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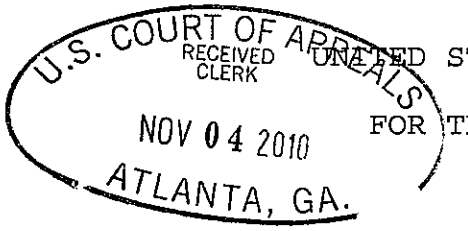

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 08-13740-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THERESA KOTTWITZ
GERARD MARCHELLETTA, SR., and
GERARD MARCHELLETTA, JR.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Northern District of Georgia

APPELLEE'S RESPONSE TO PETITIONS FOR PANEL REHEARING FROM APPELLANTS GERARD MARCHELLETTA, JR AND GERARD MARCHELLETTA, SR

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Appellee	:	
	:	
v.	:	APPEAL NO. 08-13740-CC
	:	
THERESA L. KOTTWITZ,	:	
GERARD MARCHELLETTA, SR.,	:	
and GERARD MARCHELLETTA, JR.	:	
	:	
Appellants.	:	

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

The United States concurs with the Certificate of Interested Persons and Corporate Disclosure Statement included with the brief filed by Appellant Gerard Marchelletta, Sr., and agrees that it reflects a complete list of all persons and entities known to have an interest in the outcome of this appeal, except that the United States adds:

Sommerfeld, Lawrence R., Assistant United States Attorney, Northern District of Georgia.

ARGUMENT

THE COURT CORRECTLY CONCLUDED THAT THE JURY WAS ADEQUATELY INSTRUCTED AND THAT THE DEFENDANTS WERE NOT ENTITLED TO AN ACCOUNTANT-RELIANCE INSTRUCTION AS TO COUNT ONE.

The Defendants' petitions should be denied because the Court correctly found that:

> [t]he defense's theory of the case as to the conspiracy charge [Count One] was fully encompassed by the good faith instruction given by the district court because the conspiracy was consummated before any reliance upon the advice of an accountant.

U.S. v. Kottwitz, et al., docket 08-13740-CC, at 65.

A. The Reliance Instruction Only Covers Prospective Conduct.

The reliance instruction applies only where a defendant consults a professional "for the purpose of securing advice on the lawfulness of his *future* conduct." *U.S. v. Conner*, 752 F.2d 566, 574 (11th Cir. 1985) (emphasis added). Thus, courts deny the charge where defendants begin crimes prior to advice. *See U.S. v. Al-Shahin*, 474 F.3d 941, 947-48 (7th Cir. 2007) (Defendants "did not receive advice from or even contact [attorney] prior to [fraudulent] accident although they did solicit his representation prior to making claims with the insurance company"); *U.S. v. Cheek*, 3 F.3d 1057, 1061-62 (7th Cir. 1993) (Defendant sought advice mid-way through his tax scheme); *U.S. v. Polytarides*, 584 F.2d 1350, 1352-53 (4th Cir. 1978) (Defendant began crime before advice).[1]

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[1] *See also U.S. v. O'Connor*, 158 F.Supp.2d 697, 729 (E.D.Va. 2001) ("[Defendants] formed the intent to put the fraudulent

B. As The Court Correctly Found, No Reasonable Basis Existed For Conviction As to Count One That Could Have Involved Good Faith Reliance On Schwartz's Advice, Because The Conspiracy Was Underway Prior To Any Relevant Advice.

The theory of the conspiracy - and the nature of the evidence adduced at trial - was that the Marchellettas skimmed company money for house construction and other personal expenses, while Kottwitz helped hide the income on the books.[2]

Any conspiracy was underway by the time the CPA (Schwartz) "advised" the Defendants as to the transactions. This is because necessary conspiratorial acts - the conversion of company money to personal gain and the false book entries that disguised the income - pre-dated Schwartz's review of the transactions.

It bears recalling Schwartz's limited, after-the-fact, role at Circle. He visited the company for two days every year, typically in June, to gather records for the previous year. *App. Br.* at 7-11. He then produced audited financials and draft tax returns (personal and corporate), typically in July or later, for the

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immigration scheme in motion long before" purported advice).

