with the duration of the delay.

And as the delay increases, the degree of prejudice intensifies.

Take, for example, what Judge Scheindlin said in the Leaver case, L-E-A-V-E-R, which we cited in page 12 of our reply brief: Given the fact that five years had already elapsed before the indictment was returned, the government, therefore, faced a heightened burden of urgency.

What we have here is such a contrast to that, Your Honor, because the facts by which this indictment is likely based, the same facts that underlie the Count Two of the criminal information to which Jack Stanley pled guilty occurred as long ago as 1989. So you have 20 years of pre-indictment delay and what may well be —

THE COURT: 1989?

MR. LEEPER: Yes, sir.

THE COURT: Closer to 30 years.

MR. LEEPER: You add the 10 years of post-indictment delay, which I believe Your Honor would find if you took judicial notice of the records, and you have got a total of 30 years.

Another reason that the Court has to act now is the decision last year by the Fifth Circuit in the United States against Sealed Search Warrants. In that case, the Fifth Circuit held that it is the duty of district courts to exercise [9] their discretion to seal court documents charily and when it does so, to make particularized findings of need as to why the sealed judicial record needs to remain sealed.

Furthermore, it is an abuse of discretion for district court judges to rely on general assurances or representations from the government that somehow their

investigation is going to be impaired by continued sealing of the document.

In that case, search warrant affidavits were at issue, but there is no difference. They are both judicial records. And in both instances, the government comes in here and tells you and magistrate judges, We need to keep these things sealed because our investigation is going to be impaired if we unseal them — or if you unseal them. That can't possibly be the case after 30 years.

If they had to make a showing, they couldn't. And, of course, as I mentioned earlier, you have the admonition in Sharpe itself that indictments may not be sealed indefinitely. Ten years is pretty close to indefinitely.

THE COURT: Does any part of your argument depend on showing that there has been cognizable prejudice to your client, or is prejudice irrelevant and we are just looking at time?

MR. LEEPER: It is relevant. Actual prejudice is relevant to the second basis for our motion to dismiss; the [10] first basis we have been discussing. It is the Speedy Trial prong. As Your Honor knows, when the indictment is older than five years, then prejudice is presumed. No need for the defendant to show prejudice and the burden shifts to the government to show that the defendant has not been prejudiced, a mere insurmountable burden as the Fifth Circuit recognized just last October in the Whitlock case.

If all the factors, the other Barker factors weigh in favor of Mr. Khoury, as I believe that they would, that too requires that prejudice be presumed. For purposes of my Speedy Trial argument, I'm going to put prejudice aside, but actual prejudice is very relevant to our statute of limitations argument.

If I may, Your Honor, display a document, a copy of which I have given government's counsel prior to this hearing.

THE COURT: Can you make that any bigger, Art?

MR. LEEPER: Your Honor, would you like a hard copy? Would that be easier to review?

THE COURT: Do you have one for my law clerk?

MR. LEEPER: I do.

THE COURT: Give it to Mr. Rivera, if you would.

MR. LEEPER: This is an example of the great prejudice that my client has experienced in the time that this indictment, we believe, has been sealed.

[11] After my inquiry in late 2014 to the prosecutors, an inquiry that was rebuffed when I contacted them and asked, What is the status of the investigation, what is my client's status, are there any arrest warrants outstanding for my client? None of which the government counsel would answer.

We began an investigation without subpoena power, without discovery as best we could. We went out and interviewed witnesses. We did other investigations work. In the course of doing that, Your Honor, we learned that no fewer than a dozen witnesses have died since early 2009, witnesses who would be able to speak directly to —

THE COURT: — the facts at issue?

MR. LEEPER: Those being the allegation that Mr. Khoury was steered, was given consulting contracts by Jack Stanley, and that Mr. Khoury, along with Jack Stanley, conspired to deprive KBR of its money and property by Mr. Khoury being paid lucrative consulting fees to which he otherwise would not be entitled.

As Judge Steinlin said in the Leaver case, Witnesses are no less likely to die nor their memories to dim because an indictment has been sealed. And I respectfully submit to Your Honor that this data validates that.

THE COURT: I will take that point.

MR. LEEPER: So we have here ten former colleagues of Mr. Khoury's at KBR, or Kellogg, and two individuals who [12] operate companies that ventured with KBR in the pursuit of these LNG projects, including projects that were the subject of the Stanley charge. They all worked closely with Mr. Khoury. They knew the quality of his work. They knew the process by which consulting fees — at least KBR/Kellogg folks knew the process by which the consulting contracts were awarded and knew that Mr. Khoury was performing his services at a rate that was far below the market rate.

I would like to mention just a few of these individuals particularly, and I can elaborate if Your Honor would like me to cover them all. But let's just look at the first gentleman here. His name is Robert Taylor. He was a lawyer in the general counsel's office working both in Houston and the United Kingdom. He was involved in the preparation of the Kellogg proposals for these LNG contracts, including projects on which Mr. Khoury rendered his consulting services. He knew the contractual conditions that were included in those contracts and he will testify that the conditions on contracts that Mr. Khoury procured for KBR were uniformly more favorable than when other consultants were representing the company. He assisted the general counsel in the review of the applications for approval of agents and so was familiar with the multilayer requirement and signoff process and he knew the

customary rates for agents servicing the company on LNG projects and that Mr. Khoury's were well below the market.

[13] Mr. Page, who is the third gentleman listed here, Former Chief Executive Officer of Kellogg. He was formerly the Assistant Secretary of the Army and the Chair of the Panama Canal Commission. He would have been a character witness for Mr. Khoury in addition to testifying to facts similar to those to which Mr. Taylor would testify to: the quality of Mr. Khoury's work; the process by which consultants were selected, not one man's say-so but a committee who all weighed in; and lastly, the value, the relative value of Mr. Khoury's services given, that his fees were below market.

Mr. Cafiero, C-A-F-I-E-R-O, was a direct supervisor of Mr. Khoury's in the 1980s. He too would have been a character witness for Mr. Khoury, testifying to these same matters that Mr. Page and Mr. Taylor testified to.

THE COURT: One indicia of prejudice is unavailability of witnesses who would have been pertinent. I will take that point.

MR. LEEPER: And as recognized in the Sharpe case, which we have been discussing — and I quote: A sealed indictment will not relate back to the time of its filing for limitation purposes if the defendant can demonstrate that substantial actual prejudice occurred between the sealing and the unsealing.

We have cited no fewer than nine cases in our motion, Your Honor, at page 33 of our motion where indictments [14] were dismissed on the ground that the sealing was either unsupported when made or inappropriately long. And the sealing periods in those

cases ranged from two months to 21 months, compared to what I expect Your Honor will find when he goes into the court files and looks at the indictment here, a seal that has lasted almost a decade.

Two of those cases, Heckler and Rogers — Heckler is from the Southern District of New York; Rogers is from the Southern District of Mississippi, I believe — held that a sealing that lasts more than one year beyond the expiration of the statute of limitations is presumptively unreasonable. Applying that rule of law to this matter, the last overt act alleged in the conspiracy charged in Count Two of the criminal information to which Mr. Stanley pled guilty occurred in January of 2004. Absent tolling, that conspiracy, or the statute of limitations applicable to that conspiracy, would have expired in January of 2009.

THE COURT: Are you speaking primarily to the issue of unsealing or primarily to the issue of dismissal of the indictment?

MR. LEEPER: Well, initially unsealing. The issues are inextricably intertwined, Your Honor. For example, because the Barker inquiry is mandatory and because it is necessarily adversarial, it needs to be unsealed in order for Your Honor to take up those matters. So I'm addressing both of them.

[15] THE COURT: Okay.

MR. LEEPER: I will take any other questions Your Honor may have about any of the other defenses that the government has raised, but just to sum up, it's undisputed that Your Honor can ascertain facts through judicial notice, and one way of doing that in this case is looking at the indictment. If the indictment has been pending for more than one year, the Barker analysis is mandatory. That too is undisputed. The

government didn't challenge that authority. It is textbook law in this circuit. And if the length of the delay exceeds more than five years, then prejudice —

THE COURT: The delay has unquestionably been a heartache for your client. I don't doubt that. The delay has also meant the unavailability of witnesses and perhaps the failed memories of other witnesses.

Are there other externalities we need to talk about? Has it caused reputational damages? Has it been an obstacle to his free use of his finances? Has it caused any collateral damage to family?

MR. LEEPER: The reason we made the inquiry of the prosecutors in 2014 is because he discovered that he could no longer open a bank account in Lebanon, that the Lebanese authorities would not permit him to open up a bank account as a result of inquiries that had been made of the Lebanese authorities by the U.S. authorities. His expertise, as we have [16] explained, is in the liquid natural gas industry.

THE COURT: Has it restricted his ability to travel?

R. LEEPER: He hasn't had a need to travel because he can't get employed.

THE COURT: He can't?

MR. LEEPER: Cannot get employed. Because, as we have demonstrated in our pleadings, when the government seared him in September of 2008 when they took the Stanley plea by identifying him publicly as an unindicted coconspirator, the entire LNG industry knew who the government was talking about because there is only one human being on the face of this earth —

THE COURT: — who fit all the metrics.

MR. LEEPER: I want to mention two things, Your Honor, that have happened since the last time we were in here. One is that last year the Fifth Circuit, in the Doe case — of course, Doe is Mr. Khoury.

THE COURT: Doe is D-O-E.

MR. LEEPER: In that case, the Fifth Circuit found that the prosecutors in the Stanley proceeding had improperly identified Mr. Khoury as an unindicted coconspirator without affording him immediately an opportunity to test those charges. The government has called that finding dicta. I leave it to you whether the following sounds like dicta, and I will use Mr. Khoury's name in lieu of the name Doe.

[17] In accusing Khoury of a crime without providing a public forum in which Khoury could seek to vindicate his rights, whether with a hearing, a trial, a criminal proceeding in which Khoury could defend the serious charges against him, the government failed to act and failed to provide relief or remedy to Doe — to Khoury. It accused Khoury of a crime without indicting him, without introducing evidence to prove the allegations and without allowing Khoury to challenge that evidence and present evidence of his own.

And so by doing what it did in 2008, Your Honor, our view is that the government forfeited any right it may ever have had to indict Mr. Khoury under seal. Because the moment that they identified him publicly as an unindicted coconspirator, as the Fifth Circuit recognized in Doe, an obligation arose immediately for the government to afford Mr. Khoury an opportunity to contest those charges. To then turn around and three or six months later and indict him under seal is entirely inconsistent with the satisfaction of that obligation.

THE COURT: Okay. Thank you very much.

MR. LEEPER: Thank you.

THE COURT: Has the weather gotten better in DC?

MR. ROMANO: I think it is better today, Your Honor. It wasn't so good yesterday.

Likewise, I would like to thank the Court for [18] giving me an opportunity to appear before you today.

THE COURT: Pleased to have you with us.

MR. ROMANO: Your Honor, Mr. Khoury seeks the same relief that he sought three years ago, that is, to unseal and dismiss an indictment, an alleged indictment that he does not know to exist. But nothing has changed since this Court denied the motion.

THE COURT: Is there no time limit? I mean, if he is back here in 10 years making the same arguments, are your arguments going to be the same?

MR. ROMANO: Your Honor, they would be largely the same, and that is that the first threshold inquiry is that under Rule 64, that precludes a defendant and his counsel from learning about the existence of any under-seal indictment. To the extent any indictment may exist against Mr. Khoury, the appropriate time for him to challenge the sealing of that indictment is after the indictment is unsealed. That's clear from the Sharpe decision as well the decision that Sharpe cites in footnote 10, the decisions from other circuits, including the Lakin decision.

THE COURT: Are we to give no weight at all to the personal trauma that Mr. Khoury has suffered and continues to suffer? Is that for naught under the Sixth Amendment?

MR. ROMANO: Your Honor, I think the Sixth Amendment inquiry, like the sealing inquiry, comes into play after any [19] indictment is unsealed because there would be a —

THE COURT: The Speedy Trial right, among its justifications, was precisely those that have been argued by Mr. Leeper: that evidence is attenuated over time, witnesses disappear, it is harder to put on the case you would have put on with a prompt process. I don't really see a difference between the considerations as to prejudice under a post-unsealing indictment — post-unsealing scenario versus a pre-unsealing scenario. We still have dead witnesses. We still have witnesses that are no longer employed by the same company. We still have probably disappearance of records.

MR. ROMANO: A couple responses, if I may, Your Honor. First, of course, the government would be entitled to challenge the representations of Mr. Khoury and his counsel about whether or not he has been prejudiced by — including by what those witnesses —

THE COURT: We can do that here.

MR. ROMANO: Understood. But there is also a wrinkle on the facts of this case that I think Mr. Leeper respectfully glossed over, which is that Mr. Khoury is not in the United States. Let's assume for the sake of argument that there exists an indictment against Mr. Khoury. Let's assume for the sake of argument that that indictment were to get unsealed. Then there is a question of whether or not Mr. Khoury is going to come to the United States and subject himself to the [20] jurisdiction of this Court and litigate his Speedy Trial claim. Because if he doesn't, if he remains outside the jurisdiction of the United States, then he is a fugitive, and certainly the government would ask

the Court as a threshold matter to consider the Speedy Trial Act issue — I'm sorry — the Speedy Trial issue. The government would ask the Court to invoke the fugitive disentitlement doctrine.

I say this not because the Court needs to resolve the fugitive disentitlement doctrine, but just as an example of why the argument Mr. Leeper is making, the Speedy Trial arguments are premature.

THE COURT: But he did not leave the footprints of a fugitive. He is desperate for his day in court. He wants to remove this cloud on his good name. He wants again to be employable and again to be able to open bank accounts.

MR. ROMANO: Your Honor, it is not clear. Those are representations that counsel has made, that the fact that he is not employed can be tied to these statements that the government made in 2008. I would note —

THE COURT: I'm not going to roll over just because a lawyer has made that representation, but we can have an evidentiary hearing and consider those matters.

MR. ROMANO: Understood, Your Honor. And we would say that one issue to be considered if the Court were to go down that road, assuming an indictment exists and we are conducting [21] this hearing on that assumption, that it is under seal, one issue the Court would — the government would ask the Court to consider would be if Mr. Khoury stays outside the United States would be the fugitive disentitlement doctrine.

I will say this: The government is willing to answer any questions the Court has about the existence of any

indictment, about the reasons for continued sealing of an indictment ex parte. I know the Court does not —

THE COURT: Let's talk about the reasons. By any normal measurement this is a very long time to keep an indictment under seal. Is fact gathering still going on?

MR. ROMANO: Your Honor, I want to be helpful to the Court. The nature of the Court's questioning in this area when we are talking about whether or not an indictment exists, whether or not any sealed indictment should continue to remain sealed, those are questions and inquiries that, by definition, are done ex parte.

THE COURT: You said you were willing to talk about them. You mean you are willing to talk about them ex parte?

MR. ROMANO: Exactly, Your Honor.

THE COURT: I do not like ex parte hearings.

Can you give me an estimate of when this indictment, whether it names Mr. Khoury or not, when this indictment will be unsealed?

MR. ROMANO: Your Honor, in this forum, I cannot. And [22] I do apologize. The government does want to be helpful to the Court.

THE COURT: I know you are operating under a rubric that has not been created by you. I know that.

MR. ROMANO: If I may just address the Doe decision by the Fifth Circuit that Mr. Leeper raised.

THE COURT: Yes, sir.

MR. ROMANO: Two things on that. First, even if you agree with Mr. Khoury's reading of the Doe deci-

sion, which is that the Fifth Circuit found improper conduct by the government by inappropriately referencing Mr. Khoury and all but named him during the Jack Stanley proceedings, that doesn't change the rules in a criminal case governing when the sealing of an indictment can be challenged.

