APPEAL NO.: 08-13740-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

GERARD MARCHELLETTA, JR.,
THERTESA L. KOTTWITZ,
and
GERARD MARCHELLETTA, SR.,

Defendants-Appellants.

ON APPEAL FROM CRIMINAL JUDGMENT
IN THE U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
THE HONORABLE TIMOTHY C. BATTEN, SR., JUDGE PRESIDING
DISTRICT COURT CASE NO. 1:07-cr-00107-TCB-AJB

GERARD MARCHELLETTA, JR.'S REPLY TO GOVERNMENT'S RESPONSE TO THE ELEVENTH CIRCUIT'S PER CURIAM ORDER ON PETITION FOR REHEARING

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Gerard Marchelletta, Jr. by and through counsel of record Robert G. Bernhoft and pursuant to 11th Cir. R. 26.1-1 hereby chooses not to amend the original Certificate of Interested Persons and Corporate Disclosure Statement filed with his opening brief. There have been no omissions and the Certificate of Interested Persons and Corporate Disclosure Statement is complete.

ARGUMENT

The Court was clear in its order of October 5, 2010, issued in response to the Defendants-Appellants' Petitions for Rehearing, directing the prosecution to address "one issue" relating exclusively to the sole remaining affirmed conviction count: "Given the evidence in the case, were the Defendants entitled to an accountant-reliance instruction on Count I?" (Order, p. 2.) Going further, the Panel unambiguously specified the touchstone dispositive to answering that question: "Given the evidence in the case, did an evidentiary basis exist for conviction of Count I that could have involved the Defendants', in fact, relying on the advice of the accountant?" *Id.* After specifically drawing the prosecution's attention to the eight total pages the Marchellettas devoted to this crucial argument in their petitions for rehearing, the Court further admonished: "That there was also sufficient evidence to convict under Count I for conduct independent of the accountant might not answer the question we are trying to pose to the Government." *Id.*

Ignoring the Court's unambiguous response parameters and specific admonition from the outset, however, the prosecution spends the lion's share of its argument attempting to revisit, and unavailingly so, the Court's seminal holding that the Defendants were seriously prejudiced by the district court's failure to give the accountant-reliance instruction as to Counts III, IV, and V – for the simple

reason the answer is fatally adverse to its position. The prosecution makes clear it simply disagrees with the Court's unanimous reversal of those counts for failure to give the accountant-reliance instruction, and redundantly urges that the defendants were not entitled to the instruction as to Count I for the same unsound reasons the Court unanimously and soundly rejected in its lengthy decision.

All of this government argument, of course, misses the mark entirely, because the trial record is replete with evidence on which the jury could have convicted as to Count I that involved Schwartz and the Marchellettas' reliance on him. Perhaps most significant in this regard were the multiple corporate and personal returns prepared by CPA Schwartz based upon his certified audits of Circle, set forth as "overt acts" in the Indictment under a telling sub-header: "Preparation of False Personal Income Tax Returns for the 2001 Tax Year and a False Circle Corporate Income Tax Return for the Taxable Period Ended March 31, 2002". (Vol. 1, R. 42, p. 10.) Then explicitly incorporating "by reference as overt acts [of the Count I conspiracy] the acts charged in Counts 2 through 9 of th[e] Indictment", the prosecution sets forth approximately six pages detailing the preparation of corporate and personal returns as overt acts of the conspiracy. *Id.*, pp. 11-20. CPA Schwartz's return preparation was the dominant feature of the Indictment itself, the sole overt act the Jury *could* find as their basis to convict.

Second, the prosecution called CPA Schwartz as their trial witness on the conspiracy count, with days of wearying testimony covering the accounting procedures, protocols, and return characterization methodologies Schwartz utilized, including expert testimony from both sides focusing exclusively on return preparation and income and deduction characterizations.

Third, and concluding the prosecution's consistent main theory of criminality, the prosecution reemphasized to the jury the critical importance of Schwartz's returns in the conspiracy count by singling out the Schwartz returns to the jury in their closing argument on the conspiracy count: "And the overt acts are replete throughout the evidence of this case. *There are the filing of the returns*." (Vol. 29, R. 213, p. 1242) (emphasis added).

As the prosecution's Indictment, case-in-chief evidence, and closing argument made clear to the jury, the record is replete with evidence *directly involving reliance on CPA Schwartz* upon which the jury *could* have convicted on the conspiracy count. In fact, the prosecution explicitly urged the jury to convict based upon multiple corporate and personal returns – returns CPA Schwartz personally prepared for filing with the Service.

Under this Circuit's decisional precedents, whenever any post-reliance evidentiary basis exists for conviction of any conspiracy count, the failure to give the reliance instruction is reversible error. *See United States v. Musgrave*, 444

F.2d 755 (5th Cir. 1971) (evidence warranted submission of reliance on counsel defense to jury in prosecution for conspiracy to defraud). The Supreme Court long ago approved the reliance instruction in conspiracy cases. *See Williamson v. United States*, 207 U.S. 425 (1908). Sister Circuits compel reversal where reliance evidence post-dated the commencement of the conspiracy, because the events related to part of the conspiracy's time-period, and the jury could have found lack of intent and acquitted thereon without that post-reliance evidence. *See United States v. Moran*, 493 F.3d 1002 (9th Cir. 2007) (evidence involved testimony of attorney advice after the date conspiratorial objective was alleged, and after the first date of any alleged overt act). This does not surprise, since the allegations of a conspiratorial objective typically pre-date any reliance upon counsel in general conspiracy cases, and almost always pre-date reliance on tax advisor in tax conspiracy cases.

The prosecution's suggestion that the jury could not conceivably have considered the preparation and filing of returns in their decision to convict is both untenable and incredulous, but also invites a pernicious and problematic application of conspiracy law beyond that ever approved in criminal tax and § 371 conspiracy to defraud cases – removal of the relevance of positive obstruction of a government program from conspiracies to "defraud" the government. This Circuit long ago rejected such a misapplication of Learned Hand's "fishnet" of conspiracy,

long ago holding a charge of conspiracy to defraud does not even lie where there is no positive obstruction of a governmental program. *See United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979). A conspiracy to defraud "can stand only if the government can point to some lawful function which has been impaired, obstructed or defeated." *Id.* at 1055-56. Put simply, it is the obstructive act (here, the preparation and filing of returns alleged as overt acts in the Indictment, presented with extensive evidence in the prosecution's case-in-chief, and explicitly argued to the jury) that is the *sine qua non* of a tax conspiracy to defraud such as the one charged here. *Id.* at 1054-1055, nts.6-7 (referencing the critical act in analogous conspiracy-to-defraud cases is the submission of the false claim).

In conclusion, an evidentiary basis did exist upon which the jury *could* have convicted the Marchellettas on Count I that *could have* involved the Defendants', in fact, relying on the advice of the accountant. Indeed, it was the evidence (the Schwartz returns) the government told the jury to focus on in the indictment of the conspiracy charge, during the days of trial testimony, and again in closing argument. As the Court found respecting Counts III, IV, and V, the core theory of defense on the Count I conspiracy charge was reliance upon Circle's bookkeeper and independent CPA, and without the reliance instruction, the jury was left adrift in a sea of competing post-reliance evidence without proper legal guidance from the trial court. Count I should therefore be reversed and remanded.

Dated: November 29, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was sent to the parties, by sending a copy to their respective attorneys of record, by Federal Express next-day delivery pre-paid, to the following addresses:

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