[2] *Inter alia*, throughout 2000 and 2001, Kottwitz (a) paid company checks to contractors working on her bosses' residences; (b) falsely posted those expenses to job accounts in Circle's books; and (c) dumped voluminous records on the outside accountant (Schwartz) without disclosing that buried within the hundreds of supposed construction jobs were these two personal projects. *See Appellee's Response Brief ("App. Br.")* at 3-11, 44-47. The Marchellettas were aware of and had to approve the use of company funds to pay for the other's house construction. *See* Doc. 206 at 281-86; Doc. 207 at 377-78. Indeed, they shared the same architect, builder, and many vendors. *Id.*

previous year. *Id; see, e.g.*, Ex. 427.9. While he could re-classify transactions, the transactions already occurred and been posted by Kottwitz to specific company accounts at least several months and in some cases over a year earlier.

Importantly, no one asked Schwartz how to record the personal construction and other transactions as they were occurring. Indeed, he testified without contradiction that he was unaware of these expenses, and that had he been aware he would have advised against booking them as Kottwitz did. *See App. Br.* at 9-10.[3]

Thus, Defendants did not specifically seek or receive express advice. Rather, their theory is that they received implicit advice, in the form of the returns themselves, because Schwartz prepared them after his audit. *See, e.g., Junior Reply Brief* at 5 ("The preparation of necessary tax returns *is the advice*").[4]

These documents - and any implicit advice contained within - were produced after-the-fact, months after the checks were written,

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[3] In August 2003, after all the expenses at issue in this case were incurred and all the false tax returns were prepared, Kottwitz asked Schwartz for the first time about how the company might "set up a note receivable" for any personal expenses borrowed by the owners going forward. (Doc. 99 at 98).

[4] This argument does not apply to Senior. His 2000 return was prepared and filed in April 2001, (Ex. 4), before Schwartz produced his audited financials of Circle's FY 2000 in August 2001 (Ex. 427.9). This return could not have included any advice based on Schwartz's review of Circle's 2000 financials because at the time the return was prepared and filed, Schwartz had not yet audited those records. Similarly, Senior's 1999 return was filed in April 2000 (Ex. 2), prior to Schwartz's July audit of Circle's FY 1999 financials. (Ex. 475.1).

the work was done, and the transactions were falsely posted by Kottwitz as job expenses on the company's ledgers.

For example, during 2000, the Marchellettas received no relevant accountant advice as they were approving checks for each other's house construction, and as Kottwitz was falsely booking those payments as job expenses. They did not even provide Schwartz the records that contained these transactions until June 2001 and he did not issue any financials until August. (Ex. 427.9) By that time, the Marchellettas had already spent over $400,000 on their houses, all of which was booked falsely, based on no advice from Schwartz. (Exs. 520, 522, 529, 531).[5]

The entire theory of the conspiracy and the nature of the evidence was that the books had been "cooked" through Kottwitz's false entries prior to Schwartz's yearly after-the-fact audit.[6]

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[5] The first Circle financials that Schwartz prepared were for FY 1999, prepared in July 2000 (Ex. 475.1). This report and any returns Schwartz based on information obtained during the audit contained no advice pertinent to the future house expense and other transactions that formed the core of the conspiracy, as the house expenses did not begin until 2000.

The personal expenses in 1999 consisted of $5,000 in nightclub expenses for Junior (booked as "vehicle" expenses), and $5,000 in custom suits for Junior (booked as "miscellaneous," "vehicle," or "other" expenses). (Ex. 518). The club expenses did not recur; the suit expenses did so only sporadically, and only as to Junior. (Exs. 520, 529). Junior was acquitted of the only substantive count relating to 1999. (Count 2).

[6] *See, e.g.*, Government opening statement (Doc. 205 at 10) ("[The Marchellettas] conspired with each other and with their long-time loyal employee, Defendant Kottwitz, the bookkeeper. You'll hear they needed her, because the way they accomplished this

The false entries were critical to show why the returns later prepared by Schwartz - who was not a conspirator - were false. Indeed, for the jury to convict Kottwitz of conspiracy, it had to find that she did these things prior to Schwartz's preparation of returns. Everything Kottwitz did to help hide personal income - the payment of personal expenses, the false booking of those expenses, and the dumping of massive company records on Schwartz without revealing personal expenses hidden within - was done before Schwartz produced the applicable financials and tax returns.