Also, I would disagree with their reading of Doe. If you look at what the Fifth Circuit was deciding in that case, the two parts of the Fifth Circuit's decision, one addressed whether or not the civil suit filed by Mr. Khoury was barred by the doctrine of sovereign immunity. The other was whether or not the civil suit was timely. Those are two sort of threshold procedural questions that deal with issues before the Fifth Circuit. And the Fifth Circuit assumed for the purposes of its analysis the truth of the allegations in the civil complaint. I think that is clear from looking at the particular language in the Doe decision. For example, if the [23] Court were to look at page 798, this is 853 F. 3d 798, before it conducts the inquiry into sovereign immunity, which says, Because the government has been sued, subject matter jurisdiction is at issue and we must resolve that issue —

THE COURT: You are going too fast. Subject matter is at issue?

MR. ROMANO: — must resolve that issue prior to addressing the merits of any claims. So it wasn't getting into the merits. Likewise, on page 800, before it addresses whether the suit was time barred, the Court reviews the standard that is applicable to the motion to dismiss. And it says, To survive a motion to dismiss a complaint must contain sufficient factual matter accepted as true to state a claim for relief that is plausible on its face. Again, if the Court turns to page 802, the Fifth Circuit is again referring to the question of

whether the suit is time barred. Doe's claim that the Fifth Amendment was violated when government charges were made with no opportunity to defend accrued when the government purportedly accused him of criminal activity.

THE COURT: Read the quote again. You were going too fast.

MR. ROMANO: This is on page 802. Doe's claim that the Fifth Amendment was violated when government charges were made with no opportunity to defend accrued when the government purportedly accused him of criminal activity without indicting [24] him. All of this is just to say, Your Honor, that the Fifth Circuit's analysis is conducted on the assumption that the allegations in the complaint were true. The Fifth Circuit did not have to reach the merits question of whether the government had improperly named Mr. Khoury. So we think that Mr. Khoury's reliance on the Doe decision is misplaced. It does not support the weight that he places on it.

He likewise cited another intervening decision of the Fifth Circuit, United States versus Sealed Search Warrants. But the circumstances of that case were completely different from the case before Your Honor. That case involved whether or not probable cause affidavits which were sealed — whether those should remain sealed, and those affidavits supported search warrants that had already been executed. That case did not involve the sealing of an alleged indictment. So Rule 64 did not come into play. The rules governing when a defendant may challenge the sealing of an indictment was not an issue. Sealed Search Warrants does not help Mr. Khoury nor does — I'm sorry. Do you have a question?

THE COURT: I know you are not ready to concede that the indictment does unmistakably identify Mr. Khoury, but let's assume a set of facts where the identity were clear. Would that change the case?

MR. ROMANO: I don't think so. And, again, on the assumption that his identity were clear doesn't go to whether [25] or not an indictment exists, which is a separate question.

THE COURT: Is this entirely a Sixth Amendment question, you think, or is there a due produces right implicated? Somebody who is kept under — who endures this long-running stain on his reputation without any forum to litigate about it, surely that is not consistent with the Fourteenth Amendment, is it?

MR. ROMANO: Your Honor, Mr. Khoury hasn't invoked due process. There may be at the margins some due process concerns. I just don't know. But nothing that — Mr. Leeper said that his client had no need to travel, so nothing precludes, for example, as far as I understand the case to be, Mr. Khoury from traveling. So these are representations that opposing counsel has made about the effect, the alleged effects on Mr. Khoury's representation, but they are just that. They are just arguments that are being made.

THE COURT: Well, I understand that these are arguments being made, but the issue is not whether I accept those without more. The issue is whether we convene an evidentiary hearing where we can resolve that issue in typical adversarial fashion.

Mr. Khoury doesn't look just to Rule 6 of the Federal Rules of Criminal Procedure. Mr. Khoury says — not just to the Sixth Amendment. Rule 6 he says — he quotes: The Court may authorize disclosure at a time and in a manner and [26] subject to any other

conditions that it directs of a grand jury matter preliminarily to or in connection with a judicial proceeding.

Does that provide me the necessary authority to unseal the indictment?

MR. ROMANO: I'm sorry. Your Honor was reading Rule 6?

THE COURT: Part of Rule 6.

MR. ROMANO: Your Honor, I don't think the government has disputed that ultimately a court may review —

THE COURT: Is this ex parte too? Or could I do it publicly, authorize disclosure of a grand jury matter preliminarily to or in connection with a judicial proceeding?

MR. ROMANO: Certainly the government would ask the Court, if the Court were to entertain the unsealing of any alleged indictment that may exist — the government would ask the Court for the opportunity to make a proffer as part of why the continued sealing that an indictment may exist is warranted.

THE COURT: In other cases where the government — excuse me — the Court seems to take in something of a proprietary interest in a sealed record or a sealed indictment is United States versus Lalibrte. That's L-A-L-I-B-R-T-E. The district court refused to seal an indictment without a detailed factual basis and requested prosecutors file an affidavit. [27 In United States versus Gigante, G-I-G-A-N-T-E, the government sought the sealing of indictment to toll the statute of limitation period rather than because the defendant was a flight risk. The Court found there was no basis for sealing the indictment.

In United States versus Shelton, the government — the Court held the government should closely monitor the case and make determinations on a continuing basis of whether sealing the indictment and accompanying documents is helping or hindering the arrest of the defendant.

Then we have this Ohio case, United States versus Deisernia, D-E-I-S-E-R-N-I-A. The defendant brought up a motion to unseal indictment after learning that an investigation that he was the subject of was underway. The judge reasoned that because of the, quote, rare circumstances, unquote, where the defendant, quote, has knowledge of the indictment in some capacity, there is no continuing purpose for the indictment to remain sealed and a seal does not prevent him from avoiding arrest.

That is our case, isn't it?

MR. ROMANO: I don't think so, Your Honor. Certainly in the Deisernia case — I may be mispronouncing it — the case out of the Northern District of Ohio proves our point. Because in that case, Your Honor read a portion of the order where the district court emphasized in unsealing the indictment the rare [28] and unique circumstances of that case. And those rare and unique circumstances was that the defendant had learned about the existence of the indictment from an extradition filing that the government had made in another case. And the defendant somehow even knew the case number for the sealed indictment in that case. So there was no reason to continue the sealing of the indictment in Deisernia. That's not what you have here. The government has never confirmed or denied the existence of any indictment against Mr. Khoury.

I think the Gigante case is likewise distinguishable. I have it in my notes here. In that case, the district court concluded that there was no need to maintain secrecy because the defendant was aware of the investigation and that one of the reasons why the government had wanted sealing in that case was they needed time to bring additional charges, and the Court said that's not a legitimate reason for sealing. And, again, that's not the case here where the government has neither confirmed or denied the existence of any indictment.

So I think the facts of those cases are distinguishable and I would indulge the Court to take that into account.

THE COURT: Okay. Anything further?

MR. ROMANO: Nothing further, Your Honor. Thank you. MR. PEARSON: Your Honor, may I have a moment to [29] confer?

THE COURT: Yes. And I will give you another chance, Mr. Leeper, and then we will take a break.

(Pause)

MR. PEARSON: Judge, I'm not counsel of record in this case. I'm here on behalf of the United States. And with the Court's permission, I would just add one point from the U.S. Attorney's Office's perspective on these issues.

THE COURT: Yes, sir.

MR. PEARSON: And that is without confirming or denying the existence of the indictment, I wanted to remind the Court of what I think the Court already knows, which is, if this Court were to unseal any indictment, and certainly to dismiss any indictment, that — I don't know what the opposite of deterrence is

— the incentivization for defendants with means to go to jurisdictions from which the government cannot extradite them — I don't know if Mr. Leeper has said it or not, but the understanding that I think we have is that he is in Lebanon.

THE COURT: I think that's conceded. Yeah.

MR. PEARSON: I don't know if that is argued or not, but that is my understanding.

THE COURT: How does that bear on this argument?

MR. PEARSON: Well, just in that the reason behind this — I'm a big why person and I want the Court to understand [30] not just that the government is standing on its position based on: This is what the rule says and you have to follow the rules. And the Court is asking good questions about where are we going to be if this happens in the future.

THE COURT: Where does the fact that he has a Lebanese residence fit into this?

MR. PEARSON: It is my understanding that Lebanon will not extradite its citizens back to the United States. And so if this Court were to grant all of the relief that I understand the defendant is seeking, it would create an incentive and it would be a precedent for other defendants with means. And as this Court is aware from its time here and down on the southern border, those precedents get around. And I am concerned about the deterrent effect of that if this Court were to set that kind of precedent.

THE COURT: Mr. Khoury came to United States voluntarily to meet with prosecutors in 2006.

MR. PEARSON: That's correct, Your Honor. That was in 2006.

THE COURT: Okay. Thank you very much.

Anything more before we take a break, Mr. Leeper?

MR. LEEPER: Yes, Your Honor, very briefly. The government's counsel says what I'm trying to do is learn about the existence of an indictment and that somehow the Deisernia case is distinguishable because the defendant in that case [31] somehow had gotten a case number that he thought was a sealed indictment. We are not here to learn about the existence of the indictment. We don't want anything from the government. We are asking the Court to simply exercise the exclusive control that it has over its records and to unseal those records, unseal that indictment. First, take judicial notice, which the government counsel doesn't contest and then unseal them for the reasons that we articulated. We are not here conducting some lateral skirmish to find out whether or not an indictment exists. We want our day in court.

Secondly, on the Doe case —

THE COURT: On which case?

MR. LEEPER: Doe. The government's counsel says the Fifth Circuit just assumed the accuracy of the facts alleged. Just what is government counsel representing to this Court? Is the government representing that in the Stanley criminal information, the LNG consultant referred to there was someone other than Samir Khoury?

THE COURT: I think they are not going to say one way or the other.

MR. LEEPER: I can't imagine he would make that argument inasmuch as from the government's filings in connection with the sentencing of Jack Stanley, in

its in-camera allocution memo, I expect Your Honor knows that the LNG consultant is Samir Khoury.

[32] THE COURT: Okay. I understand your point.

MR. LEEPER: On the idea that somehow Mr. Khoury is a fugitive because he is in Lebanon, he didn't go to Lebanon because there is no extradition treaty there. He was born in Lebanon. And as Chief Judge Rosenthal has said recently, in this circuit, the fugitive disentitlement doctrine is discretionary, sparingly invoked and rarely applied. That's what he said in the O'Donnell case that he decided last year.

And lastly, Your Honor, Mr. Pearson in what I will call his floodgates arguments, there will be a floodgate of motions like this one. Like all floodgate arguments, it's inherently speculative, and the government has provided this Court with no information that would allow the Court to conclude that it's a realistic threat here. But let me just say — let's analyze the government's logic. How many individuals out there, U.S. citizens living overseas have been indicted under seal? How many of those indictments charge offenses based on decades-old allegations? How many of those indictments of individuals whose whereabouts and the identity of U.S. counsel are clearly known to the prosecutors? How many of those indictments did the government publicly accuse the defendant of being a criminal before the indictment was returned and unsealed? I would respectfully suggest none.

THE COURT: Okay. I understand your point. We will have a break. It will be at least 15 minutes.

[33] *(Court recessed at 2:52 p.m.)*

(Court resumed at 3:10 p.m.)

THE COURT: I want to make sure I have understood all sides' arguments. You began, Mr. Leeper, by saying two things have changed since the last time we were here. I'm not sure I got both things. Can you help me? Remind me.

MR. LEEPER: Actually three things.

THE COURT: Three things.

MR. LEEPER: The two that I had in mind were the Doe decision where the Fifth Circuit made its finding that we have been talking about. The second thing is three more years have passed. And you might recall, Your Honor, in the hearing in February of 2015, you asked Mr. Stokes, What's the end date? And it's been three years and we still have no end date.

And then the third thing that's changed, Your Honor, is that unlike our motion in 2015 where in a sealed proceeding we asked Your Honor to unseal the indictment and make it available to the defendant, we are in an open proceeding now. We are seeking different relief. We are asking that the indictment be unsealed for all purposes. So those are the three differences.

THE COURT: I'm going to take this under advisement. I suspect I will write on it. Does anybody wish to say anything before we adjourn?

MR. LEEPER: One last thing, Your Honor. You asked [34] government counsel if 10 years from now Mr. Khoury comes back here, will we be making the same arguments relying on Sharpe and saying that the government doesn't have to disclose the indictment? Ten years from now, one year from now, Mr. Khoury may be dead.

THE COURT: I may be too. I know that. We are all mortal. I know that.

MR. LEEPER: Just like these witnesses.

Thank you, Your Honor.

MR. ROMANO: Very briefly, Your Honor. Nothing else on the sealing point.

I would just reiterate one point that we made, which is that the sealing and the dismissal issues are not inexplicably intertwined and that we do believe there is a threshold question before the Court should undertake any Speedy Trial analysis.

THE COURT: Okay. Thank you very much.

MR. ROMANO: Thank you.

(Court adjourned at 3:12 p.m.)

[35] * * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled cause.

Date: March 23, 2018

/s/ Mayra Malone
Mayra Malone, CSR, RMR, CRR
Official Court Reporter

APPENDIX S

UNDER SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed July 2, 2018]

Case No. 4:17-mc-02553
[Related to Case No. 4:08-cr-763]

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMIR KHOURY,

Defendant.

EX PARTE NOTICE OF GOVERNMENT'S WITHDRAWL OF OPPOSITION TO UNSEALING THE INDICTMENT

The United States of America, by and through undersigned counsel, hereby notifies the Court that it is withdrawing its previous opposition to the unsealing of the indictment and arrest warrant in *United States v. Samir Khoury,* No. 4:08-cr-763.[1] In support of this Notice, counsel state the following:

1. Before the Court are the Motion of Samir Khoury to Unseal and Dismiss the Indictment for Violation of His Right to a Speedy Trial or as Time-Barred, Doc.

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[1] Because the indictment and arrest warrant remain sealed at this time, the Government is filing this Notice *ex parte*.

No. 4-2; the Government's response thereto, Doc. No. 13; and Khoury's reply, Doc. No. 14.

2. On June 11, 2018, the Court issued a Memorandum and Order on Khoury's motion, addressing several of the Government's arguments in opposition to unsealing the indictment and providing the Government with the opportunity to submit for in camera review "any evidence that [it] wishes to adduce in opposition to [the] Motion to Unseal." Doc. No. 22 at 5-9.

3. The Government appreciates the Court's invitation to supplement the record with any additional evidence. Nevertheless, mindful of the issues raised by the Court in its Memorandum and Order, the Government withdraws its previous opposition to unsealing the indictment and arrest warrant in *United States v. Samir Khoury,* No. 4:08-cr-763.

4. Assuming the Court decides to unseal the indictment and arrest warrant, Khoury now will have appropriate "instruction[s] on how he [can] submit to custody." Doc. No. 22 at 6. Should the Court believe there are any remaining issues to litigate before Khoury appears in Court, the Government respectfully requests the opportunity to brief them.[2]

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[2] As the Court noted in its Memorandum and Order, the Government's original response to Khoury's motion addressed only the potential unsealing of the indictment, not his Sixth Amendment and statute of limitations challenges. Doc. No. 22 at 8. Assuming the Court decides to unseal the indictment and arrest warrant—thereby providing Khoury with instructions on how to submit to custody—the Government submits that these challenges are premature until Khoury appears in Court to face charges. The Government respectfully requests the opportunity to brief that threshold issue if necessary.

Respectfully submitted,

SANDRA L. MOSER
ACTING CHIEF

/s/

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June 29, 2018

APPENDIX T

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed August 6, 2018]

Case No. 4:08-cr-763

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMIR KHOURY,

Defendant.

GOVERNMENT'S REQUEST TO DENY DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

The United States of America, by and through undersigned counsel, respectfully requests that the Court deny defendant Samir Khoury's ("Defendant") motion to dismiss the indictment unless and until he submits fully to this Court's jurisdiction. The motion not only raises meritless speedy trial and statute of limitations challenges, but also represents another attempt to circumvent the U.S. judicial system by a fugitive who "is willing to enjoy the benefits of a legal victory, but is not at all prepared to accept the consequences of an adverse holding." *United States v. Stanzion*e, 391 F. Supp. 1201, 1202 (S.D.N.Y. 1975). Consequently, the fugitive disentitlement doctrine should be applied in this context to bar consideration of Defendant's motion until he appears before this Court.

BACKGROUND

On November 24, 2008, a grand jury in the Southern District of Texas returned an indictment charging Defendant with conspiring to commit mail and wire fraud, in violation of 18 U.S.C. § 1349; seven counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346; and three counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346. Indictment ¶¶ 2-3, 5-7, ECF No. 1. The indictment alleges that Defendant paid approximately $11 million in kickbacks to Albert Jackson Stanley ("Stanley"), the former Chairman and Chief Executive Officer of the M.W. Kellogg Company ("Kellogg") and its successor, Kellogg Brown & Root ("KBR"), in exchange for providing exorbitant fees to Defendant's consulting company on contracts won by Kellogg or KBR in various countries. *Id*. The indictment was placed under seal when it was returned.

Defendant is a dual citizen of the United States and Lebanon who resided in Cleveland, Ohio, with his family from in or about 1988 to February 2004; his daughters still live in the United States. Indictment ¶ 1; Mot. to Unseal and Dismiss the Indictment 2, ECF No. 11 ("Mot.")[1]; Decl. of Christina Smothers in Support of Gov't Request ("Decl.") ¶ 3. Defendant was employed by Kellogg until 1988 and subsequently became a consultant to Kellogg, KBR, and other U.S. and international companies. Indictment ¶ 1; Mot. 5. He traveled frequently to and from the United States, but discontinued all travel to the United States as of February 2004.[2] Decl. ¶ 4. He has since returned only

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[1] Khoury originally filed his motion in Misc. Action No. 4:17-mc-2553 and refiled the motion in this criminal case after the Court unsealed the indictment.

[2] Notably, on March 8, 2004, KBR's parent company, Halliburton Company, reported that it and its subsidiaries were being

once to the United States in August 2006 to proffer information in connection with the Government's investigation into Stanley, Kellogg, and KBR. Mot. 6. Setting aside the content of Defendant's proffer, Defendant admits that he was aware as early as September 2008 that he was implicated as a co-conspirator in the case against Stanley. *See* Mot. 6-8; Reply to Gov't Resp. in Opp'n to Mot. to Unseal and Dismiss Indictment, ECF No. 12 ("Reply"); Mot. to Unseal and Dismiss the Indictment 6-8, *United States v. [Sealed Case]*, Misc. No. 4:14-mc-2884 (S.D. Tex. 2014) ("2014 Mot."); Compl. ¶¶ 13-14, *Doe v. United States*, No. 4:15-cv02414 (S.D. Tex.) ("*Doe* Compl."). He further acknowledges that he has closely followed the Government's investigation and related prosecutions, including Stanley's sentencing in February 2012. Mot. 6-8.

In December 2014, Defendant moved to unseal and dismiss the indictment he presumed was pending against him. *See* 2014 Mot. This Court denied that motion, ruling that the government was not required to provide any sealed indictment to Defendant's counsel. Order, *United States v. [Sealed Case]*, Misc. No. 4:14-mc-2884 (S.D. Tex. Feb. 19, 2015). The Fifth Circuit dismissed Defendant's appeal of that ruling on the Government's motion.

In December 2015, Defendant filed a civil complaint against the United States seeking, *inter alia*, expunge-

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investigated by the Department of Justice and the Securities and Exchange Commission for violations of the Foreign Corrupt Practices Act, and by the French authorities for improper payments. *See* Compl. ¶ 10, *Doe v. United States*, No. 4:15-cv-02414 (S.D. Tex.); Halliburton Form 10-K (March 8, 2004), *available at* https://www.sec.gov/Archives/edgar/data/45012/000004501204000086/ed10k2003.txt (last viewed Aug. 3, 2018).

ment from court records of certain allegations made in Stanley's criminal case, which, Defendant alleged, pertained to him and identified him in all but name.[3] *Doe* Compl. ¶ 13. The district court dismissed the complaint as time-barred, and the Fifth Circuit affirmed. *Doe v. United States*, 853 F.3d 792, 800-801, 804 (5th Cir. 2017).

On September 29, 2017, Defendant filed a second motion to unseal and dismiss the indictment he presumed was pending against him. *See* Mot. As grounds for dismissal, Defendant argued that his Sixth Amendment right to a speedy trial had been violated, and that the statute of limitations was no longer tolled and had expired, as a result of the length of time the presumed indictment has been pending. Mot. 18-38. The government opposed Defendant's motion on the ground that a challenge to the sealing of any indictment is not cognizable until after the indictment is unsealed. *See* Gov't Resp. in Opp'n to Mot. to Unseal and Dismiss Indictment, *United States v. Samir Khoury*, Misc. Action No. 4:17-mc-2553 (S.D. Tex. Nov. 27, 2017).

On June 11, 2018, after a hearing on Defendant's motion, the Court issued a Memorandum and Order addressing several of the Government's arguments in opposition to unsealing the indictment. Memorandum & Order, *United States v. [Sealed Case]*, Misc. Action

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[3] In September 2008, Stanley pleaded guilty to conspiring to violate the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq.*, and to mail and wire fraud conspiracy. *United States v. Albert J. Stanley*, Crim. No. 4:08-cr-597 (S.D. Tex. Sept. 3, 2008). In February 2012, this Court sentenced Stanley to 30 months of imprisonment, to be followed by three years of supervised release, and ordered that he pay $10.8 million in restitution. *Id.* (Feb. 23, 2012).

No. 4:17-mc-2553 (S.D. Tex. June 11, 2018) ("Order"). Among other things, the Court observed established case law in the Fifth Circuit that "[t]he fugitive disentitlement doctrine limits a criminal defendant's access to the judicial system whose authority he evades." *Id.* at 5 (citing *Bagwell v. Dretke*, 376 F.3d 408, 410 (5th Cir. 2004)). The Court declined to extend the fugitive disentitlement doctrine to circumstances where an indictment remains under seal, noting that Defendant "ha[d] not absconded from custody, and without a public indictment, there is no instruction on how he could submit to custody."[4] *Id.* at 6.

The Government notified the Court in an *ex parte* submission that it was withdrawing its opposition to unsealing the indictment in light of the issues addressed by the Court in its Order. *Ex Parte* Notice of Gov't Withdrawal of Opp'n to Unsealing Indictment, *United States v. Samir Khoury*, Misc. Action No. 4:17-mc-2553 (S.D. Tex. July 2, 2018) ("Gov't Withdrawal"). On July 9, 2018, the Court unsealed the arrest warrant and indictment against Defendant. Order, *United States v. Samir Khoury*, Misc. Action No. 4:17-MC-2553 (S.D. Tex. July 9, 2018).

Since the indictment was unsealed, Defendant has not come to the United States or represented that he would appear before this Court. On July 13, 2018, Defendant filed a motion to set a briefing schedule on his speedy trial and statute of limitations challenges to the indictment, which the government opposed as

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[4] In the Court's subsequent Order dated July 9, 2018, the Court noted that its previous Memorandum and Order "addressed arguments regarding the unsealing of the indictment, but not arguments regarding the dismissal of the indictment." Order, *United States v. [Sealed Case]*, Misc. Action No. 4:17-mc-2553 (S.D. Tex. July 9, 2018).

premature. Mot. to Set Briefing Schedule (S.D. Tex. July 2, 2018); *see* Gov't Withdrawal 2, n.2 (noting the Government's position that the challenges "are premature until Defendant appears in Court to face charges"). On July 18, 2018, the Court ordered briefing solely on the Government's request that the Court invoke the fugitive disentitlement doctrine to deny Defendant's attacks on the indictment until he submits to the Court's jurisdiction.

ARGUMENT

I. The Fugitive Disentitlement Doctrine Applies to Defendant's Motion to Dismiss.

The fugitive disentitlement doctrine arises from a court's inherent power to protect its proceedings by preventing criminal defendants "from obtaining a favorable ruling while escaping unfavorable results or impending proceedings." *O'Donnell v. Harris Cty*, 227 F. Supp. 3d 706, 727 (S.D. Tex. 2016); *see also Bagwell*, 376 F.3d at 410-411. Consequently, the Fifth Circuit has repeatedly found that the fugitive disentitlement doctrine bars defendants and other litigants from seeking one-sided relief. *See, e.g., Giri v. Keisler*, 507 F.3d 833, 836 (5th Cir. 2007) ("Someone who cannot be bound by a loss has warped the outcome in a way prejudicial to the other side; the best solution is to dismiss the proceeding." (internal quotations and citation omitted)); *United States v. All Funds on Deposit at Sun Secured Advantage*, 864 F.3d 374, 378-81 (5th Cir. 2017); *United States v. 2005 Pilatus Aircraft*, 838 F.3d 662, 663-65 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 2128 (2017); *Bright v. Holder*, 649 F.3d 397, 399-400 (5th Cir. 2011); *United States v. Ibanex-Martinez*, 288 Fed. Appx. 213, 214 (5th Cir. 2008); *AlMomani v. Mukasey*, 257 Fed. Appx. 746, 747 (5th Cir. 2007); *see also United States v. Oliveri*, 190 F. Supp. 2d 933 (S.D.

Tex. 2001); *United States v. All Monies*, No. 4:93-cv-336, 1996 U.S. Dist. LEXIS 20639 (E.D. Tex. Jan. 25, 1996); *United States v. All Funds on Deposit at Old Mut. Of Berm.*, No. 2:13-cv-294, 2014 U.S. Dist. LEXIS 115208 (S.D. Tex. June 5, 2014); *O'Donnell*, 227 F. Supp. 3d at 727; *Bell v. United States*, No. 4:16- CV-1056-O, 2017 U.S. Dist. LEXIS 147861 (N.D. Tex. Sept. 12, 2017).

While the doctrine is often applied to immigration, appellate, and civil forfeiture proceedings, it has also been applied in the criminal pretrial context, including to deny fugitives' motions to dismiss indictments. *See Oliveri*, 190 F. Supp. 2d at 936 (recognizing that doctrine "also applies to pretrial motions made by fugitives in district court"); *Stanzione*, 391 F. Supp. at 1202 (denying the defendant's motion to dismiss indictment based on fugitive disentitlement); *United States v. Kashamu*, 656 F. Supp. 2d 863, 867 (N.D. Ill. 2009) (holding "that fugitive disentitlement doctrine can apply to pretrial motions in criminal cases, subject to the discretion of the Court"); *United States v. Bakri*, No. 3:00-CR-76-TAV-CCA-2, 2014 U.S. Dist. LEXIS 59708, at *5-6 (E.D. Tenn. Apr. 30, 2014) (utilizing fugitive disentitlement to deny motion to dismiss indictment); *United States v. Bokhari*, 993 F. Supp. 2d 936, 938 (E.D. Wis. 2014) ("Courts have applied the doctrine, as here, to pretrial motions in criminal cases."); *United States v. Chung Cheng Yeh*, No. CR-10-00231-WHA, 2013 U.S. Dist. LEXIS 69284, at *2, 8 (N.D. Cal. May 15, 2013) (denying the defendant's motion to dismiss based on fugitive disentitlement, and finding that "[i]t would be a waste of resources to adjudicate advisory opinions at [the defendant's] behest"). Accordingly, the Court should invoke the doc-

trine here and decline to consider Defendant's motion to dismiss.[5]

Defendant satisfies the fugitive disentitlement doctrine's two-part inquiry. The doctrine first requires a showing that the defendant is a fugitive. Defendant falls squarely within the definition of an individual attempting to evade this Court's authority:

> Courts define the term "fugitive" as someone who seeks to evade prosecution by either actively avoiding the authorities, or remaining in a geographic location that is out of the authorities' reach. The intent to flee from prosecution or arrest may be inferred from a person's failure to surrender to authorities once he learns that charges against him are pending. This is true whether the defendant leaves the jurisdiction intending to avoid prosecution, or, having learned of the charges while legally outside the jurisdiction, "constructively flees" by deciding not to return.

Kashamu, 656 F. Supp. 2d at 867 (internal quotation marks and citation omitted). The fact that a defendant is outside the United States when indicted does not preclude finding that he is a fugitive. *Bokhari*, 993 F.

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[5] To the extent Khoury argues that this Court has already decided not to apply the fugitive disentitlement doctrine (*see* Order 5-6), the Court's analysis of the doctrine was limited to the context of a sealed indictment. Circumstances have changed–the indictment is now unsealed and, knowing to whom and how he should submit, Khoury still has not come to the United States. Additionally, the Court previously lacked information regarding Khoury's knowledge of the potential charges and his pre-indictment actions, both of which confirm that Khoury was and remains a fugitive and should be disentitled from employing the Court's resources to his advantage.

Supp. 2d at 938. "Fleeing from justice is not always a physical act; it may be a state of mind." *Id.* (quoting *United States v. Eng*, 951 F.2d 461, 464-465 (2d Cir. 1991)). Therefore, courts consider the circumstances surrounding a defendant's knowledge of the charges and his subsequent actions in designating him a fugitive. *See id.*; *Bakri*, 2014 U.S. Dist. LEXIS 59708, at *7-8; *United States v. Garza*, No. 1:02-CR-584-CAP-AJB, 2014 U.S. Dist. LEXIS 197521, at *39-40 (N.D. Ga. Dec. 22, 2014) (finding that defendant had constructive knowledge of the charges in a sealed indictment and deliberately evaded capture based on inquiry into defendant's actions).

The *Bakri* and *Bokhari* cases are especially instructive because those defendants and Defendant have similar backgrounds. In *Bakri*, the defendant fled the United States to Jordan after a search warrant was executed at his business and never returned. *Bakri*, 2014 U.S. Dist. LEXIS 59708, at *1-2. He was indicted while abroad and hired local counsel to represent him in the matter, waiting eleven years to file a motion to dismiss the indictment on speedy trial grounds. *Id.* at *2. In denying that motion on fugitive disentitlement grounds, the court found the defendant was a fugitive because he left the United States after becoming aware of the investigation and potential charges against him, remained in Jordan after learning about the indictment, retained local counsel from the time of indictment, and was unwilling to submit to the court's jurisdiction. *Id.* at *7-8.

The court in *Bokhari* reached the same result, focusing on, inter alia, the defendant's "substantial connections to the United States . . . most significant of which is the fact that he is a United States citizen," his commission of the alleged fraud in the United States,

his marriage to and divorce from a United States citizen, and his failure to surrender when indicted. 993 F. Supp. 2d at 939. The court also emphasized that,

> setting aside the fact that Bokhari was already in Pakistan when he was indicted, it takes little imagination to deduce that Bokhari went to Pakistan in an effort to insulate himself from the possibility of a criminal prosecution. Bokhari should not be allowed to set a criminal plan in motion, leave the country, then attempt to gain a favorable ruling from the security of a foreign country once the U.S. government discovers the fraud.

Id.