Of course, the Marchellettas received whatever advice was contained in Schwartz's draft returns before filing them. But the act of filing these individual personal returns did not itself establish a conspiracy that did not already exist. There was no evidence that any of the Defendants reviewed or assisted in the filing of each other's personal returns or were aware of the contents of each others' returns (except insofar that they knew from their conspiracy that large amounts of personal income were hidden as job expenses). There was no evidence that Kottwitz was even involved in the Marchellettas' returns at all once she provided the yearly financial information to Schwartz. Thus, for a jury to reasonably find a conspiracy among the three Defendants to evade reporting income on any return, it had to find that the

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crime was through accounting tricks, cooking the books... to hide hundreds of thousands of dollars that the Marchelletta defendants were taking out of their company....")

conspiracy existed when the books were "cooked" and presented to the CPA, which occurred before he prepared the applicable return.[7]

C. The Defendants' Petitions Misstate The Facts And Law.

The Defendants mistakenly focus on when Schwartz was hired. Senior, for example, argues that Schwartz was "hired" by Circle to do annual audits in June 1999, which was "prior to Kottwitz being hired as the controller," and thus necessarily prior to the alleged

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[7] Another issue relating principally to Senior and Kottwitz was $600,000 in "consulting" income payable to Senior from his former company, Nastasi, but which was omitted from the returns Schwartz prepared for Senior in 2000 and 2001. Senior's consulting fees were received by Circle and falsely booked to mask any personal tax liability, first as Circle income (which it was not) and then as a loan from Senior. (*App. Br.* 13-17). Just like the home expenses, Senior's realization of and failure to report this income, and Kottwitz's false entries that assisted, pre-dated Schwartz's review. First, in 1999, Kottwitz booked over $200,000 in payments from Nastasi for Senior, first as Circle income, and then re-classified the money as a loan at the end of the year. (Doc. 99 at 107-8) ("The client made that entry."). Then, in 2000 and 2001, Kottwitz continued to falsely book the ongoing consulting payments for Senior as Circle income; at the end of the year, Schwartz re-classified those receipts as loans from Senior, only because Kottwitz falsely told Schwartz that the money was Senior's "return of capital" from his Nastasi investment. (Doc. 99 at 120-123). In doing so, she never provided Schwartz the invoices, checks and agreements that stated the payments were instead for Senior's consulting services. *Id.*

Thus, any re-classification by Schwartz occurred months after the payments were received and booked falsely by Kottwitz, and was based on false information provided by Kottwitz. Moreover, Senior's failure to report this income violated the only express advice Senior ever received. A CPA advised in 1999 that Senior must report as ordinary income any consulting fees from Nastasi. (Doc. 207 at 1108-1109). *See Polytarides*, 584 F.2d at 1353 (instruction denied where before the supposedly relied-upon advice, defendant already took steps toward the illegal conduct, and had been warned of the illegality).

conspiratorial acts involving payment and false recording of house construction and other expenses. *Senior Petition* at 7.

But merely hiring an accountant is insufficient foundation for the reliance instruction. *See U.S. v. Johnson*, 730 F.2d 683, 686-87 (11th Cir. 1984); *U.S. v. Miles*, 290 F.3d 1341, 1354 (11th Cir. 2002). Rather, the Defendants must show that they consulted with the expert about the issue at hand, received advice, and strictly followed that advice. *Id.* The key question, therefore, is not when Schwartz was hired, but when the Defendants sought and received actual advice - implicit or otherwise - about the transactions in this case. As discussed above, any such advice was sought and furnished after-the-fact, that is, after the Defendants had conspired to cook the books to mask the true tax liability.

The Defendants also mistakenly argue that no conspiracy could have existed prior to the actual filing of a false return. *See, e.g., Senior Petition* at 4-5; *Junior Petition* at 2-3. No such element is required. Rather, "[i]n order to sustain a conviction under 18 U.S.C. § 371, the government must prove (1) the existence of an agreement to achieve an unlawful objective [i.e, in this case, to defeat the lawful functioning of the IRS]; (2) the defendants' knowing and voluntary participation in the agreement; and (3) the commission of *an act* in furtherance of the agreement." *United States v. Adkinson*, 158 F.3d 1147, 1153 (11th Cir. 1998) (emphasis added). While the filing of a false return "*can*

constitute the requisite act" in furtherance, id. (emphasis added), it does not have to, and in fact no return need be filed at all.