With these examples, there is no question that Defendant is a fugitive. Although he has repeatedly touted his desire for "access to the court as a forum of vindication" and "the opportunity to confront the charges against him" (*see* Mot. 2, 13-14, 20, and 23; Reply 2), he avoided the question of whether he would submit to U.S. authorities if the indictment was unsealed—his continued absence, however, provides a clear answer.

Most significantly, his prior knowledge and actions establish that he was a fugitive before the indictment was unsealed. As in *Bakri* and *Bokhari*, Defendant is a U.S. citizen who resided in Ohio for decades and had significant familial and business connections here. Indictment ¶ 1; Mot. 2, 5; Decl. ¶¶ 3-4. He also knew that the investigation into KBR and Stanley involved him before he was indicted and left the country just as the Government's investigation was made public. Indictment ¶ 2; Mot. 4-6; *Doe* Compl. ¶ 10. In fact, Defendant hired counsel to represent his interests

from 2006 onwards, including at his proffer with the Government in August 2006. Mot. 6. By his own admission, Defendant further understood he was implicated in Stanley's wire fraud conspiracy as early as September 2008 when Stanley pleaded guilty (again, before Defendant was indicted). Mot. 6-8. Taken together, Defendant appears to have intentionally left, and stayed away from, the United States to avoid prosecution.

Once the defendant's fugitive status is established, the doctrine then requires that courts look to any special circumstances or policy concerns that would preclude the fugitive disentitlement doctrine's application. Despite Defendant's opinion that he is uniquely situated when compared to other fugitives (*see, e.g.*, Reply 12, 14), nothing about his situation warrants an exception to disentitlement. *See, e.g., United States v. Noriega*, 683 F. Supp. 1373, 1374-1375 (S.D. Fla. 1988) (defense counsel allowed to appear for defendant because he was *de facto* head of a foreign government and case involved delicate issues of first impression). Even the amount of time that has passed since indictment does not make Defendant's situation unique. *See Bakri*, 2014 U.S. Dist. LEXIS 59708, at *1 (approximately 14 years from indictment to denial of motion to dismiss based on fugitive disentitlement); *Bokhari*, 993 F. Supp. 2d at 937 (approximately 10 years with same result and reasoning); *Kashamu*, 656 F. Supp. 2d at 864, 868 (approximately 11 years with same result and reasoning).

Because Defendant has been and remains a fugitive, and because the indictment is now unsealed, the Court should use its discretion to apply the fugitive disentitlement doctrine to his motion to dismiss unless and until he submits to this Court's jurisdiction.

II. The Principles Underlying the Fugitive Disentitlement Doctrine Weigh Heavily Against Considering Defendant's Motion to Dismiss.

"[T]he fugitive disentitlement doctrine has come to signify the unwillingness of courts to waste time and resources exercising jurisdiction over litigants who will only comply with favorable rulings of the court." *Oliveri*, 190 F. Supp. 2d at 935. The considerations underlying whether to limit a fugitive's access to the judicial system include: (1) being unable to enforce the court's judgment or ruling; (2) the risk of delay or frustration in determining the merits of the claim; (3) affording relief to a defendant who has abandoned or waived his right to that relief; (4) deterring other defendants from fleeing; and (5) the impact on the process and efficiency of the courts. *Bagwell*, 376 F.3d at 411; *see also Degen v. United States*, 517 U.S. 820, 825-828 (1996). In reviewing these considerations in *Oliveri*, the court held that ruling on the defendant's motion to dismiss the indictment would be ineffectual because he could remain outside the jurisdiction, but "if the court were to dismiss the indictment against Oliveri, he would obtain a significant benefit from this court at no risk to him." *Oliveri*, 190 F. Supp. 2d at 936; *see also Stanzion*e, 391 F. Supp. at 1202 (using the same reasons as *Oliveri* to deny the fugitive defendant's motion to dismiss).

Similar considerations apply here. Defendant lived for decades in the United States and then, at the time the Government's investigation was made public, fled to Lebanon. Mot. 5-6; *Doe* Compl. ¶ 10. He then stopped traveling to the United States despite having children and strong business ties here. Decl. ¶¶ 3-4. Because Defendant remains outside the United States and is not extraditable from Lebanon, the Court will

not be able to enforce its ruling if it denies his motion to dismiss. That will also result in judicial inefficiencies, as the Court will have spent valuable resources in hearing and ruling upon the motion of a defendant unwilling to submit to its jurisdiction. Moreover, the Government will be placed at a disadvantage by being forced to litigate a motion with no upside if it prevails. Defendant, on the other hand, could obtain a potential victory despite his deliberate evasion of the court's jurisdiction, a result that will embolden future defendants to employ similar tactics when they are facing prosecution.[6]

The inequity in considering Defendant's motion to dismiss is underscored by the fact that Defendant is responsible for the lengthy delay in this matter whereas the Government has, among other things, acted diligently in seeking his apprehension.[7] *See Barker v. Wingo*, 407 U.S. 514, 530 (1972) (factors relevant to speedy trial analysis include "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"); *compare United States v. Hijazi*, 589 F. 3d 401 (7th Cir. 2009) (granting writ of mandamus and ordering district court to rule on motion to dismiss because, *inter alia*, Hijazi was not considered a fugitive as he had surrendered to Kuwaiti authorities, Kuwait refused to produce him and objected to U.S. jurisdiction, and the motion raised threshold legal arguments

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[6] The impact of such a ruling would be acutely felt in prosecutions involving foreign nationals, including money laundering, narcotics, terrorism, and espionage cases.

[7] The Government reserves the right to request permission to make an in camera submission regarding its diligence in prosecuting and apprehending Khoury to the extent that evidence of its efforts might assist Khoury in continuing to evade custody.

regarding extraterritorial application of statutes at issue); *see also United States v. Hijazi*, 845 F. Supp. 2d 874, 879-880 (C.D. Ill. 2011) (ultimately denying the defendant's motion to dismiss the indictment on jurisdictional and speedy trial grounds, and noting that if the defendant "truly wants a speedy trial, and desires his right thereto, he cannot at the same time refuse to show up for it").[8]

Consequently, to preserve fairness and promote efficiency, the Court should decline to consider the substance of Defendant's motion to dismiss unless and until he fully submits to the Court's jurisdiction.

CONCLUSION

Based on the foregoing reasons, Defendant's motion to dismiss should be denied.

Respectfully submitted,

SANDRA L. MOSER
ACTING CHIEF
/s/
JOHN-ALEX ROMANO
NIKHILA RAJ
TRIAL ATTORNEYS

RYAN K. PATRICK
UNITED STATES ATTORNEY
/s/
JOHN P. PEARSON
ASSISTANT U.S. ATTORNEY

[8] Khoury posits that the Government has not been diligent in its efforts to prosecute him, but cites cases that are factually dissimilar. *See United States v. Judge*, 425 F. Supp. 499 (D. Mass. 1976) (indictment was not sealed so defendant could have been notified in some way); *United States v. Leaver*, 358 F. Supp. 2d 255 (S.D.N.Y. 2004) (defendant was in an extraditable country and lived openly, and government abandoned attempts to find him); *United States v. Mendoza*, 530 F. 3d 758 (9th Cir. 2007) (indictment not sealed and government had contact with defendant's family).

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August 6, 2018

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Request to Deny Defendant's Motion to Dismiss the Indictment, and attached Declaration, was filed and served electronically using the Court's CM/ECF system on this 6th day of August, 2018.

/s/ John-Alex Romano
John-Alex Romano

APPENDIX U

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(HOUSTON)

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Criminal Docket for Case #: 4:08-cr-00763-1

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USA

v.

Khoury

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DOCKET ENTRIES

Date Filed	#	Docket Text
11/24/2008		Judge Nancy F Atlas added. (mmapps, 4) (Entered: 07/09/2018)
11/24/2008	1 (p.10)	INDICTMENT (The original indictment with the signature of the grand jury foreperson is on file under seal with the clerk) as to Samir Rafic Khoury (1) count(s) 1, 2-8, 9-11, filed. (mmapps, 4) (Entered: 07/09/2018)
11/24/2008	2 (p.34)	US Attys Criminal Docket Sheet as to Samir Rafic Khoury, filed.(mmapps, 4) (Entered: 07/09/2018)

Date Filed	#	Docket Text
11/24/2008	3 (p.35)	ORDER for Issuance of Arrest Warrant as to Samir Rafic Khoury (Signed by Magistrate Mary Milloy) Parties notified. (mmapps, 4) (Entered: 07/09/2018)
11/24/2008	4 (p.36)	MOTION to Seal by USA as to Samir Rafic Khoury, filed. (mmapps, 4) (Entered: 07/09/2018)
11/24/2008	5 (p.38)	ORDER granting 4 (p.36) Motion to Seal as to Samir Rafic Khoury (1).(Signed by Magistrate Mary Milloy.) Parties notified.(mmapps, 4) (Entered: 07/09/2018)
11/24/2008	6 (p.39)	Notice of Related Case(s): 4:08cr597 and Motion to Transfer, filed. (mmapps, 4) (Entered: 07/09/2018)
12/30/2008	7 (p.41)	MOTION to Modify Sealing Order 4 (p.36) MOTION to Seal filed by USA by USA as to Samir Rafic Khoury, filed. (mmapps, 4) (Entered: 07/09/2018)
01/13/2009	8 (p.43)	ORDER transferring case to Judge Keith Ellison as to Samir Rafic Khoury (Signed by

Date Filed	#	Docket Text
		Judge Nancy F Atlas) Parties notified. (mmapps, 4) (Entered: 07/09/2018)
01/14/2009	9 (p.44)	ORDER granting 7 (p.41) Motion to Modify as to Samir Rafic Khoury (1).(Signed by Judge Keith P Ellison.) Parties notified.(mmapps, 4) (Entered: 07/09/2018)
07/13/2018	10 (p.45)	MOTION to Set Briefing Schedule by Samir Rafic Khoury, filed. (Attachments: # 1 (p.10) Proposed Order, # 2 (p.34) Proposed Order)(Leeper, Charles) (Entered: 07/13/2018)
07/13/2018	11 (p.52)	MOTION to Dismiss Case by Samir Rafic Khoury, filed. (Leeper, Charles) (Entered: 07/13/2018)
07/13/2018	12 (p.100)	REPLY TO RESPONSE to Motion by Samir Rafic Khoury re 11 (p.52) MOTION to Dismiss Case , filed.(Leeper, Charles) (Entered: 07/13/2018)
07/16/2018	13 (p.124)	NOTICE OF SETTING as to Samir Rafic Khoury - regarding 10 (p.45) MOTION to Set Briefing Schedule . Motion Hearing set for 7/18/2018 at 11:00 AM in Courtroom 3A

Date Filed	#	Docket Text
		Houston before Judge Keith P Ellison, filed. Parties may appear by phone. (arrivera, 4) (Entered: 07/16/2018)
07/18/2018		Minute Entry for proceedings held before Judge Keith P Ellison: MOTION HEARING as to Samir Rafic Khoury on 7/18/2018 on Motion to Set Briefing Schedule (Doc. No 10). Defendant not present for hearing. Briefing schedule set on fugitive disentitlement arguments. Government must file on or before 8/1/2018; Defendant will have ten days to reply. Appearances: John P. Pearson, John Alexander Romano, Charles S. Leeper, David Gerger.(Court Reporter: J. Sanchez)(Law Clerk: M. Rock), filed.(arrivera, 4) (Entered: 07/18/2018)
07/25/2018		By agreement between the parties the Court grants the Government's request for extension of time to respond as to Samir Rafic Khoury: Deadline for Governments Submission due by 8/6/2018. Deadline for Mr. Khourys Response due by

Date Filed	#	Docket Text
		8/21/2018 (arrivera, 4) (Entered: 07/25/2018)
07/27/2018	14 (p.125)	MOTION for Nikhila Raj to Appear Pro Hac Vice by USA as to Samir Rafic Khoury, filed. (amartinez, 2) (Entered: 07/27/2018)
07/30/2018	15 (p.128)	ORDER granting 14 (p.125) Motion for Nikhila Raj to Appear Pro Hac Vice as to Samir Rafic Khoury (1).(Signed by Judge Keith P Ellison.) Parties notified.(gkelner, 4) (Entered: 07/30/2018)
08/06/2018	16 (p.129)	Response to 11 (p.52) MOTION to Dismiss Case by USA as to Samir Rafic Khoury, filed. (Attachments: # 1 (p.10) Affidavit Declaration of Christina Smothers in Support of Government's Request)(Romano, John) Modified on 8/6/2018 (arrivera, 4). (Entered: 08/06/2018)
08/06/2018		(Court only) ***Response filed as a Motion as to Samir Rafic Khoury re: 16 (p.129) MOTION Deny motion to dismiss re 11 (p.52) MOTION to Dismiss

Date Filed	#	Docket Text
		Case filed by USA. (arrivera, 4) (Entered: 08/06/2018)
08/20/2018	17 (p.147)	REPLY TO RESPONSE to Motion by Samir Rafic Khoury re 16 (p.129) MOTION Deny motion to dismiss re 11 (p.52) MOTION to Dismiss Case , filed. (Attachments: # 1 (p.10) Exhibit)(Leeper, Charles) (Entered: 08/20/2018)
10/22/2018	18 (p.200)	NOTICE OF SETTING as to Samir Rafic Khoury. Miscellaneous Hearing set for 11/6/2018 at 02:30 PM at Courtroom 3A Houston before Judge Keith P Ellison, filed. The Court will discuss whether the fugitive disentitlement doctrine should be applied, as suggested by the Government in their Response (Doc. No. 16 (p.129)) to Khoury's Motion to Dismiss (Doc. No. 11 (p.52)). (arrivera, 4) (Entered: 10/22/2018)
10/24/2018	19 (p.201)	NOTICE OF RESETTING as to Samir Rafic Khoury - regarding 18 (p.200) Notice of Setting,. Miscellaneous Hearing reset for 11/29/2018 at 02:30 PM at Courtroom 3A Houston before

Date Filed	#	Docket Text
		Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 10/24/2018)
11/29/2018		Minute Entry for proceedings held before Judge Keith P Ellison: MOTION HEARING as to Samir Rafic Khoury held on 11/29/2018. Argument heard on the fugitive disentitlement doctrine. The Court declines to apply the fugitive disentitlement doctrine. Defendant not present for hearing. Defendant has until 12/30/2018 to file a renewed Motion to Dismiss. Briefing on the renewed motion will follow the Court's typical schedule. Appearances: John P. Pearson, David Gerger.(Court Reporter: F. Warner)(Law Clerk: L. Scaduto), filed.(arrivera, 4) (Entered: 11/29/2018)
11/29/2018		**Misc hearing held as to Samir Rafic Khoury. (arrivera, 4) (Entered: 11/29/2018)
12/10/2018	20 (p.202)	20 MOTION to Unseal Document by Samir Rafic Khoury, filed. (Attachments: # 1 (p.10) Exhibit, # 2 (p.34) Proposed Order)(Leeper, Charles) (Entered: 12/10/2018)

Date Filed	#	Docket Text
12/11/2018	21 (p.210)	ORDER granting 20 (p.202) Motion to Unseal Docket entries 4-9 as to Samir Rafic Khoury (1).(Signed by Judge Keith P Ellison.) Parties notified.(arrivera, 4) (Entered: 12/11/2018)
12/17/2018		Document unsealed as to Samir Rafic Khoury. 9 (p.44) Order on Motion to Modify, 8 (p.43) Order, 4 (p.36) MOTION to Seal, 5 (p.38) Order on Motion to Seal, 7 (p.41) MOTION to Modify 4 (p.36) MOTION to Seal filed by USA, 6 (p.39) Notice of Related Criminal Case (arrivera, 4) (Entered: 12/17/2018)
12/20/2018	22 (p.211)	MOTION to Compel by Samir Rafic Khoury, filed. (Attachments: # 1 (p.10) Exhibit, # 2 (p.34) Proposed Order)(Leeper, Charles) (Entered: 12/20/2018)
12/20/2018	24 (p.249)	ORDER FOR EXPEDITED BRIEFING as to Samir Rafic Khoury ; Motion-related deadline set re: 23 (p.230) MOTION to Compel Production of Information Necessary, 22 (p.211) MOTION to Compel

Date Filed	#	Docket Text
		Motion Hearing set for 12/28/2018 at 02:30 PM in Courtroom 3A Houston before Judge Keith P Ellison. Responses due by 12/27/2018. (Signed by Judge Keith P Ellison) Parties notified. (arrivera, 4) (Entered: 12/21/2018)
12/21/2018	23 (p.230)	MOTION to Compel Production of Information Necessary by Samir Rafic Khoury, filed. (Attachments: # 1 (p.10) Exhibit A, # 2 (p.34) Exhibit B, # 3 (p.35) Exhibit C, #4 (p.36) Exhibit D, # 5 (p.38) Proposed Order)(Leeper, Charles) (Entered: 12/21/2018)
12/21/2018	25 (p.250)	NOTICE OF RESETTING as to Samir Rafic Khoury - regarding 22 (p.211) MOTION to Compel , 24 (p.249) Order, 23 (p.230) MOTION to Compel Production of Information Necessary. Motion Hearing reset for 1/10/2019 at 11:00 AM in Courtroom 3A Houston before Judge Keith P Ellison, filed. Response due by 1/7/2019. (arrivera, 4) (Entered: 12/21/2018)

Date Filed	#	Docket Text
12/21/2018		Reset Deadlines re Motion or Report and Recommendation in case as to Samir Rafic Khoury 23 (p.230) MOTION to Compel Production of Information Necessary, 22 (p.211) MOTION to Compel . Responses due by 1/7/2019. (arrivera, 4) (Entered: 12/21/2018)
12/26/2018	26 (p.251)	NOTICE OF RESETTING as to Samir Rafic Khoury - regarding 22 (p.211) MOTION to Compel , 23 (p.230) MOTION to Compel Production of Information Necessary. Motion Hearing reset for 1/8/2019 at 03:30 PM in Courtroom 3A Houston before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 12/26/2018)
01/03/2019	27 (p826)	Sealed Event, filed. (With attachments) (Entered: 01/03/2019)
01/07/2019	28 (p.252)	RESPONSE to Motion by USA as to Samir Rafic Khoury re 23 (p.230) MOTION to Compel Production of Information Necessary , filed. (Attachments: # 1 (p.10) Exhibit 1, # 2 (p.34)

Date Filed	#	Docket Text
		Exhibit 2, # 3 (p.35) Exhibit 3, # 4 (p.36) Exhibit 4)(Romano, John) (Entered: 01/07/2019)
01/08/2019	29 (p.838)	Sealed Order, filed. (Entered: 01/10/2019)
01/08/2019		Minute Entry for proceedings held before Judge Keith P Ellison: MOTION HEARING as to Samir Rafic Khoury held on 1/8/2019. Argument heard on Defendant's motion to compel. 23 (p.230) The Court ORDERS the Government to submit responsive documents to the Court ex parte. Appearances: John Alexander Romano, Charles S. Leeper, David Gerger.(Court Reporter: N. Forrest)(Law Clerk: L. Scaduto), filed.(arrivera, 4) (Entered: 01/10/2019)
01/10/2019		(Court only) Document(s) Sent by regular mail to John Romano, US Dept of Justice re: 29 (p.838) Sealed Order, filed. (olindor, 4) (Entered: 01/10/2019)

Date Filed	#	Docket Text
01/15/2019	30 (p.840)	Sealed Event, filed. (With attachments) (Entered: 01/15/2019)
01/16/2019	31 (p.846)	Sealed Order, filed. (Entered: 01/16/2019)
02/06/2019	32 (p.271)	AO 435 TRANSCRIPT ORDER FORM by David Gerger as to Samir Rafic Khoury for Transcript of Motion hearing before Judge Ellison on January 8, 2019. Daily (24 hours) turnaround requested. Court Reporter/Transcriber: Nichole Forrest, filed. (Gerger, David) (Entered: 02/06/2019)
02/25/2019	34 (p.277)	STATUS REPORT by Samir Rafic Khoury, filed.(Leeper, Charles) (Entered: 02/25/2019)
02/26/2019	35 (p.282)	STATUS REPORT (Response to Defendant) by USA as to Samir Rafic Khoury, filed.(Romano, John) (Entered: 02/26/2019)
03/01/2019	36 (p.287)	MEMORANDUM AND ORDER as to Samir Rafic Khoury (Signed by Judge Keith P Ellison) Parties notified. (arrivera, 4) (Entered: 03/14/2019)

Date Filed	#	Docket Text
04/19/2019	37 (p.289)	Renewed MOTION to Dismiss by Samir Rafic Khoury, filed. (Attachments: # 1 (p.10) Exhibit A, # 2 (p.34) Exhibit B, # 3 (p.35) Exhibit C, # 4 (p.36) Exhibit D, # 5 (p.38) Exhibit E)(Leeper, Charles) (Entered: 04/19/2019)
05/24/2019	38 (p.439)	RESPONSE in Opposition by USA as to Samir Rafic Khoury re 37 (p.289) Renewed MOTION to Dismiss Indictment, filed. (Attachments: # 1 (p.10) Exhibit 1, # 2 (p.34) Exhibit 2)(Romano, John) (Entered: 05/24/2019)
06/24/2019	39 (p.491)	REPLY TO RESPONSE to Motion by Samir Rafic Khoury re 37 (p.289) Renewed MOTION to Dismiss , filed. (Attachments: # 1 (p.10) Exhibit Exhibit A)(Leeper, Charles) (Entered: 06/24/2019)
08/07/2019	40 (p.537)	NOTICE OF SETTING as to Samir Rafic Khoury - regarding 37 (p.289) Renewed MOTION to Dismiss . Motion Hearing set for 8/15/2019 at 03:00 PM in Courtroom 3A Houston before Judge Keith P Ellison, filed.

Date Filed	#	Docket Text
		(arrivera, 4) (Entered: 08/07/2019)
08/08/2019	41 (p.538)	NOTICE OF RESETTING as to Samir Rafic Khoury - regarding 37 (p.289) Renewed MOTION to Dismiss . Motion Hearing reset for 8/16/2019 at 02:30 PM in Courtroom 3A Houston before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 08/08/2019)
08/16/2019		Minute Entry for proceedings held before Judge Keith P Ellison: MOTION HEARING as to Samir Rafic Khoury held on 8/16/2019. Argument heard on the Defendant's Renewed Motion to Dismiss the Indictment. (Doc. No. 37 (p.289).) The Court ORDERS the Government to submit within thirty days the evidence discussed regarding the availability of extradition. Appearances: John Alexander Romano, Charles S. Leeper.(Court Reporter: N. Forrest) (Law Clerk: L. Scaduto), filed.(arrivera, 4) (Entered: 08/16/2019)

Date Filed	#	Docket Text
08/26/2019	42 (p.770)	TRANSCRIPT as to Samir Rafic Khoury re: Motion Hearing held on 8/16/19 before Judge Keith P Ellison. Court Reporter/ Transcriber Nichole Forrest, CRR, RDR, CRC. Release of Transcript Restriction set for 11/25/2019., filed. (Nichole Forrest,) (Entered: 08/26/2019)
08/27/2019	43	Notice of Filing of Official Transcript as to 42 (p.770) Transcript. Party notified, filed.(jdav, 4) (Entered: 08/27/2019)
09/16/2019	44 (p.539)	NOTICE of Filing Declaration in Support of Government's Opposition to Defendant Khoury's Renewed Motion to Dismiss by USA as to Samir Rafic Khoury re 38 (p.439) Response in Opposition, filed. (Attachments: # 1 (p.10) Declaration)(Raj, Nikhila) (Entered: 09/16/2019)
10/14/2019	45 (p.545)	RESPONSE by Samir Rafic Khoury re 44 (p.539) Notice (Other), , filed. (Attachments: # 1 (p.10) Exhibit A, # 2 (p.34) Exhibit B, # 3 (p.35) Exhibit C,

Date Filed	#	Docket Text
		# 4 (p.36) Exhibit D)(Leeper, Charles) (Entered: 10/14/2019)
11/05/2019	46 (p.649)	REPLY TO RESPONSE to Motion by USA as to Samir Rafic Khoury re 37 (p.289) Renewed MOTION to Dismiss Reply to Response to Notice 45 (p.545) , filed. (Attachments: # 1 (p.10) Exhibit A, # 2 (p.34) Exhibit B, # 3 (p.35) Exhibit C)(Romano, John) (Entered: 11/05/2019)
12/06/2019	47 (p.704)	MEMORANDUM AND ORDER as to Samir Rafic Khoury denying 37 (p.289) Renewed MOTION to Dismiss (Signed by Judge Keith P Ellison) Parties notified. (arrivera, 4) (Entered: 12/06/2019)
12/23/2019	48 (p.717)	MOTION for Additional Separate Challenges Motion for Rulings on Unaddressed Constitutional Issues by Samir Rafic Khoury, filed. (Leeper, Charles) (Entered: 12/23/2019)
01/16/2020	49 (p.729)	RESPONSE in Opposition by USA as to Samir Rafic Khoury re 48 (p.717) MOTION for Additional Separate Challenges Motion for Rulings on

Date Filed	#	Docket Text
		Unaddressed Constitutional Issues , filed.(Raj, Nikhila) (Entered: 01/16/2020)
01/23/2020	50 (p.739)	REPLY TO RESPONSE to Motion by Samir Rafic Khoury re 48 (p.717) MOTION for Additional Separate Challenges Motion for Rulings on Unaddressed Constitutional Issues , filed.(Leeper, Charles) (Entered: 01/23/2020)
02/24/2020	51 (p.749)	MEMORANDUM AND ORDER as to Samir Rafic Khoury denying 48 (p.717) MOTION for Additional Separate Challenges Motion for Rulings on Unaddressed Constitutional Issues (Signed by Judge Keith P Ellison) Parties notified. (arrivera, 4) (Entered: 02/24/2020)
02/27/2020	52 (p.752)	Unopposed MOTION for Leave to File Records in Related Cases by Samir Rafic Khoury, filed. (Attachments: # 1 (p.10) Proposed Order)(Leeper, Charles) (Entered: 02/27/2020)
02/27/2020	53 (p.760)	ORDER Granting 52 (p.752) Unopposed MOTION for Leave to File Records in Related

Date Filed	#	Docket Text
		Cases. Docket 4 Filed in Case No. 4-17-mc-2553 is Unsealed. (Signed by Judge Keith P Ellison) Parties notified. (jguajardo, 4) (Entered: 02/28/2020)
03/02/2020		Cases 4:17mc2553 and 4:14mc2884 related to this case per court order as to Samir Rafic Khoury:, filed. (dhansen, 4) (Entered: 03/02/2020)
03/03/2020	54 (p.825)	Records to be Incorporated by Reference, per Order 53 (p.760) as to Samir Rafic Khoury, filed. (USB flash drive placed in vault)(MarcelleLaBee, 4) (Entered: 03/04/2020)
03/09/2020	55 (p.763)	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit by Samir Rafic Khoury as to Samir Rafic Khoury (Filing fee $ 505, receipt number 0541-24359866.), filed.(Leeper, Charles) (Entered: 03/09/2020)
03/10/2020	56 (p.766)	Clerks Notice of Filing of an Appeal as to Samir Rafic Khoury. The following Notice of Appeal and related motions are pending in the District Court:

Date Filed	#	Docket Text
		55 (p.763) Notice of Appeal - Judgment and Sentence. Fee status: Paid. Reporter(s): J. Sanchez; F. Warner & N. Forrest, filed. (dnoriega, 1) (Entered: 03/10/2020)
03/10/2020		Appeal Review Notes as to Samir Rafic Khoury re: 55 (p.763) Notice of Appeal ¬ Judgment and Sentence. Fee status: Paid. The appeal filing fee has been paid or an ifp motion has been granted. Hearings were held in the case. DKT13 transcript order form(s) due within 14 days of the filing of the notice of appeal. Hearings were held in the case - transcripts were produced. Number of DKT-13 Forms expected: 3,filed.(dnoriega, 1) (Entered: 03/10/2020)
03/12/2020		Notice of Assignment of USCA No. 20-20126 as to Samir Rafic Khoury re: 55 (p.763) Notice of Appeal - Judgment and Sentence,filed.(dnoriega, 1) (Entered: 03/12/2020)
03/12/2020		(Court only) ***Set/Clear Flags as to Samir Rafic Khoury.

Date Filed	#	Docket Text
		Appeal_Nat flag cleared. (dnoriega, 1) (Entered: 03/12/2020)
03/12/2020		(Court only) ***ROA requested from the Fifth Circuit. Due 3/27/2020.***(PRIVATE ENTRY), filed. (dnoriega, 1) (Entered: 03/12/2020)
03/12/2020	57 (p.767)	DKT13 TRANSCRIPT ORDER REQUEST by David Gerger as to Samir Rafic Khoury. Transcript is already on file in Clerks office regarding Motion Hearing before Judge Ellison on 11/29/18. (No transcript is needed). Court Reporter/Transcriber: Fred Warner. This order form relates to the following: Motion Hearing,,, filed. (Gerger, David) (Entered: 03/12/2020)
03/12/2020	58 (p.768)	DKT13 TRANSCRIPT ORDER REQUEST by David Gerger as to Samir Rafic Khoury. Transcript is unnecessary for appeal purposes This order form relates to the following: 55 (p.763) Notice of Appeal - Judgment and Sentence, filed. (Gerger, David) (Entered: 03/12/2020)

Date Filed	#	Docket Text
03/12/2020	59 (p.769)	DKT13 TRANSCRIPT ORDER REQUEST by David Gerger as to Samir Rafic Khoury. Transcript is already on file in Clerks office regarding Motion Hearings before Judge Ellison on 1/8/19 and 8/16/19. (No transcript is needed). Court Reporter/Transcriber: Nichole Forrest. This order form relates to the following: Motion Hearing, 55 (p.763) Notice of Appeal - Judgment and Sentence, Motion Hearing,, filed. (Gerger, David) (Entered: 03/12/2020)

APPENDIX V

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

No. 08 cr 763

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAMIR KHOURY,

Defendant.

MOTION HEARING

August 16, 2019

HONORABLE KEITH P. ELLISON,
JUDGE PRESIDING

APPEARANCES:

For the Plaintiff: John Alex Romano, Esq.

For the Defendant: Charles S. Leeper, Esq.

Reported by: Nichole Forrest, RDR, CRR, CRC
Official Court Reporter
United States District Court
Southern District of Texas
nichole_forrest@txs.uscourts.gov

Proceedings recorded by mechanical stenography. Transcript produced by Reporter on computer.

[2] PROCEEDINGS

(The following proceedings held in open court.)

THE COURT: Good afternoon. Welcome back, everybody. Okay. We know this case well. United States versus Khoury.

We'll take appearances, counsel.

MR. ROMANO: John Alex Romano on behalf of the United States.

THE COURT: Thank you.

MR. LEEPER: Charles Leeper for Mr. Khoury.

THE COURT: Have we discussed how you wish to proceed today?

MR. LEEPER: We haven't discussed it, Your Honor, but it's my motion.