It is "basic conspiracy law" that the Government does not have to prove that the objective was successfully achieved, or even could be achieved. *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003). Rather, "the essence of a conspiracy is 'an agreement to commit an unlawful act,'" which "is 'a distinct evil,' [that] 'may exist and be punished whether or not the substantive crime ensues.'" *Id.* (citations omitted). This is exactly what the jury was correctly instructed here, pursuant to this Court's pattern charge, without any objection from the Defendants. Doc. 213 at 1221.[8] The jury was also correctly charged that the overt act element could be met not just by the filing of a false return, but "*any* transaction or event ... which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy." *Id.* (emphasis added).[9]

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[8] The Court has already stated that the pattern instructions are "a correct statement of the law." *Kottwitz*, at 62.

[9] To support their novel argument that actually filing a false return is an element of a tax conspiracy, Defendants cite language in the Court's initial opinion that is, respectfully, unclear on this point. *See Kottwitz*, at p. 41 ("The government must show not only (1) the requisite act of a failure to properly report income; (2)...") The Government assumes that the Court did not mean to establish new and contradictory law that the filing of a false return is required to satisfy the overt act requirement of § 371. Indeed, the Court cites *Adkinson* as precedent on this point. *Adkinson* states that the Government must show "*an* act in furtherance of the conspiracy," which "*can*" (not "must") be satisfied by a false return. 158 F.3d at 1153 (emphasis added).

Here, the conspirators accomplished numerous acts in furtherance of their object to conceal income on tax returns, that necessarily occurred before Schwartz actually prepared the returns themselves. These acts included the conversion of company money to personal use in the first place, as well as the false book entries that were necessary to hide the personal nature of the payments. These plainly qualify as overt acts and, for there to have been any conspiracy at all among these three Defendants, necessarily occurred prior to Schwartz's after-the-fact audits.

The most instructive cases are the ones cited above, i.e., *Cheek*, *Al-Shahin*, *Polytarides* and *O'Connor*. In each one, the court properly denied the instruction because the defendants began crimes before advice, even though they continued committing the crimes afterwards. In *Cheek*, for example, the defendant committed a multiple year tax scheme, in the middle of which he claimed to have received advice. 3 F.3d at 1061-62. The Seventh Circuit affirmed the denial of the instruction on several grounds, including that the defendant failed to show the "crucial element in this defense ... that defendant secured the advice on the lawfulness of his possible future conduct." *Id* (internal quotations omitted). This was so, even as to crimes that occurred only after the receipt of

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The Court should reject Defendants' attempt to twist *Kottwitz* into adding a new element to § 371, in contradiction to *Adkinson*, *Jimenez Recio*, the agreed-to charges in this case, and basic conspiracy law.

advice, because those reflected a continuation of the prior course of conduct. *Id.* So too here. The Defendants skimmed income and recorded false expenses, before and after Schwartz's yearly audits. This negates any foundation for the instruction for Count One.[10]

CONCLUSION

The Court should deny the Defendants' petitions.

Respectfully submitted,

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[10] The Defendants' cases are inapposite. *Mills v. Maryland*, 486 U.S. 367, 375-77 (1988) was a death penalty case, in which a poorly worded charge might have falsely suggested that the jury must unanimously find mitigating facts to reject a death sentence. In this distinguishable context, in which the law "demand[s] even greater certainty that the jury's conclusions rested on proper grounds," the Court remanded. *Id.* *Grunewald v. U.S.*, 353 U.S. 391 (1957) found that a prosecution in 1954 for acts that occurred in 1949 was untimely. While a properly charged jury might find the conspiracy to be timely, the jury was never properly instructed on that issue. *Id.* at 415.

Defendants cite *Kottwitz*'s reliance on *U.S. v. Snipes*, 611 F.3d 855, 868 (11th Cir. 2010), for the point that "[i]t is only if the issue of reliance is not before the jury on the charges of convictions that the instruction need not be given." *Junior Petition* at 6 (quoting *Kottwitz at 61*). This is an incomplete description of *Snipes*. *Snipes* affirmed in part because the requested charge related to acquitted counts. However, *Snipes* also independently affirmed because it found the trial court's "good faith and willfulness instructions ... were altogether sufficient to cover ... good faith reliance." *Id.* *Snipes* follows prior case law in this Circuit and elsewhere that good faith and intent charges adequately cover the theory that the defendant relied on professional advice. *See App. Br.* at 34-39.

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below a copy of the foregoing document by depositing in the U.S. Mail a copy of same in an envelope with correct postage for delivery. This is also to certify that the foregoing document was this day uploaded to the Court's website.

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This 4th day of November, 2010.

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