THE COURT: It's your motion, for sure. Yeah.

MR. LEEPER: I was going to touch on some highlights in our briefs. But before I do, let me ask: Is there any particular issue or topic you would like me to begin with?

THE COURT: I think I would rather focus on the Speedy Trial Act, rather than the statute of [3] limitations.

MR. LEEPER: Very well, Your Honor. I'll begin with the law. The parties have not found a single case that held that the government satisfied its Sixth Amendment diligence obligation by filing an Indictment under seal, waiting for years for the possibility of making a surprise arrest where the defendant's location was known.

In fact, to the contrary, Mr. Khoury has cited numerous cases in the Fifth Circuit and five other circuits that have held that waiting is not diligence. And that the government has an obligation to attempt to notify a defendant or his lawyer when the defendant's location or the identity of his lawyer is known, once the delay becomes prejudicial.

I mentioned a few cases here and elsewhere in my argument, Your Honor. I'll give spellings to Ms. Forrest at the conclusion of the hearing.

THE COURT: Yeah, okay.

MR. LEEPER: Here, in the Fifth Circuit, *Bergfeld*. *Velazquez* in the Third Circuit. *Heshelman* and *Brown* in the Sixth Circuit. *Mendoza* [4] in the Ninth Circuit. And *Handa* and *Shelton,* two District Court cases out of the First Circuit and Seventh Circuit, respectively. They all held that waiting is not diligence, and the government has to make an attempt to notify the defendant.

The government, here, is asking Your Honor to make a new law, and make it on bad facts, very bad facts. Among the many bad facts in this case are that the government publically smeared Mr. Khoury, accused him of a crime before indicting him under seal; immediately triggering a right, a due process right, to a forum for vindication. That right was immediate.

The prosecutors knew all along where Mr. Khoury was, who his lawyer was. The prosecutors waited a decade for the theoretical and increasingly improbable opportunity to make a surprise arrest. In the last four years of this delay, the prosecutors affirmatively blocked Mr. Khoury's efforts to learn whether or not he's been charged. This is the very antithesis of the

serious effort required by the Supreme Court in *Doggett*.

The government showing of supposed diligence in this case is almost exclusively [5] argument, not evidence. In the Fifth Circuit, government arguments in their brief about such things as what the prosecutors considered, decided, intended, their beliefs and reasoning, their justifications for sealing Indictments. Those arguments are not evidence. And they are insufficient, as a matter of law, to satisfy the government's diligence obligation.

In the *Cardona* case, in reversing Judge Quinn's denial of the defendant's motion to dismiss, the Fifth Circuit said something so apt, appropriate for this case, that I want to read it. Fifth Circuit said, and I quote: The government argued in its opposition that it was diligent.

THE COURT: They what? I'm sorry. The government argued. . .

MR. LEEPER: Diligent.

Offering reasons for its delay and explaining efforts to track Cardona down. But did not support its memorandum with a single shred of evidence then or at another hearing. The record provides no evidence of the government's diligence in attempting to locate Cardona, as it contains no evidence whatsoever of the government's intentions and efforts. The government's argument and brief [6] are not evidence.

We'll be talking about this case. Aside from the Diffusion Notices, there is nothing in the record. No testimony. No declaration from the responsible prosecutors or agents regarding the most fundamental questions.

THE COURT: Let me see if I got the timeline right. Mr. Khoury was indicted November 24, 2008. The government issued a diffusion to 12 countries in May of 2009.

Did the government do anything else before 2019?

MR. LEEPER: They did one other thing in 2015, Your Honor. They —

THE COURT: Reissued the diffusion.

MR. LEEPER: They hit the Diffusion Notice resend button. That is one of the many open questions, as to which Your Honor is entitled to have evidence as to what was going on in that time period. Beginning with: Why was the Indictment sealed when Mr. Khoury had already been accused of a crime publicly? Did the prosecutors consider that at the time the Indictment was returned in November of 2008, the evidence was already 20 years stale? Why did the Indictment remain sealed after those [7] Diffusion Notices that were issued in May of 2009, confirmed that Mr. Khoury was not traveling outside of Lebanon? Why was there no activity or further inquiry for six more years? When did the prosecutors come to believe that Mr. Khoury, in effect, knew of the charges as the government now argues in its brief? And if, indeed, they believe that, why did the Indictment need to continue to be sealed? And why didn't the prosecutors engage with the Lebanese authorities?

The Diffusion Notices, which are the only evidence, actual evidence of what little the government did in this case, are actually evidence of neglect. Not diligence. As Your Honor noted, they issued those in May of 2009. They confirmed that Mr. Khoury was not traveling. They didn't do a single other thing over the next

nine years that the Indictment was sealed, except hit the resend button in 2015.

The government's showing on extradition is especially weak. The fact that there is no extradition treaty between United States and Lebanon is beside the point, because the Justice Department has extradited defendants successfully from Lebanon. There is no evidence in this record [8] of the responsible prosecutors even considering extradition; much less contacting someone at the Department of Justice, Office of International Affairs, or the State Department to inquire about what might be available and permissible under Lebanese law.

And the former prosecutors who handled this matter, and any office of International Affairs lawyer or State Department lawyer who would know whether extradition was considered, who would be in a position to explain whether or not it was available, those witnesses are exclusively within the control of the United States. And their absence in this matter, Your Honor, is conspicuous.

There is also no evidence in this record that Lebanon would not extradite a dual U.S./Lebanese citizen, like Mr. Khoury. The law that Mr. Khoury cited in his brief in his opening — excuse me, in his reply brief at Note 4, the Lebanese law on its face indicates that extradition is available.

In the Seventh Circuit, in the *Hijazi* case, observed that Lebanon very well may extradite its own nationals. And in all the cases cited in the government opposition about the [9] futility of extradition, in every single one of those cases, the government introduced evidence. The testimony of a lawyer who handled the investigation or a lawyer from the Office of Interna-

tional Affairs, contemporaneous diplomatic cables and other evidence to prove what was available and what was not available.

Of course, Your Honor, the discussion in the government's brief about extradition and its futility — supposed futility, it's just a diversion. Because, after all, extradition is necessary only where the government has given the accused notice of the charges and an opportunity to appear voluntarily, and the accused has chosen not to appear. Here, the government usurped that choice. They determined by fiat that there would be no speedy trial for Mr. Khoury.

So being unable to make a proper showing of diligent, the government falls back on the argument that Mr. Khoury, in effect, knew of the charges. That claim is directly at odds with the position that the government took earlier in this case.

On March 22, 2018, Mr. Romano stood at this podium and said the following: Mr. Khoury [10] seeks the same relief that he sought three years ago. That is, to unseal and dismiss an Indictment, an alleged Indictment that he does not know to exist.

He was saying that Mr. Khoury didn't know about it in 2014. He didn't know about it, still, in 2018. And this, in effect, new argument is also inconsistent with the position that the government is taking in its opposition brief that it was necessary to continue to keep the Indictment sealed and that the prosecutors could not notify the Lebanese authorities, because to do so might alert Mr. Khoury to the charges.

So the government is being more than a little schizophrenic about this. Mr. Khoury knew the charges, but, then again, he did not. Of course, on top of all this

inconsistency and illogic, it's the law of the case that Mr. Khoury did not know of the charges prior.

THE COURT: I agree. I agree.

MR. LEEPER: Just when — Your Honor, under the government's theory, just when was Mr. Khoury supposed to come to the United States and stand by to be indicted? Was it in March of 2004 when KBR announced that the company was under [11] investigation for foreign corporate practice violations? Should he have come then and sit by for five years? Was it in August of 2006 when he voluntarily came to be interviewed by the prosecutors? Should he have stood by for several more years waiting to be indicted? Of course not.

He had every right to continue to live in the country of his birth where he had been residing for several years. And that is because he had every right to believe that the prosecutors, who smeared him publicly in the *Stanley* case, would charge him publicly or not charge him at all.

Your Honor, I want to spend just a few minutes on prejudice. We demonstrated, in our brief, that Mr. Khoury is entitled to the presumption of prejudice under the *Barker* analysis. We gave examples of recent Fifth Circuit cases like *Whitlock* that showed how this presumption is nearly impossible to overcome. *Whitlock* involved recorded drug buys, actually had recordings. And the presumption of prejudice was not overcome in that case.

But I want to spend just a few minutes to refer to our overwhelming evidence of actual prejudice. In Exhibit E to our Memorandum, [12] we provided Your Honor a list of 12 witnesses who died while —

THE COURT: I think that is hard to controvert.

MR. LEEPER: We had another one die. As we explained in our reply brief, Number 13, Guy Gerro, who gave testimony in the *Doe* proceeding, which I'll refer to in just a minute, he died earlier this year.

These 13 witnesses, including Mr. Gerro, would have testified about the importance of consultants in the LNG industry; about Mr. Khoury's particular value to KBR on specific projects identified in the Indictment and his work on those projects at under-market rates, lower-than-market rates; about the multiple approvals required by the KBR process for consulting contracts.

And they would testify that Mr. Khoury had already performed the services that enabled KBR to obtain those projects before he was ever awarded consulting contracts. On top of that, several of them would have given favorable character testimony on his behalf.

And, of course, the decade of delay [13] would affect the memories of whatever few witnesses are still around and their ability to recall events, some of which occurred as far back as the late 1980s. Should Mr. Khoury choose to testify in his defense, the jury well could be skeptical about his ability to recall details of events that occurred 30 years ago.

So, Your Honor, because of this significant actual prejudice, we have a gross violation of Mr. Khoury's speedy trial rights. And actual prejudice makes the tolling effect of a sealed Indictment disappear under the *Sharpe* case.

THE COURT: Okay. Thank you very much. Mr. Romano?

MR. ROMANO: Good afternoon, Your Honor.

Your Honor, in addressing the speedy trial, I would like to focus on what the government thinks are the main points, rather than going through all the arguments set forth in our motion to respond. Certainly, the Court has already received a lot of briefing on the motions.

THE COURT: You can assume I've read all that, too.

MR. ROMANO: Exactly. Exactly.

I would like to just begin and [14] really focus most of my points on the second *Barker* factor. That is a requirement the government exercise reasonable diligence in trying to apprehend the defendant. And the reason I start there is because, as the Court knows, if the government did exercise reasonable diligence, well, there is no presumption of prejudice and the burden is on the defendant to show specific and actual prejudice from the passage of time in the case.

And the law, here, in terms of what the government must do is that the government need not make heroic or extraordinary efforts.

THE COURT: I agree with you on that. But I'm not sure — I'm not sure the government did even the bare minimum here. That is the part that concerns me.

MR. ROMANO: If I may start, perhaps, just laying the landscape of what the government was facing. And let me start by responding to Mr. Leeper's arguments about how we haven't established that extradition would be futile.

THE COURT: Okay.

MR. ROMANO: We think we have. There is no extradition treaty between Lebanon and the United States.

[15] THE COURT: Is this a legal question or question of fact?

MR. ROMANO: I think it can be either one. Here, it is a legal question. I think it's quite clear. Not only is it that the absence of an extradition treaty, but Lebanese law does not allow for the extradition of a Lebanese national.

I'll start, first, by saying to this Court's prior order from last year, June 11th, this Court observed — and I think it's one of the last orders before the Indictment was unsealed. The Court observed that Mr. Khoury is in a country from which he cannot be extradited. The Court was absolutely correct there.

If the Court looks at two provisions of Lebanon's Penal Code, Articles 32 and 20. Article 32 states that with respect to offenses over which Lebanon will exercise personal jurisdiction, that type of offense won't give rise to extradition. And Article 32 cross-references, among other things, Article 20. And Article 20 defines one form of personal jurisdiction as offenses that were committed — or conduct committed by a Lebanese national abroad that would qualify as an offense under Lebanese law.

[16] Article 20 states: Lebanese law is applicable to any —

THE COURT: Slowly now. Slowly.

MR. ROMANO: Lebanese law is applicable to any Lebanese defendant who is acting outside Lebanese territory as a perpetrator, instigator, or accomplice, commits a felony or misdemeanor that is punishable under Lebanese law.

So you have Article 32 that says no extradition, if it's an offense over which Lebanon will extradite —

exercise personal jurisdiction. And you have Article 20 that says Lebanon exercises personal jurisdiction over conduct committed abroad by Lebanese nationals. That would be a crime under Lebanese law.

And, of course, if it's not a crime under Lebanese law, then you don't have dual criminality, and then Article 33 would prohibit extradition.

So we think it's quite clear, from Lebanon's Penal Code, as a matter of law, that Lebanon will not extradite one of its own nationals.

THE COURT: The fact that he has dual citizenship doesn't change things?

MR. ROMANO: I don't think Article 32 [17] gets overridden by Article 31, which is a provision that Mr. Leeper is relying upon, just because Mr. Khoury also had U.S. citizenship.

And, of course, the law is — and these are cases we cite on page 14 of our brief. The law is clear that it would be futile for the government to make an extradition request. And then that's not required under the second *Barker* factors.

And Mr. Leeper referred to evidence put on in those cases that we cite, the *Blanco*, the *Bagga* case, *Corona-Verbera,* with respect to the extradition practices. Well, each of those three cases, I believe, there was an extradition treaty between the country and the United States. Here, you don't even have a bilateral extradition treaty. We think the provisions of Lebanese law are quite clear and preclude extradition.

THE COURT: What were you hoping? What was the best-case scenario when you sent out the diffusion?

MR. ROMANO: The best-case scenario was that Mr. Khoury travel to a third country. It was certainly rea-

sonable for the government to believe he might. He had family in the United States. So it was a possibility he might then go to a third [18] country to visit his daughter.

I would like to take a moment and just walk through, quickly, the steps the government did take. Because I think the defense is glossing over certain things and minimizing its significance. So I would like to cover that very briefly.

First, within two months of the Indictment being returned, the government had the sealed arrest warrant entered into the NCIC database. This is an exhibit we submitted with our motion in response. So it gets — the warrant gets entered into that database.

By doing that, that would alert border officials here in the United States if Mr. Khoury were ever, by chance, to attempt to reenter the United States. The defense might minimize that. But, certainly, the cases point out where the government had not done that. That is done within two months. Within six months, you have the issuance of the wanted person diffusion or the Diffusion Notice by Interpol U.S.

And contrary to the defense's arguments, that was a significant step. As part of that process — well, first, as the Court knows, the notice requests the assistance of 12 countries in [19] securing the apprehension of Mr. Khoury. These are 12 countries the government believed he was most likely to travel to.

And as part of that process, the government had to commit, had to undertake to formally request that Mr. Khoury's provisional arrest and his extradition, if one of those 12 countries located and detained Mr. Khoury.

And contrary to the defense, this was not just a one-time request that gets renewed or where the government presses resend in 2015. The Diffusion Notice stays in the Interpol system. And the 12 countries who received it originally have access to it. To be sure, the government did need to reissue that. That was done in 2015. But the information is still in the database.

THE COURT: So is there a procedure, if you reup every five years, every six years?

MR. ROMANO: Correct. My understanding is that was five years. And around the five-year mark was when the proceedings on the first motion to unseal and dismiss the Indictment, the first miscellaneous action occurs. That gets litigated out. I can't recall —

THE COURT: I want to understand the [20] government's position on this. Are you saying the government did everything it possibly could have done?

MR. ROMANO: I am, Your Honor.

THE COURT: It may be. It may be that's all you can do. But it seems like, over the course of — the denial was issued in 2008. Over the course of ten years, it seems like a very modest effort.

Now, if that's the most you could do, that is to be acknowledged. But that — I would have thought that by now, where the focus has been on the Middle East, there would have been something more the government could have done.

MR. ROMANO: For purposes of the second *Barker* factor, again, the government doesn't have to do everything. It doesn't have to take extraordinary efforts or things that it believes would be futile. I will admit, it turned to whether or not the government should have unsealed.

But in terms of what the government practically could have done, this case is very similar to the *Tchibassa* case. This is a case out of the DC Circuit, where there was an 11-month — excuse me, 11-year period between the return of the [21] Indictment and the arrest of the defendant. And the DC Circuit rejected a speedy trial challenge to the Indictment. It found that it was the defendant who was responsible for most of that 11-year delay, because he was living, by choice, in a country from which he could not be extradited. He was — it was in then-Zaire, and there was no extradition treaty.

In fact, in *Tchibassa*, even worse for the government, I think, than they are here. In *Tchibassa*, the government waited, I think it was two years before it issued the Interpol notice. It was a red notice in *Tchibassa*. In *Tchibassa*, the defendant actually goes to the U.S. Embassy a couple of times in Zaire.

Here, there's no evidence that Mr. Khoury, in effect, stepped on the equivalent of U.S. soil by going to the U.S. Embassy or U.S. Consulate in Lebanon.

So I think what *Tchibassa* recognizes is that when you have a defendant who, for whatever reason — I'm not asking the Court to get in the mind of Mr. Khoury. Whatever his mindset was, he chose to move to Lebanon before the Indictment and remained there. That is undisputed, I think.

[22] For whatever reason, he did. But when that happens and the government has no practical ability to get him extradited, there is little that can be done. And for purposes of the second *Barker* factor, it's now counted against the government.

I would like to, Your Honor, turn to the question of sealing and also address Mr. Leeper's argument about

the absence of evidence in the record about the government's decision-making.

The question is whether there was a reasonable basis for the government to request that the Indictment remain under seal and to seal it to begin with. And, Your Honor, there was, as I mentioned, still the possibility that Mr. Khoury might travel to visit a family member to a third country.

THE COURT: Let me make sure I understand where we are. We're going through the Barker factors. Is that right?

MR. ROMANO: That's correct. I'm still on the second one.

THE COURT: You concede the length of delay would justify a speedy trial analysis; right?

[23] MR. ROMANO: Correct. Correct.

THE COURT: And so we're now on whether he promptly asserted his right to speedy trial?

MR. ROMANO: No. I'm still on the second factor. I really do think that is a significant factor here, because if the government — if the Court were to find that the government exercised reasonable diligence.

THE COURT: Okay.

MR. ROMANO: Then the defendant has to show — I'm happy to address the third factor.

THE COURT: That's all right. That's fine.

MR. ROMANO: I'm moving away back from there.

But I'm just focusing on — and this gets back to Your Honor's question about: What else could the government have done? Certainly, Mr. Khoury's argu-

ment is that the government could have unsealed the Indictment, at least give Mr. Khoury notice.

And my argument is, first, the government had a reasonable basis to believe that if it had any chance of picking up Mr. Khoury on the arrest warrant, it was that he might travel to a [24] third country to visit a family member. The government had a reasonable basis for believing that Mr. Khoury was not interested in confronting the charges against him.

Again, not to repeat myself, but I'm not asking the Court to get into the mindset of Mr. Khoury. This is just the information available to the government.

Mr. Khoury lived in the United States for about 15 years. He relocates and moves to Lebanon in 2004. He stops all travel to the United States except for once when he comes to meet with the government under safe passage protection. That was before the Indictment.

He's aware of the possibility of charges. We indicated it in our motion response that there were conversations between the government and Khoury's counsel about the possibility of charges before the Indictment. So he's on notice of a possibility of being charged. He still does not travel to the United States anymore. Faced with all of that, the government could reasonably believe that he was not interested in confronting the charges against him.

Now, let me turn to this allegation [25] that the government, quote, smeared him in the *Stanley* case. The Court has heard these arguments about the *Doe* case before, so I won't belabor that. The government's position is that it adequately anonymized Mr. Khoury when it referred to him in the *Stanley* proceedings.

I think the real take-way from the *Doe* case is, this is a civil case that Mr. Khoury brings. I believe it was filed in 2015, alleging due process from what the government said during the *Stanley* proceedings. The take-away from that is really the outcome of the case. The District Court dismissed that complaint as time-barred. The Fifth Circuit agreed that it was time-barred. That is the holding of the Fifth Circuit in *Doe*.

And if that's the case, if Mr. Khoury was dilatory in asserting his due process claims, I think that supports the reasonableness of the government's view that he was never interested in coming and confronting any criminal charges against him. I think the reasonable inference for the government to draw was that he waited so long to raise these due process allegations, the speedy trial claims here, when he first moved to unseal and dismiss the Indictment.

[26] He was trying to make the government's evidence in the criminal case grow stale and let the statute of limitations' clock run. At least that's a reasonable inference for the government to have drawn. So we think there was a reasonable basis for the Indictment to remain under seal.

Fourth point, still on the second *Barker* factor. In response to Mr. Leeper's argument that the government did not set forth evidence of its decision-making as to why it kept the Indictment under seal, why it issued the Diffusion Notice.

Your Honor, I just disagree with the argument. I will quickly go through what's in the record in terms of evidence. You have the original motion to seal the Indictment that is filed. That is Docket Entry 4. That sets forth the basis for the government's request to seal the Indictment. That is, to facilitate the defend-

ant's arrest; i.e., not to tip him off and confirm formally that he's been charged.

You have a motion to modify the sealing order that was filed shortly thereafter. This is Docket Entry 7. We filed that motion for permission to allow the government to share the [27] sealed arrest warrant and the Indictment with law enforcement. Domestic law enforcement, and I believe Docket Entry 7 also cites foreign law enforcement. That foreshadows our attempts to ask for the assistance of Interpol members in securing Mr. Khoury's apprehension.

Of course, the Court has in-camera Interpol communications that we submitted those in-camera.

THE COURT: Yes, yes.

MR. ROMANO: We provided a lot of those communications to Mr. Khoury.

There is also a Declaration from the current case agent about the entry of the arrest warrant in the NCIC database. That is an exhibit to our motion for response.

You have an earlier Declaration from a government employee that was filed. This was filed in connection with the Fugitive Disentitlement litigation that was last summer. It's Docket Entry 16-1. And it describes Mr. Khoury's travel records; that he traveled frequently out of and into the United States before 2003, 2004, and then that travel drops off.

And you have the provisions of [28] Lebanese law concerning extradition that I've already discussed.

All of that provides a record of the government's decision-making in this case. It's different from the *Cardona* case. The quote in *Cardona* is the government presented no evidence of the government's

intentions and efforts. There is ample evidence of the government's efforts. I would submit that the government's intentions are clear from that evidence. I don't think the Court needs a declaration or testimony from the former case prosecutors or agents to analyze and assess the government's efforts in this case.

So just to summarize on the second *Barker* factor, and then I'll turn to prejudice and sit down unless the Court has questions. The government took significant steps here to try and get hands on Mr. Khoury and effectuate his arrest.

Again, when you have a defendant who, for whatever reason, decides to remain in a country from which he cannot be extradited, there is only so much the government can do. Defense counsel will always be ill to allege something in hindsight that the government could have done, but that's not the standard under the second *Barker* factor.

[29] And because we believe it weighs in the government's favor, the burden is on the defendant to show, under the fourth *Barker* factor, that the passage of time has resulted in —

THE COURT: That's almost always true. It's passage of time that makes evidence harder to obtain and witnesses become unavailable.

MR. ROMANO: I think it's *Doggett*. I believe we cite this in the prejudice portion of our brief. But I think the *Doggett* case recognizes that prejudice — also the unavailability of witnesses and the staleness also affects the government case.

THE COURT: Well, our concern, under due process analysis, is with the accused, I think.

MR. ROMANO: Let me just respond, because Mr. Khoury has proffered particular types of testimony from allegedly deceased witnesses. And I would like to respond to why I do not think that proffer of testimony is enough to carry his burden.

I would like to begin, quickly, with a recap of what the Indictment charges and alleges. As the Court knows, it charges conspiracy, mail fraud, and wire fraud. And the crux of the allegations are that Mr. Khoury and Stanley engaged in a kickback scheme; that Albert Stanley used his [30] position and influence as the head of Kellogg and the KBR to steer lucrative consulting contracts to Mr. Khoury's company in exchange for kickbacks from Khoury to Stanley.

THE COURT: The injured party here is KBR, right?

MR. ROMANO: I'm sorry?

THE COURT: The injured party here is KBR?

MR. ROMANO: Right. They were the ones in default.

THE COURT: In an earlier generation, this would have been a civil suit probably, wouldn't it have been? KBR suing Mr. Khoury to discourage his ill-gotten gains.

MR. ROMANO: I don't know. There could have, but I don't want to comment on the viability of that separate suit. I don't think there was anything unusual about us charging as mail fraud. This classic deprivation of money or property from Kellogg — by Kellogg and KBR.

The Indictment charges that there was wire transfers totaling about $11 million that go — this is the kickback money that goes from Khoury-controlled accounts to Stanley-controlled [31] accounts. It

charges that those wire transfers were concealed and that KBR and Kellogg didn't know about them.

So just to address these categories of proffered testimony that is now unavailable. One category is that Mr. Khoury allegedly provided valuable consulting services. Well, Your Honor, that is fine, but that's no defense to a charge. If he is getting contracts because he's paying kickbacks to Albert Jack Stanley, it's still a crime whether or not the services he performs under the contract are valuable.

Whether his fees were under market. Your Honor, I think every consulting contract that is charged or alleged in the Indictment was for over $10 million. So these are still very lucrative contracts. Again, no defense, if he's charging less than competitors. He's certainly charging enough to kick back, according to the allegations in the Indictment, $11 million.

That other individuals are involved in the contracting process. That is — those are large companies. That it wouldn't be usual to have other individuals involved in the contracting process. Again, no defense to a conspiracy to use [32] — for Stanley to use his influence to steer the contracts to Mr. Khoury in exchange for kickbacks.

The contention that a witness would say Mr. Khoury already performed these services. He still needed to get paid. If there is not a formal contract, you know, he's not going to get paid.

So I do not believe that any of the lost testimony that has been proffered by Mr. Khoury is, in fact, exculpatory. We do not believe that he has carried his burden under the fourth *Barker* factor. And because the balance —

THE COURT: Tell me what would happen now. Tell me, if I denied the motion to dismiss, what then happens? We still don't have a lawsuit. We still don't have a criminal prosecution to pursue, do we?

MR. ROMANO: Well, Your Honor, we've said this throughout these proceedings that

Mr. Khoury today has never indicated his willingness to come —

THE COURT: No, he hasn't.

MR. ROMANO: — and face the charges. And where we're left, the government shouldn't be penalized if the *Barker* test —

THE COURT: But the issue is whether we [33] dismiss the indictment or whether we leave the indictment in place and just let it lie fallow.

MR. ROMANO: It stays in place. I believe so.

THE COURT: Nothing happens?

MR. ROMANO: Well —

THE COURT: Either way, nothing happens; right?

MR. ROMANO: Your Honor, I think that Mr. Khoury should — you know, as it has been, it's been up to him to come and face these charges, certainly since the Indictment has been unsealed. But that's, you know, simply because things might remain status quo.

THE COURT: Was there a reason the Indictment could be unsealed in 2018 and not in 2010?

MR. ROMANO: I'm sorry?

THE COURT: Was there a reason the Indictment could have been unsealed in 2018 and not in 2010?

MR. ROMANO: I think the government saw the Court's interim order that came out last year where —

THE COURT: But has anything been [34] jeopardized?

MR. ROMANO: No. Certainly, the passage of time has shown that Mr. Khoury by now is not going to travel to a third country. Certainly, now that it's been unsealed and, certainly, with passing years and he hasn't traveled.

The government —

THE COURT: Okay.

MR. ROMANO: Well, I don't want to go back over points I've already made.

THE COURT: I want to talk to my colleagues for a minute. No one needs to rise.

(Court in recess.)

THE COURT: Mr. Romano, as to whether the government did everything it could, didn't the government do more in other cases? Didn't they have a red notice or whatever it's called?

MR. ROMANO: Yes, Your Honor. And there is a difference between, as the Court probably knows, between a red notice and a Diffusion Notice. A red notice would go out to all Interpol members. And that was what was issued after the Indictment was unsealed.

And the reason that they've written down this was not issued, Your Honor, is because it [35] would have gone to Lebanon. And I think there is proof in the record what happened when Lebanon got the red notice after the Indictment was unsealed.

So the government was concerned. The reason it went with a Diffusion Notice that was targeted, as opposed to a red notice, is because the government was concerned that Mr. Khoury would have been tipped off to the charges if the government had issued the red notice. And, in fact, that is — we know that is what happened. And given the impediment to extradition by — from Lebanon to the United States to Mr. Khoury, the government, you know, went the route of the Diffusion Notice.

The bottom line is that, you know, it wouldn't have mattered. Mr. Khoury did not travel from Lebanon.

THE COURT: Isn't the truth of the matter — is it "Khoury" or "Cory"? We've heard both.

MR. ROMANO: Well, I'll defer to

Mr. Leeper. I thought it was Mr. Khoury.

MR. LEEPER: "Cory."

THE COURT: Thank you.

Mr. Khoury, he's already — punishment has already been exacted, hasn't it? [36] Mr. Khoury has had to live now for a decade and a half with a strong suspicion, at least, that he was under Indictment. It's restricted his travel. It's inhibited his ability to stay in contact with his family.

Any time we mention an individual's name in connection with federal prosecution, that's, by itself, heavy punishment, isn't it?

MR. ROMANO: Your Honor, the Indictment was under seal.

THE COURT: But he's had a strong suspicion.

MR. ROMANO: Well, he's had a strong suspicion. And that corroborates the government's view that he was never interested in coming to face the charges.

Now, again, there's a question of whether — I don't know if this — part of Your Honor's question goes back to this allegation that he was effectively named in the *Stanley* proceeding. We don't believe that he was. But he had a chance to raise that claim.

And the fact that District Court and Fifth Circuit in *Doe* finds that he didn't raise that timing, I think, speaks volumes of fact that [37] he — at least the reasonableness of the government's view that he did not want to come and face charges. He wanted the case to grow stale. He wanted the limitation clock to run before he emerged from the safety of the Lebanon to assert due process claims in the civil case and speedy trial allegations, you know, the miscellaneous actions that are now in this case. The strategy backfires in the civil case.

You know, those questions about what happened in the *Stanley* proceedings were for the civil case to be addressed in the civil case.

THE COURT: Okay. Anything further?

MR. ROMANO: Nothing further.

THE COURT: Thank you very much.

You can have another turn at bat if you want.

MR. LEEPER: Let me start with the *Tchibassa* case that Mr. Romano said is just like this case. It's T-C-H-I-B-A-S-S-A. I know that case well, because it was decided in my home district. And it's not at all like this case. The government in *Tchibassa* did two things that the government did not do here.

After the Indictment had been [38] sealed for two-and-a-half years, they notified Mr. Tchibassa of the charges. They did that by sending communication to Interpol in Zaire. Interpol met with Mr. Tchibassa, advised him.

And there was a transcript of that meeting. And the trial judge in the District Court in Washington and the DC Circuit relied on that transcript as showing, both, diligence on the part of the government to satisfy its obligation to make the defendant aware of the charges; and the defendant, in turn, having the opportunity to come and confront the charges, and he did not.

The second thing that the government did in that case that the government didn't do here is that when Mr. Tchibassa moved from Zaire to Congo, the United States government made a written request to the Congolese authorities to arrest him and to hold him for extradition. And the Congolese authorities, for whatever reason, did not honor that request. So the case is very much unlike this case here. The kinds of things that should have been done here were done in *Tchibassa*.

Mr. Romano represents that extradition is not available. With all due respect, he's not an authority on extradition. Where are the [39] Department of State lawyers who could inform the Court as to whether Articles 32 and 20 had anything at all to do with extradition of nationals? I respectfully suggest that they do not.

THE COURT: You think he could have been extradited?

MR. LEEPER: I certainly do. I certainly do.

THE COURT: That is a huge factor. We don't have any proof from you either, do we?

MR. LEEPER: Well, but I don't have the burden.

THE COURT: No, you don't, but. . .

MR. LEEPER: And the reason that I say what I say is twofold. Number one, the Justice Department has successfully extradited individuals from Lebanon, despite the absence of a treaty. We cited a 2016 example in our reply brief.

And, secondly, when the government finally did notify the Lebanese authorities via red notice, the Lebanese authorities brought Mr. Khoury in and detained him and seized all of his travel documents. Has the government made a request since that time for extradition? They have not. Is there any impediment to having made that request today? [40] There is not.

This notion that somehow the Lebanese will be tipped off. And I come back —

THE COURT: They know it.

MR. LEEPER: — with what I began with. Either Mr. Khoury knew about the charges or he didn't. As my father used to say, The government is talking out of both sides of its mouth. Because they're claiming that he's to blame for the delay because he knew about the charges and decided to stay in Lebanon. But yet, they're trying to excuse their lack of inaction.

THE COURT: Their lack of action?

MR. LEEPER: Lack of action, thank you. I can use all the help I can get.

Lack of action by pointing to the fact that he would have been alerted to the charges if they had notified Lebanon.

We had this list of so-called action that Mr. Romano rattled off, starting with the motion to seal the Indictment and putting a warrant in the system and making this first Diffusion Notice request in May of 2009. All of that might support the argument that it was reasonable for the government to seal the Indictment [41] for six months. But he hadn't said a word about what the government did — because they didn't do anything — in the six years after the first round of Diffusion Notices were sent.

There comes a point in time, Your Honor, when this notion that Mr. Khoury might travel, might see his daughters, might be caught by surprise, becomes merely theoretical.

As the Supreme Court has said in *Doggett*, the government didn't bother to question its own increasingly questionable strategy. And that is what we have here, Your Honor, an increasingly questionable strategy.

Ultimately, the cases that I listed when I began my argument, beginning with *Bergfeld* in the Fifth Circuit, say that waiting is not diligence. And once the waiting leads to prejudicial delay, then the government —

THE COURT: Well, it seems to me everything, just about, hinges on whether the government has or has not done everything it could have. If it's done everything it could have, then I don't know that Mr. Khoury should be the beneficiary of the gradual erosion of the evidence. If they haven't done everything the government could have [42] done, then it seems that, quite rightly, should be counted against the government.

MR. LEEPER: Well, of course, they haven't done everything they could have done, because they never gave him notice. I'm going to take the *Tchibassa* case, which is Mr. Romano's case.

THE COURT: But that one, he had notice. He's not coming forward. It's not as if notice was going to make a big difference in his conduct.

MR. LEEPER: Well, the notion that the government is trying to sell in his briefs that Mr. Khoury has refused to submit to the jurisdiction of the Court is a false premise. Because Mr. Khoury has never said he would not submit to the jurisdiction of this Court.

Your Honor has permitted him to make his arguments through counsel. They're legal questions. And under Rule 43(B)(3), he's permitted to do that, so long as Your Honor authorizes that.

THE COURT: Yeah, I know that.

MR. LEEPER: Your Honor has never directed him to appear personally.

THE COURT: If it makes any difference, I'm happy to do that.

MR. LEEPER: I don't think it makes a [43] difference, Your Honor, for the reason that the government has the burden, and they haven't met it.

At this stage, remember, when the government finally agreed to unseal the Indictment, it was ten years old. So the charges were already fatally stale. The speedy violation had already occurred.

Does it make sense to require Mr. Khoury to run the travel gauntlet, to come to the United States through countries which have received the Diffusion Notice where he would be arrested and incarcerated? That

would simply reward the government for not doing what they did in the *Tchibassa* case. After two-and-a-half years, they made sure that Mr. Tchibassa knew. That way, he had the choice.

THE COURT: Okay. Okay. Thank you. Mr. Romano, could we have extradited Mr. Khoury?

MR. ROMANO: Thank you, Your Honor. I appreciate the question. I just want to respond to that. No, Your Honor.

To address a couple things

Mr. Leeper just said. The example of the 2016 extradition that Mr. Khoury cited in his reply [44] brief, it's not a Lebanese national. The Court need only pull the press release that's cited there. The Court will see that this is a national Senegal — I believe it's Senegal and Morocco who is extradited, not a Lebanese national.

The government was also entitled to rely on the Court's order from last year of June 11th where it recognized and observed that Mr. Khoury is in a country from which he cannot be extradited. The Court absolutely got it right when it said that.

THE COURT: Well, I'm not as confident as you are I got it right. I would feel better if we had something from the State Department saying there is no extradition treaty.

MR. ROMANO: The government is prepared. If the Court would like to hear that evidence, the government is prepared to present it. We thought — we think it's clear from the law. That is why we did not present it here. We think it's clear from Article 32 and 20. But —

THE COURT: I would like to give you 30 days to submit that evidence.

MR. ROMANO: Okay. And does the Court have any preference as to the form of that evidence, [45] whether it's by —

THE COURT: No. Declaration or memorandum, either one.

MR. ROMANO: Okay.

THE COURT: Thank you.

(Proceedings concluded.)

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[46] CERTIFICATE

I hereby certify that pursuant to Title 28, Section 753 United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings in the above matter.

Certified on August 26, 2019.

/s/ Nichole Forrest
Nichole Forrest, RDR, CRR, CRC

APPENDIX W

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed March 9, 2020]

Crim. No. 08-cr-763

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMIR KHOURY,

Defendant.

NOTICE OF APPEAL

Samir Khoury hereby appeals to the United States Court of Appeals for the Fifth Circuit from: (1) the Memorandum and Order entered in this action on the 24th day of February, 2020 [Doc. No. 51], which supplemented and amended (2) the Memorandum and Order entered in this action on December 6, 2019 [Doc. No. 47]. The Indictment in this case was returned under seal on November 24, 2008, and remained sealed for nearly ten years, until July 9, 2018. The District Court has found that numerous defense witnesses have died during the decade-long sealing, and defendant's ability to preserve documents and testify in his own defense has been impaired. *See* [Doc. No. 47] at 5, 10 ("the Court agrees that Mr. Khoury has suffered substantial actual prejudice between the sealing and unsealing") (*quoting United States v. Sharpe*, 995 F.2d 49, 51 (5th Cir. 1993)). The decision

of the District Court declining to dismiss the Indictment—notwithstanding its conclusive determination that defendant has suffered irreversible prejudice, which makes it impossible for him to receive a fair trial—is effectively final or, alternatively, is reviewable under the collateral order doctrine.

The Court of Appeals could also exercise mandamus jurisdiction, and defendant will petition for a writ in the alternative. The defendant's right not to be subjected to a trial in-name-only will be lost if he must await conviction and appeal from final judgment before his constitutional claims are heard. His right to a writ is clear and indisputable, and issuance is appropriate under the circumstances, where the District Court disregarded precedent of the Fifth Circuit Court of Appeals, and the United States Supreme Court, in reasoning that defendant has a duty to bring himself to trial.

Dated: March 9, 2020 */s/ Charles S. Leeper*

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Counsel for Defendant
Samir Khoury

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was filed and served electronically by the Court's CM/ECF system on this 9th day of March, 2020.

/s/ Charles S. Leeper
Charles S. Leeper

APPENDIX X

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Misc. No. 17-2553

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMIR KHOURY,

Defendant.

FILING OF EXHIBIT 1 FROM
MARCH 22, 2018 HEARING

Mr. Khoury files to make part of the record the attached Exhibit 1, which was identified and discussed at the March 22 hearing.

Respectfully Submitted By:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served via electronic mail on this 27th day of March 2018 upon:

JOHN-ALEX ROMANO
UNITED STATES DEPARTMENT OF JUSTICE
Trial Attorney, Fraud Section
1400 New York Avenue Northwest
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Washington, DC 20530

JOHN PEARSON
ASSISTANT UNITED STATES ATTORNEY
1000 Louisiana Street, Suite 2300
Houston, TX 77002

/s/ David Gerger
David Gerger

EXHIBIT 1

Witnesses Lost to Samir Khoury Defense Since 2009

NAME	COMPANY	POSITION	DATE OF DEATH	LOST TESTIMONY
J. Robert Taylor	KBR	Senior Attorney	October 23, 2009	° Value to Company of SK work ° SK consulting fees below market ° Procedures for approval of consultant contracts
Douglas A. D'Albertson	M.W. Kellogg	VP - Plant Operations Group	March 9, 2010	
Robert W. Page	M.W. Kellogg	Chief Executive Officer	June 29, 2010	
Louis J. Cafiero	M.W. Kellogg	Vice President - Sales	2011- 2012	
Colin Cooke	M.W. Kellogg	Senior Executive	2011- 2012	
James J. Degan, Jr.	M.W. Kellogg, Ltd.	Managing Director	October 4, 2012	
Edward Swift	KBR	Senior Attorney	November 15, 2012	
Richard T. Arnott	M.W. Kellogg	Senior Vice President - Proposal Management & Sales	July 16, 2013	
Marvin E. Walker	KBR	Vice President - Construction	September 24, 2014	
Michael A. Aldag	KBR	LNG Proposal & Project Director	September 10, 2016	
Imad Saffarini	Mannai Corp. [KBR business partner]	Executive Manager	September 2012	° Value to Company of SK work ° SK consulting fees below market
Said Khoury [no relation to SK]	Consolidated Contractors [KBR business partner]	Founder	October 16, 2014	

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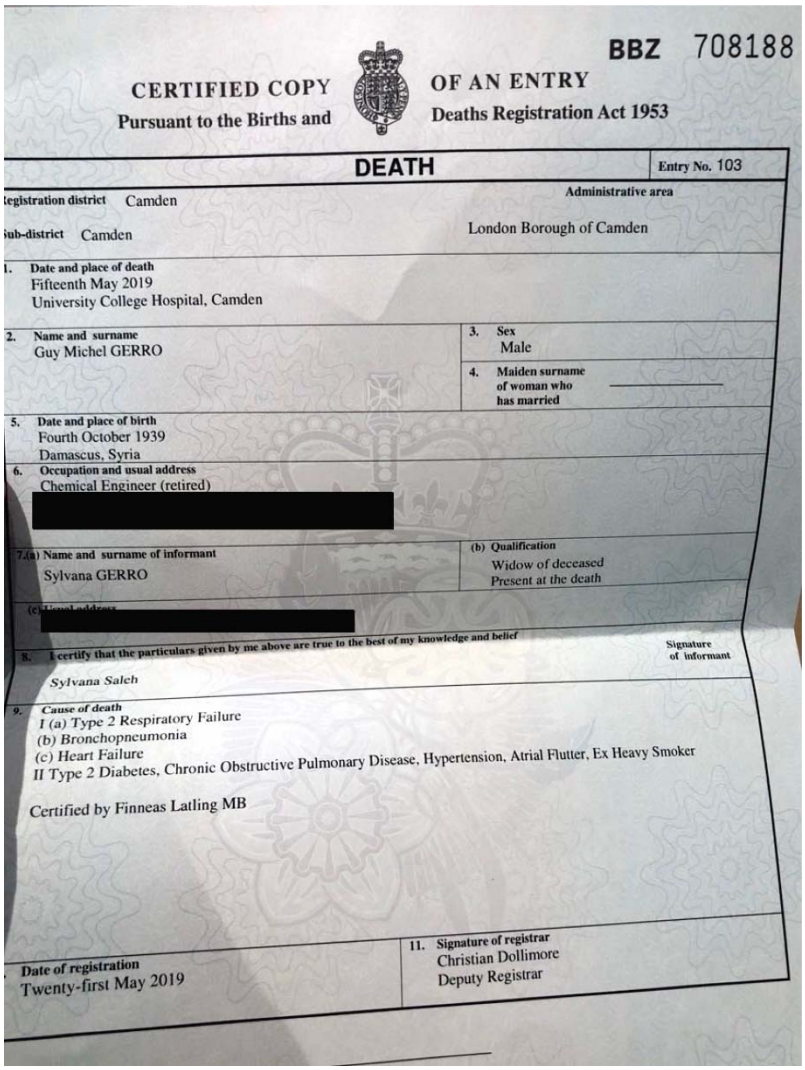
APPENDIX Y



BBZ 708188

CERTIFIED COPY OF AN ENTRY
Pursuant to the Births and Deaths Registration Act 1953

DEATH Entry No. 103

Registration district Camden
Sub-district Camden
Administrative area: London Borough of Camden

1. Date and place of death
Fifteenth May 2019
University College Hospital, Camden

2. Name and surname
Guy Michel GERRO

3. Sex
Male

4. Maiden surname of woman who has married

5. Date and place of birth
Fourth October 1939
Damascus, Syria

6. Occupation and usual address
Chemical Engineer (retired)
[redacted]

7.(a) Name and surname of informant
Sylvana GERRO

(b) Qualification
Widow of deceased
Present at the death

(c) Usual address
[redacted]

8. I certify that the particulars given by me above are true to the best of my knowledge and belief
Signature of informant
Sylvana Saleh

9. Cause of death
I (a) Type 2 Respiratory Failure
(b) Bronchopneumonia
(c) Heart Failure
II Type 2 Diabetes, Chronic Obstructive Pulmonary Disease, Hypertension, Atrial Flutter, Ex Heavy Smoker

Certified by Finneas Latling MB

Date of registration
Twenty-first May 2019

11. Signature of registrar
Christian Dollimore
Deputy Registrar

Death Certificate of Guy Michel Gerro
Dated May 15, 2019

APPENDIX Z

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed May 24, 2019]

Case No. 4:08-cr-763

UNITED STATES OF AMERICA

Plaintiff,

v.

SAMIR KHOURY,

Defendant.

DECLARATION OF PAUL K. ZUKAS
IN SUPPORT OF GOVERNMENT'S
OPPOSITION TO DEFENDANT'S
RENEWED MOTION TO DISMISS

I, Paul K. Zukas, declare under penalty of perjury that the following is true and correct:

1. I have been a Special Agent with the Federal Bureau of Investigation ("FBI"), for 16 years, assigned to the Chicago, Illinois division for approximately 13 years and currently assigned to the Houston, Texas division for approximately the past three years. During the entirety of that time, I have worked only on criminal cases, including, among others, complex white collar crimes, and international and domestic public corruption.

2. I have reviewed records pertaining to defendant Samir Khoury's ("Defendant") arrest warrant and travel documents.

3. Based on my training and experience, I know that the National Criminal Information Center ("NCIC") contains electronic records of various kinds, including wanted person files, that law enforcement can access.

4. Based on my review of the NCIC records, an arrest warrant was issued for the Defendant on or about November 24, 2008 and was active within the NCIC's database as of on or about January 13, 2009.

5. I also reviewed passports for the Defendant issued by the United States. Based on my review, the Defendant's last issued United States passport expired on or about February 19, 2014. No subsequent passport has been issued.

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct, and that this declaration was executed on May 22, 2019 at Washington D.C.

/s/ Paul K. Zukas
Paul K. Zukas
Special Agent
Federal Bureau of Investigation
Houston Division
1 Justice Park Drive
Houston, Texas 77092
(713) 936-7222